



UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2025-01482

Work-Product

COUNSEL: NONE

(AKA *Work-Product*)

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. She be reinstated on active duty.
2. She be granted selective continuation for the CY10C Biomedical Science Corps (BSC) Major Selective Continuation Board and she be continued to 24 years of active duty service.
3. She be considered by a special selection board (SSB) for promotion to the grade of lieutenant colonel (O-5).
4. If selected by an SSB for promotion to the grade of O-5, she be afforded the opportunity to decline to be restored and she be voluntarily retired in the grade of O-5.

APPLICANT'S CONTENTIONS

The United States District Court for the District of Maryland (D. Md) ordered the vacation of the decisions in the applicant's prior AFBCMR case (BC-2014-01548) and remanded her petition to the Board for further consideration pursuant to the Memorandum Opinion.

The District Court's Memorandum Opinion in *Garcia v Kendall* reflects the Court considered the Motion for Summary Judgment filed by the plaintiff (applicant) and the Cross-Motion for Summary Judgment filed by the Secretary of the Air Force (SecAF). The Court ordered the applicant's case be remanded to the Board for reconsideration and denied the SecAF's cross-motion.

On 9 Mar 11, the applicant was not selected for promotion to the grade of O-5 for the second time. A continuation board recommended the applicant for selective continuation. However, the SecAF disapproved selective continuation and she was discharged from active duty. The SecAF cited the reason was to meet Congressionally mandated end strength.

In the years following, the Court of Appeals for the Federal Circuit (CoAFC) overturned the decision of the Court of Federal Claims (CoFC) and opined in *Baude v United States*, DoDI 1320.08, *Continuation of Commissioned Officers on Active Duty and on the Reserve Active List*, that permitting a Secretary of a Military Department to discharge an officer in "unusual circumstances" does not justify doing away with the presumption of continuation. Since the only enumerated "unusual circumstance" in the regulation is "when an officer's record contains derogatory information," any other "unusual circumstance" that would justify overcoming the presumption of continuation must relate to the individual officer's circumstances. The Air Force's need to maintain an appropriate mix of airmen or reduce end strength cannot constitute "unusual circumstance." Finally, the CoAFC held that the provisions of DoDI 1320.08 required that a

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Secretary of a Military Department notify the USD (P&R) before non-continuing larger pools of officers within six years from retirement did not contravene the earlier provisions of DoDI 1320.08. The CoAFC opined the notification required did not allow the SecAF to depart from the prior rules that apply to each individual officer. The CoAFC vacated the prior ruling of the CoFC and ordered the plaintiff in *Baude v United States* to be considered for continuation by a special board (SB).

Following the CoAFC's decision in *Baude v United States*, the applicant filed a second request to the AFBCMR and argued DoDI 1320.08 similarly limited the SecAF's authority to non-continue officers. The applicant contended the SecAF's justification for non-continuation was identical in her case and *Baude* (to reduce the force). In reaching its decision, the Board confirmed its reliance on *Baude* as well as other legal authorities and denied relief. The Board concurred with the AFPC advisory opinions which recommended denial because she did not complete 20 years of service, the Temporary Early Retirement Authority (TERA) was not in effect at the time, 10 U.S.C. § 637(a)(1) explicitly makes continuation subject to the approval of the Secretary of the Military Department, and *Baude* was not controlling in the applicant's case because the applicant was not considered by the same continuation board (CY11A Major Selective Continuation Board) and did not receive the same instructions from the SecAF narrowing the continuation period that the CoAFC found problematic in *Baude*. Finally, the Board found the SecAF's memorandum notifying USD (P&R) the intent to not selectively continue the applicant was not illegal.

