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UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-02201

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COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. He be considered by a special board (SB) for the CY15A Major Selective Continuation Board.
2. If selected by the continuation board, he be granted an active duty retirement in the grade of major (O-4), effective 30 Jun 20.
3. He be considered by a special selection board (SSB) for promotion to the grade of lieutenant colonel (O-5).

APPLICANT'S CONTENTIONS

He was forced to separate with less than six years left for an active duty retirement. He was also in a critical Air Force Specialty Code (AFSC) of 35P, Public Affairs Officer. Due to the severe manning shortage, he was prohibited from applying for in-residence Air Command and Staff College (ACSC) equivalent programs, a critical factor during his promotion board.

He was advised to apply for redress in light of recent court cases brought by former Air Force officers with similar issues related to promotion, continuation and retirement during the time period.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Regular Air Force major (O-4) and a currently serving Air Force Reserve lieutenant colonel (O-5).

The applicant was honorably discharged from the Regular Air Force on 30 Nov 15, with a narrative reason for separation of "Non-Selection, Permanent Promotion." He was credited with 11 years, 4 months and 5 days of active duty service.

APPLICABLE AUTHORITY/GUIDANCE

Baude v. United States: On 9 Apr 20, the CoAFC issued an opinion (*Baude v. United States*) that the named plaintiff demonstrated the AFBCMR's decision in denying him SB for continuation in the rank of major was arbitrary, contrary to law and unsupported by substantial evidence. The plaintiff was not selected for continuation by the CY11A Major Selective Continuation Board. He

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was within six years of qualifying for a length of service retirement; however, the SecAF's modified memorandum of instruction (MOI) to the board narrowed the window for continuation to officers within five years of retirement instead of six years. The CoAFC vacated the CoFC's earlier opinion for judgment in favor of the government and reversed the denial of the plaintiff's cross-motion for summary judgment. The CoAFC concluded the SecAF's instructions to the continuation board did in fact violate DoDI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active Status List*, because the SecAF lacked the authority to re-write the regulation or narrow the protective window or disregard the regulatory presumption in favor of continuation. It stated an officer in the Air Force who holds the grade of O-4 must appear before a promotion board to receive further promotion per 10 U.S.C. §§ 611a and 628(k). An officer who otherwise would be discharged for nonselection of promotion may nevertheless remain in active service if a continuation board selects them for continuation per 10 U.S.C. §§ 611 and 637. A commissioned officer on the active duty list (ADL) in the grade of O-4 shall normally be selected for continuation if the officer will qualify for retirement within six years of the date of continuation. The Secretary of the Military Department in unusual circumstances, such as when an officer's personnel record contains derogatory information, may discharge the officer involuntarily. In this case there were no unusual circumstances. The plaintiff's case was remanded to the AFBCMR to convene an SB for selective continuation with a process consistent with DoDI 1320.08. On 23 Nov 20, the CoAFC informed the AFBCMR of the Order. The Air Force convened an SB for the plaintiff on 25 Mar 21 for the CY11A Major Selective Continuation Board.

AIR FORCE EVALUATION

AFPC/DPMSP recommends denial. The applicant was not selected for promotion to the grade of O-5 by the CY15A Lieutenant Colonel LAF CSB. He subsequently was considered but not selected for continuation. Per the SecAF's Memorandum of Instructions for the CY15A Lieutenant Colonel Promotion Board and the Major Selective Continuation Board, the applicant's AFSC of 35P was not deemed a critical skill by the SecAF for the purpose of selective continuation.

The complete advisory opinion is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 6 Aug 24 for comment (Exhibit D) but has received no response.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of AFPC/DPMSP and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board notes the applicant is not similarly situated as the plaintiff in *Baude v United States* as he was not considered for continuation by the CY11A Major Selective Continuation Board. The applicant was considered for selective continuation by the CY15A Major Selective Continuation Board and there is no evidence the MOI provided to this selective continuation board violated DoDI 1320.08. Moreover, the applicant was not within six years of an active duty retirement at the time of his

nonselection for continuation and he was also not serving in a critical skill. Therefore, the Board recommends against correcting the applicant's records.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2024-02201 in Executive Session on 26 Nov 24:

Work-Product, Panel Chair

Work-Product, Panel Member

Work-Product, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 18 Jun 24.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory Opinion, AFPC/DP3SP, w/atchs, dated 22 Jul 24.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 6 Aug 24.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

12/10/2024

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Board Operations Manager, AFBCMR
Signed by: USAF