

United States Court of Appeals for the Federal Circuit

DANIEL BADER,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2022-2203

Appeal from the United States Court of Federal Claims
in No. 1:21-cv-01501-NBF, Senior Judge Nancy B. Fire-
stone.

Decided: April 1, 2024

JILLIAN STONECIPHER, Sidley Austin LLP, Washington,
DC, argued for plaintiff-appellant. Also represented by
CARTER GLASGOW PHILLIPS; CAROLINE A. WONG, Chicago,
IL.

TANYA KOENIG, Commercial Litigation Branch, Civil
Division, United States Department of Justice, Washing-
ton, DC, argued for defendant-appellee. Also represented
by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, DOUGLAS
K. MICKLE.

Before LOURIE, DYK, and STARK, *Circuit Judges*.

DYK, *Circuit Judge*.

Daniel Bader was a military officer who previously had held the rank of Colonel¹ but had attained the rank of Brigadier General at the time of his application for retirement in 2012. Following a finding that Col. Bader had violated 18 U.S.C. § 207(c) and 5 C.F.R. § 2635 and that his performance in the rank of Brigadier General was not “satisfactory,” Col. Bader was retired at the rank of Colonel despite his attainment of the higher rank of Brigadier General. This determination affected his rate of retirement pay. Col. Bader brought suit in the Court of Federal Claims (Claims Court) for his allegedly lost pay. The Claims Court granted the government’s cross-motion for judgment on the administrative record and denied Col. Bader’s motion for judgment on the administrative record, finding that there was no error in the decision to retire him at the rank of Colonel. Col. Bader appeals. We affirm.

BACKGROUND

I

The sole issue in this case is whether Col. Bader was properly retired at the rank of Colonel or whether he should have been retired at the rank of Brigadier General, the highest rank he attained. This in turn affects the level of retirement pay to which Col. Bader is entitled. Under 10 U.S.C. § 1370 and Air Force Instruction (AFI) 36-3203, an “officer is not automatically entitled to retire in the highest grade held.” AFI 36-3203 ¶ 7.6 (Sept. 18, 2015). “Instead, an officer is retired in the highest grade served on active duty satisfactorily . . .” *Id.* Because the Air Force determined that Col. Bader’s performance as

¹ Because Col. Bader was retired at the rank of Colonel, we refer to him throughout this opinion as Col. Bader.

Brigadier General was unsatisfactory, the Air Force determined that he was not entitled to retire at the rank of Brigadier General. *See id.* This finding was based on a determination that Col. Bader had violated ethical standards set forth in 18 U.S.C. § 207(c) and 5 C.F.R. § 2635.

First, the Air Force concluded that Col. Bader had violated 18 U.S.C. § 207(c). This provision imposes a “cooling off” period for former senior government officials, during which time they are forbidden from communicating with, or appearing before, their former agency with the intent to influence the agency on behalf of any other person. This restriction applies to anyone “employed in a position which is held by an active duty commissioned officer of the uniformed services” who is serving in a senior “grade or rank,” including the rank of Brigadier General. 18 U.S.C. § 207(c)(2)(A)(iv). Col. Bader does not challenge the determination that he violated Section 207(c), admitting that he contacted members of the Air Force during his “cooling off” period in violation of this provision.

Second, the Air Force determined that Col. Bader violated 5 C.F.R. § 2635, which defines Standards for Ethical Conduct for Employees of the Executive Branch. Section 2635.702 of the regulation provides that “an employee shall not use or permit the use of his Government position or title . . . in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit” to himself or any other person with whom the employee is affiliated in a nongovernmental capacity. 5 C.F.R. § 2635.702(a); *see also* 5 C.F.R. §§ 2635.702(d), 2635.101(a), (b). Col. Bader argues that the determination that he violated this provision was erroneous and that this error requires a judgment in his favor despite the admitted violation of Section 207(c).

The background leading to the Air Force’s determinations is as follows.

II

Col. Bader graduated from the United States Air Force Academy in 1985. Since that time, he has served many positions within the Air Force, including several staff positions at the National Guard Bureau (NGB). The National Guard Bureau “administers the federal functions of the Army and Air National Guard.” *Air National Guard, United States Air Force*, <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104546/air-national-guard/> (last visited Mar. 4, 2024). He also served as Commander of the Air National Guard/Air Force Reserve Command Test Center (AATC) in 2008 and 2009. He was promoted to the rank of Colonel in 2005 and to the rank of Brigadier General in August 2010. His service up until the time of his appointment as Brigadier General appears to have been exemplary. Col. Bader was awarded numerous service medals throughout his career and was consistently commended for his leadership.

The events in question occurred during his service as Assistant Adjutant General – Air, New York National Guard (ATAG-Air NYNG) from August 2010 until August 2012 when he held the rank of Brigadier General. During this period, because Col. Bader served as ATAG-Air NYNG in a part-time capacity, he was permitted to engage in outside employment. In September 2010, Col. Bader accepted a part-time civilian position with Gauss Management Research and Engineering, Inc. (GMRE) as their Vice President for International Programs, with full-time employment to begin in January 2011. Col. Bader’s later positions at GMRE included Vice President of East Coast Operations and Executive Vice President of Operations.

GMRE is a veteran-owned business with its headquarters in South Ogden, Utah and is a member of System of Systems Security Consortium (SOSSEC). SOSSEC consists of a variety of organizations, including academic institutions and private companies. As a consortium,

SOSSEC provides the services of its member organizations to the government under Other Transactions Authority, which, as described below, is “a special vehicle used by federal agencies to obtain or advance research and development or prototypes.” J.A. 168.

In 2011 and 2012, GMRE became aware of two government contracting opportunities. Col. Bader represented GMRE in attempting to secure these contracts, and GMRE was successful in obtaining both contracts. The 2011 contract concerned support for a division of the Air National Guard where Col. Bader previously served as Commander. The 2012 contract between the National Guard Bureau and GMRE awarded GMRE “end of year fallout funds for a GMRE study of [Remotely Piloted Aircraft Squadron Operation Centers.]” J.A. 150. These Squadron Operation Centers provide ground operational support for Remotely Piloted Aircraft. The Air National Guard sought contractors to research ways to integrate the Operation Centers. The contract impacted the six Remotely Piloted Aircraft units in the Air National Guard across the nation, one of which was located in New York at the time when Col. Bader was serving as the ATAG-Air for New York.

In each instance, the contracting parties were GMRE and divisions of the National Guard Bureau. While Col. Bader was not directly responsible for negotiating the contracts on behalf of the National Guard Bureau at the time he represented GMRE in the negotiations, he was an officer of the Air National Guard and he dealt with Air Force officers during the negotiating process. This led to the two problems at issue here—the violation of the “cooling off” period statute, 18 U.S.C. § 207(c), and the violation of private gain regulation 5 C.F.R. § 2635, described in more detail below. An investigation was commenced by the Secretary of the Air Force, Inspector General.

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