The District Court noted both parties extensively addressed *Baude's* applicability. The applicant argued the *Baude* interpretation of DoDI 1320.08 is binding because the Board relied on its determination. The SecAF argued that *Baude's* interpretation is not binding. In isolation *Baude* would not be binding since it was issued in the CoAFC. However, the *Baude* decision is persuasive authority which the District Court will give substantial weight. The Board itself recognized *Baude's* authority and purported to apply it when making its determination. In doing so, the Board was required to properly apply *Baude's* interpretation of DoDI 1320.08. The Board made no suggestion that the CoAFC misinterpreted the regulation and the Board made no qualification that its reliance was only partial. The Board's decision was arbitrary and capricious. The applicant identified excerpts in *Baude* where the CoAFC noted the 6 Dec 10 Memorandum was insufficient to satisfy the requirements of DoDI 1320.08. The plain language of DoDI 1320.08 further supported officers in the grade of O-4 subject to discharge shall normally be selected for continuation if the officer qualified for retirement within six years of the date of continuation.

The complete Remand Order and Memorandum Opinion are at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force major (O-4).

On 6 Dec 10, the SecAF informed the USD (P&R) of his intention to exercise his authority to not selectively continue officers in the applicant's position. The SecAF stated he intended to exercise his authority in DoDI 1320.08, paragraph 6.3, to not selectively continue large pools of twice deferred officers in the grades of captain (O-3) and O-4 who would otherwise qualify for retirement within six years of the date of continuation. Exceptions would include some chaplains, remotely piloted aircraft operators and some nurse corps.

On 9 Mar 11, the applicant was deferred for promotion by the CY10C Lieutenant Colonel BSC Central Selection Board (CSB). She was recommended for continuation by the CY10C Major

BSC Selective Continuation Board. However, the SecAF disapproved the selective continuation due to the need to meet Congressionally mandated end strength.

On 31 Aug 11, the applicant was honorably discharged in the grade of O-4, with narrative reason for separation of "Nonselection, Permanent Promotion." She was credited with 15 years, 4 months and 22 days of active duty service.

On 3 Sep 15, the Board denied the applicant's request her date of separation (DOS) be changed to allow for retirement under TERA or she be reinstated to active duty under selective continuation until eligible for retirement with credit for time served as a federal employee with the Department of Veterans Affairs (DVA). The Board concurred with the opinions and recommendations of AFPC/DPSOR, AFPC/DPSOO and AFPC/JA. The Board noted the statute that governs continuation makes clear that a qualified person selected for continuation under 10 U.S.C. § 611(b) may be subject to the needs of the service to be continued on active duty per 10 U.S.C. § 637. Therefore, there is no requirement to continue a member selected by a board if the needs of the service do not warrant or support continuation. Moreover, the Board was satisfied the SecAF had a reasonable basis to pursue the course of action and acted within the limits of his authority.

On 28 Feb 22 and 25 Mar 22, the Board reconsidered the applicant's request she be reinstated on active duty and granted selective continuation for the CY10C BSC Major Selective Continuation Board or in the alternative, she be granted SB consideration for the CY10 Major BSC Selective Continuation Board. The applicant also requested she be continued to 24 years in the grade of O-4 and be considered for a SSB for the grade of O-5. The applicant contended she was similarly situated to the plaintiff in *Baude v United States* and that her case was even more egregious in that she was selected for continuation. The Board concurred with the recommendations of AFPC/DP2SSR and AFPC/JA that the SecAF did not violate 10 U.S.C. § 637(c) when he disapproved the results of the CY10C Major BSC Selective Continuation Board and concluded the applicant was not similarly situated as the plaintiff in *Baude v United States*. The plaintiff in *Baude* was considered for continuation by the CY11A Major Selective Continuation Board with the SecAF Memorandum of Instruction (MOI) narrowing the continuation window from within six years from retirement to five years, which the CoAFC opined violated DoDI 1320.08. The applicant was considered for continuation by the CY10C BSC Continuation Board. While she was selected for continuation, the Board found insufficient evidence to substantiate it was not within the SecAF's authority to disapprove the recommendations of the continuation board.

On 20 Apr 23, the Board reconsidered and again denied the applicant's request she be considered for selective continuation. The applicant contended she is similarly situated to the plaintiff in *Baude v United States*; however, the Board disagreed. The CoAFC in *Baude v United States* found the SecAF's guidance in the MOI to the CY11A Major Selective Continuation Board narrowing the selective continuation window from within six years of retirement to within five years of retirement violated DoDI 1320.08. However, the applicant was not considered for continuation by the CY11A Major Selective Continuation Board. While the applicant contends the SecAF violated DoDI 1320.08 when he disapproved the recommendations of the CY10C Major BSC Selective Continuation Board, 10 U.S.C. § 637(c) states the continuation of an officer on active duty pursuant to the action of a selection board is subject to the approval of the Secretary of the Military Department concerned. The applicant also cited the 6 Dec 10 SecAF notification memorandum to USD (P&R) of his intent to not selectively continue larger pools of twice deferred officers violated DoDI 1320.08. However, there is no evidence the notification memorandum was illegal. To the contrary, the notification memorandum was a procedural requirement per DoDI 1320.08.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

APPLICABLE GUIDANCE/AUTHORITY

On 12 Jan 16, a group of 16 officers nonselected for continuation by the CY11A Major Selective Continuation Board filed a complaint with the CoFC. On 29 Aug 16, the CoFC remanded the case to the AFBCMR for reconsideration. On 8 Feb 17, the Board denied the applicant's request for reinstatement and continuation. The Board noted the Air Force was required to make a reduction in the officer force to meet Congressionally mandated end strength. The Board found the SecAF acted within the limits of his authority in the instructions he provided to the continuation Board and denied the requests. The CoFC agreed with the Board's decision the SecAF acted within his authority.

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 grade of O-4 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 was within six years of qualifying for a length of service retirement; however, the SecAF's modified the MOI to the board narrowing 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.

The CoAFC opined unusual circumstances did not authorize the SecAF to modify regulation providing that an officer within six years from retirement "shall normally" be selected for continuation, pursuant to the "up or out system," absent some unusual circumstance, so as to narrow continuation-eligibility window from six to five years and change calculation date of protective threshold from date of continuation to convening date of continuation; rather, "unusual circumstances" clause was limited to allowing presumption that an officer within the protective window shall be continued to overcome based on officer's personal circumstances, but did not justify doing away with presumption of continuation.

Even if the Air Force could deviate from the protective window defined by regulation that officer within six years from retirement "shall normally" be selected for continuation in unusual circumstances, pursuant to the up or out system and even if need for reduction in force while maintaining certain mix of airmen could be considered unusual circumstances within meaning of regulation so as to justify such deviation, the Air Force failed to identify any need to reduce

manpower and simultaneously maintain appropriate mix of airmen that would warrant involuntary discharge of officers in good standing prior to their retirement eligibility. The CoAFC ordered the Air Force to convene a SB to consider the applicant for selective continuation.

10 U.S.C. § 637(a)(1) An officer subject to discharge or retirement in accordance with section 632 of this title may, subject to the needs of the service, be continued on active duty if he is selected for continuation on active duty by a selection board convened under section 611(b) of this title.

10 U.S.C. § 637(c) Continuation of an officer on active duty under this section pursuant to the action of a selection board convened under section 611(b) of this title is subject to the approval of the Secretary of the Military Department concerned. The period of the continuation on active duty of an officer under this section may be reduced by the Secretary concerned in the case of an officer as provided in section 638a of this title.

DoDI 1320.08, dated 14 Mar 07, paragraph 6.3. Continuation of Officers Serving in the Grade of O-4. The Secretary of the Military Department concerned may when the needs of the respective military service require, convene continuation selection boards according to section 611(b) of Reference (d) to recommend commissioned officers in the grade of O-4 on the active duty list who are subject to discharge or retirement according to section 632 of Reference (d) for continuation on the active duty list according to section 637 of Reference (d). A commissioned officer on the active duty list in the grade of O-4 who is subject to discharge according to section 632 of Reference (d) shall normally be selected for continuation if the officer will qualify for retirement according to section 3911, 6323, or 8911 of Reference (d) within 6 years of the date of continuation. The Secretary of the Military Department concerned may, in unusual circumstances such as when an officer's official personnel record contains derogatory information, discharge an officer involuntarily in accordance with section 632 of Reference (d). When the Secretary of the Military Department concerned intends not to continue larger pools of officers in the grade of O-4 who would qualify for retirement within six years of the date of continuation, the Secretary shall notify the USD (P&R) of the proposed course of action.

AFI 36-2501, *Officer Promotions and Selective Continuation*, Determining Continuation Period, paragraph 7.11.2 Continue majors until the last day of the month in which he or she is eligible to retire as an officer (normally upon completion of 20 years of total active military service). Majors who possess critical skills may not be continued any longer than the last day of the month in which they complete 24 years of active commissioned service.

10 U.S.C. § 1558(c)(1) Relief Associated with Correction of Certain Actions. The Secretary of the Military Department concerned shall ensure that an involuntarily board separated person receives relief under paragraph (2) or under paragraph (3) if the person, as a result of a correction of the person's military records becomes entitled to retention on or restoration to active duty or to active status in a Reserve component.

10 U.S.C. § 1558(c)(3)(A), If an involuntarily board separated person in paragraph (1) does not consent to restoration of status, rights and entitlements under paragraph (2), the Secretary concerned shall pay that person back pay and allowances (less appropriate offsets) and shall provide that person service credit.

5 U.S.C. § 5533, Dual Pay from More than One Position, an individual is not entitled to receive basic pay from more than one federal position. Receipt of military retired pay is exempt.

AFI 36-2603, *Air Force Board of Corrections to Military Records (AFBCMR)*, paragraph 7.2.4, *Payment of Expenses*, The Air Force has no authority to pay expenses of any kind incurred by or on behalf of an applicant in connection with a correction of military records under 10 U.S.C. §1034 or 1552.

AIR FORCE EVALUATION

AFPC/JA recommends approving the applicant's request. The focus on "unusual circumstances" is the appropriate lens through which to assess the case. However, denying the applicant's claim based on "unusual circumstances" will be difficult as stated in *Baude*. In spite of this, the CoFC concluded that "reducing manpower while also maintaining an appropriate mix of airmen" was an "unusual circumstance" that triggered the SecAF's authorization to modify the regulation. However, there is no such authorization.

Although 10 U.S.C. § 637 gives the SecAF discretion to reject a board's recommendation to continue an officer, that discretion is limited by DoDI 1320.08. The Air Force's force management actions cannot constitute "unusual circumstances" under the governing regulation because the term is limited to those personal in nature. The SecAF's rationale to keep the corps within the Congressionally mandated end-strength was not personal in nature, and there are no other facts in the case file to support an unusual circumstance determination that would be personal in nature to the applicant.

The applicant was one of 24 officers selected by the board whose selection was subsequently disapproved by the SecAF. As a consequence of the two nonselections, the applicant was separated on 31 Aug 11.

Per 10 U.S.C. § 637(a)(1), An officer subject to discharge or retirement in accordance with section 632 may, subject to the needs of the service, be continued on active duty if selected for continuation by a selection board. According to paragraph (c), "Continuation of an officer on active duty under this section pursuant to the action of a selection board is subject to the approval of the Secretary of the Military Department concerned. Although the applicant was selected for continuation by the CY10C Selective Continuation board, the SecAF thereafter chose to disapprove all but one of the officers selected for continuation based on the needs of the Air Force.

The applicant challenges the SecAF's decision to disapprove her continuation on active duty as unlawful based on 10 U.S.C. § 637(a)(1), DoDI 1320.08 and the SecAF's MOI given to the board. In support of her argument, the applicant cites the ruling in *Baude*, where the CoAFC found in favor of one previous Air Force officer, who had met but was not selected for continuation by the CY11A Major Line of the Air Force (LAF) Selective Continuation board. The CoAFC determined the SecAF abused his authority within the MOI given to the CY11A Major Selective Continuation Board by modifying the protective window for continuations of majors set forth in DoDI 1320.08 from within six years of retirement to five. The CoAFC based its opinion on the verbiage within DoDI 1320.08, which stated majors within six years of retirement "shall" normally be selected for continuation absent unusual circumstances. The SecAF modified the protective window for continuation to ensure the Air Force met its congressionally mandated end strength. The CoAFC did not believe that to be an "unusual circumstance." As a result, the CoAFC ordered a SB be convened for the plaintiff. The applicant claims her request is similar to the plaintiff in *Baude* and she is entitled to the same consideration.

The District Court agrees with the applicant and remanded the case to the AFBCMR for reconsideration. The Court stated the AFBCMR cited *Baude* as an applicable authority in its

determination. When it treated *Baude* as binding, it made no suggestion that the CoAFC misinterpreted the regulation and the AFBCMR made no qualification its reliance on *Baude* was only partial. The Court therefore deferred to the interpretation of DoDI 1320.08 set forth by the CoAFC in *Baude*. The Court concluded the AFBCMR's decision was arbitrary, capricious and contrary to law.

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 20 Jun 25 for comment (Exhibit D). In a response dated 26 Jun 25, the applicant states that AF/JA retroactively approved her continuation or she meet another continuation board. She has already been selected for continuation by a selective continuation board under 10 U.S.C. § 611(b) and 10 U.S.C. § 637 and did not request that another selective continuation board be convened.

The complete rebuttal response is at Exhibit E.

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 the victim of an error or injustice. The Board reconsidered the applicant's case as remanded and ordered by the United States District Court for the District of Maryland. The Board concurs with the rationale and recommendation of AFPC/JA and finds a preponderance of the evidence substantiates the applicant's contentions, in part. Specifically, the applicant was selected for continuation in the grade of O-4 by the CY10C Biomedical Science Corps (BSC) Major Selective Continuation Board. Although 10 U.S.C. § 637 gives the SecAF discretion to reject a board's recommendation to continue an officer, that discretion is limited by DoDI 1320.08. The CoAFC opined in *Baude v United States* the Air Force's force management actions cannot constitute "unusual circumstances" under DoDI 1320.08 because the term is limited to those personal in nature. Since the applicant's records, include no "unusual circumstances" or adverse information, the Board recommends the applicant be continued in the grade of O-4 and retired in the grade of O-4 with a 20 year active duty retirement effective 1 May 16. However, the Board finds insufficient evidence to warrant continuation to 24 years of service or that the applicant be granted SSB consideration for the grade of O-5. Had the Air Force not discharged the applicant in 2011 for her twice promotion deferral to the grade of O-5, it is more likely than not she would have retired from active duty in the grade of O-4 and not O-5. With respect to the applicant's request for an SSB, the applicant was already considered by two active duty O-5 promotion boards and was not selected. The Board finds the applicant is the victim of an error or injustice with respect to continuation only. Therefore, the Board recommends correcting the applicant's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show:

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- a. She was not discharged from active duty on 31 Aug 11, but on that date she continued to serve on active duty until 30 Apr 16.
- b. She was retired from active duty in the grade of O-4, effective 1 May 16.

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-2025-01482 in Executive Session on 11 Jul 25:

Work-Product, Panel Chair
 Work-Product Panel Member
 Work-Product Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit A: D. Md, Remand Order, w/atchs, filed 1 Dec 24.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, AAFPC/JA, dated 20 May 25.
- Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 25 Jun 25.
- Exhibit E: Applicant’s response, dated 26 Jun 25.

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.

8/6/2025

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF