

## AIR NATIONAL GUARD

### Duty Status for Dual-Status Command

You asked us what statute(s) should appear on orders authorizing an Air National Guard (ANG) member to serve as a dual-status commander under 32 U.S.C. § 325(a)(2). We conclude that at least three statutes should appear: activation and duty status statute(s) under title 32, such as 32 U.S.C. § 502; activation and duty status statute(s) under title 10, such as 10 U.S.C. § 12301(d); and 32 U.S.C. § 325(a)(2), authorizing service in both duty statuses. This opinion has been coordinated with SAF/GCI, SAF/GCA, and NGB/JA.

Section 325 Analysis: ANG members are required to assemble for drill and instruction at least 48 times each year and to participate in training at least 15 days each year (known as “annual tour”).<sup>1</sup> In addition to these minimum service requirements, an ANG member may perform full time National Guard duty (FTNGD) under 32 U.S.C. § 502(f)(1) & (2); active guard and reserve (AGR) duty under 32 U.S.C. § 328; and a number of other title 32 types of duty. In all of these title 32 duty statuses, the ANG member is responsible to the governor of the state, commonwealth, or district to which s/he belongs and must perform duties in support of the ANG and/or reserve components.<sup>2</sup> In the normal course, when ANG members are ordered to title 10 active duty, they are relieved from these duties “from the effective date of his [or her] order to active duty” until s/he is relieved from active duty.<sup>3</sup>

In 2003, however, Congress amended 32 U.S.C. § 325(a) to authorize ANG officers to serve on active duty “in command of a National Guard unit” *while continuing to serve in state status*, if the President authorized and Governor consented to “such service in both duty statuses.”<sup>4</sup> Five years later, Congress struck the phrase “in command of a National Guard unit” authorizing all properly-authorized officers, not just those in command, “to retain their state status while serving

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<sup>1</sup> 32 U.S.C § 502(a)

<sup>2</sup> 32 U.S.C §§ 328 & 502. For ease of reference in this opinion, comments relating to the “State” will apply to states, commonwealths, and districts, collectively, and references to the “Governor” will apply to governors and district and commonwealth leaders, as applicable.

<sup>3</sup> 32 USC § 325(a)(1)

<sup>4</sup> Pub. L. 108-136, § 516(a), 24 Nov 2003

on active duty.”<sup>5</sup> In 2011, the President delegated his authorizing powers under this statute to the Secretary of Defense.<sup>6</sup>

The statutory language of Section 325, therefore, expressly allows a properly-authorized ANG member to serve in “both duty statuses.”<sup>7</sup> As such, Section 325(a)(2)(a) and (b) require two statuses to be identified on dual-status orders. This plain language analysis is supported by the section’s intent to provide relief of the member’s ARC duties during periods of contemporaneous active duty. Where an ANG member is not in a duty status (such as between drill weekends and when not on title 32 orders), s/he does not owe a duty to his or her state/commonwealth/district, and does not have any duty from which to be relieved.<sup>8</sup>

Accordingly, we conclude that a dual-status ANG officer’s orders must cite 10 U.S.C. § 12301(d) and 32 U.S.C. § 502(a) or 32 U.S.C. § 502(f)(1) & (2). Given the unusual nature of dual-status service, we recommend that the officer’s orders also cite 32 U.S.C. § 325(a)(2) to highlight the uniqueness of the officer’s position and the applicable statutory approval requirements.

*Applicable Title 10 Duty Status:* The dual-status officer’s orders must cite an “active duty” (Federal) activation authority and duty status. Such “active duty” service includes full-time duty on title 10 orders; training duty; annual training duty; and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the Air

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<sup>5</sup> Pub. L. 110-417, § 517(a), 14 Oct 2008. The statute currently provides:

“(a) Relief Required.—

(1) Except as provided in paragraph (2), each member of the Army National Guard of the United States or the Air National Guard of the United States who is ordered to active duty is relieved from duty in the National Guard of his State, or of the Commonwealth of Puerto Rico, Guam, or the Virgin Islands or the District of Columbia, as the case may be, from the effective date of his order to active duty until he is relieved from that duty.

(2) An officer of the Army National Guard of the United States or the Air National Guard of the United States is not relieved from duty in the National Guard of his State, or of the Commonwealth of Puerto Rico, Guam, or the Virgin Islands or the District of Columbia, under paragraph (1) while serving on active duty if—

(A) the President authorizes such service in both duty statuses; and

(B) the Governor of his State, or of the Commonwealth of Puerto Rico, Guam, or the Virgin Islands, or the commanding general of the District of Columbia National Guard, as the case may be, consents to such service in both duty statuses.”

<sup>6</sup> Memorandum of President of the United States, 14 Apr 2011, 76 F.R. 22003, set out as a note under 32 U.S.C § 325.

<sup>7</sup> 32 U.S.C § 325(a)(2)(a) & (b)

<sup>8</sup> Some have suggested that orders for a dual-status ANG member need only cite an active duty activation authority and not a title 32 statute because Section 325 only speaks to whether an ANG officer is relieved of ANG duty and specifically states that its provisions apply only when the officer is “serving on active duty.” Thus, the argument goes, only a title 10 active duty status is required on the officer’s orders. Alternatively, Section 325 would provide the only necessary title 32 authority. We disagree. We recognize that a non-duty status ANG officer could arguably have a duty to perform drill weekends and annual tour requirements – and these would be the duties from which a dual-status officer would not be relieved (i.e., an active duty ANG officer would still have to perform drill weekend duties). We concede this argument would apply if the ANG officer is not intended to exercise any title 32 authorities other than when s/he is performing drill weekend duties. Where, as here, though, the officer is expected to command title 10 as well as title 32 personnel on a daily basis, the officer must be in a title 32 status to do so. Some have also suggested that citation to Section 325 satisfies this requirement. Section 325 does not contain an activation authority or any other provision calling the member to military duty. If not activated or called to duty under title 32, then the officer does not have any legal authority to exercise command over other title 32 personnel.

Force.<sup>9</sup> “Active duty” service does not include full-time National Guard duty.<sup>10</sup> The orders of an authorized dual-status ANG officer must cite activation statutes related to one of these duty statuses, such as 10 U.S.C. § 12301(d) (voluntary activation).

ANG members activated under 10 U.S.C. § 12301(d) may serve purely “on active duty”, in which case there are no limitations on the scope of duties that they may perform.<sup>11</sup> However, other duty status under Section 12301(d) are not compatible with dual-status command.

- Active Duty for Training. ANG members activated under 10 U.S.C. § 12301(d) may also serve “on active duty for training.” In this duty status, the ANG must demonstrate that the duty is for training and the ANG officer is not permitted to perform the full scope of duties that may be assigned to other active duty personnel.<sup>12</sup> Therefore, the “active duty for training” status imposes limitations that may not be compatible with dual status command.
- An ANG officer activated under 10 U.S.C. § 12301(d) may also serve as an AGR under 10 U.S.C. § 12310. AGRs, however, are required by law to organize, administer, recruit, instruct, or train (OARIT) the reserve components (RC) as their primary duty.<sup>13</sup> Section 325 only provides authority to hold two statuses at once and does not, in itself, authorize an officer to exercise title 10 over title 32 ANG personnel.<sup>14</sup> To the contrary, the officer is still required to observe the separate lines of legal authority established under titles 10 and 32.<sup>15</sup> Therefore, the title 10 duty status referenced on the officer’s orders should not cite 10 U.S.C. § 12310.

*Applicable Title 32 Duty Status:* The dual-status officer’s orders must also cite an activation authority and duty status in the ANG, such as 32 U.S.C. § 502(a) (minimum training requirements) or 32 U.S.C. § 502(f)(1) & (2) (other training or duty).<sup>16</sup>

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<sup>9</sup> 10 U.S.C. § 101(d)(1)

<sup>10</sup> *Id.*; “The term ‘full-time National Guard duty’ means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member’s status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.” 10 USC § 101(d)(5)

<sup>11</sup> *See* 10 U.S.C. § 12314 (“Notwithstanding any other provision of law, a member of a reserve component who is on active duty other than for training may, under regulations prescribed by the Secretary concerned, be detailed or assigned to any duty authorized by law for members of the regular component of the armed force concerned.”)

<sup>12</sup> *See id.* (“...a member of a reserve component who is on active duty *other than for training* ... may be detailed or assigned to any duty authorized by law for members of the regular component. . . .”) (Emphasis added).

<sup>13</sup> 10 U.S.C. § 12310(a)(1).

<sup>14</sup> To satisfy this requirement, some may point to the dual-status officer’s role with the ANG as a primary duty, and suggest that the dual-status officer’s role with the Regular Air Force (RegAF) unit would merely be a statutorily authorized additional duty. As a general rule, we conclude this argument is not legally sufficient.

<sup>15</sup> A failure to do so could result in posse comitatus violations, lack of courts-martial jurisdiction, or issuance of unlawful orders. *See* 18 U.S.C. § 1385; 10 U.S.C. Chapter 47; MCM 2012, Part IV, para. 14c(2)(a)(iii) (in order to be lawful, the source of the order (e.g., the issuing individual) must have authority to issue the order).

<sup>16</sup> For the same reasons discussed above, we would discourage use of a training duty status and would prefer FTNGD over AGR status under 32 U.S.C. § 328 because of the duty limitations and potential fiscal law implications.

Service as an AGR under 32 U.S.C. § 328 might also be appropriate for the officer's title 32 role. In his/her title 32 status, the officer will be in command of title 32 personnel and in that role will organize, administer, recruit, instruct, and train the title 32 unit and personnel as a primary duty.

Service under 32 U.S.C. § 709 as a military technician, however, would not be an appropriate duty status. ANG members serving under this statute are civilian employees of the Department of the Air Force<sup>17</sup> and in that role, do not qualify as military officers eligible to serve in dual-status under 32 U.S.C. § 325(a)(2).

Fiscal Considerations: Section 325 does not comment on the proper funding for a dual-status ANG officer. Thus, we may rely on the duty status sections to be cited on the officer's orders to determine proper funding.

If orders for a dual-status commander cite authorities which are both funded from the same appropriation, that appropriation shall be used. For example: The use of 32 U.S.C. § 502(f)(1) & (2) or 32 U.S.C. § 328 (AGR duty) along with 10 U.S.C. § 12301(d) (active duty for operational support – reserve component (ADOS-RC)) would require ANG MILPERS funding.

Alternatively, if a Section 325 dual-status officer's orders cite authorities funded by different appropriations, like 10 U.S.C. § 12301(d) (volunteer service) and 32 U.S.C. § 502(f)(1) & (2) (other duty), funding from either title 10 or title 32 might be appropriate.<sup>18</sup> “Where two appropriations are available for the same purpose, the agency may select which one to charge for the expenditures in question. Once that election has been made, the agency must continue to use the same appropriation for that purpose unless the agency, at the beginning of the fiscal year, informs the Congress of its intent to change for the next fiscal year.”<sup>19</sup> In the present case, because the statutes at issue authorize contemporaneous use of two personnel authorities that are usually mutually exclusive and funded by distinct MILPERS appropriations, both appropriations are equally applicable and neither is the more specific.<sup>20</sup> In addition, there is clearly nothing in either appropriation that would make one MILPERS appropriation available to supplement the other.<sup>21</sup> As such, SAF/GCA has advised SAF/FMB that the Air Force must select an appropriation and maintain its use as a matter of policy and regulation. “Once the agency has made its election, it cannot change to [another] appropriation during the course of the fiscal year if funds in the first appropriation become insufficient.”<sup>22</sup>

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<sup>17</sup> 32 U.S.C. § 709(e).

<sup>18</sup> A RegAF officer might be appointed as a dual-status commander over both RegAF and ANG units under 10 U.S.C. § 315.

<sup>19</sup> B-272191 (4 Nov 1997); (citing: *Unsubstantiated DOE Travel Payments*, GAO/RCED-96-58R (28 Dec 1995) and 68 Comp. Gen. 337 (1989)).

<sup>20</sup> 64 Comp. Gen. (1984) and B-289209 (31 May 2002): (A specific appropriation must be used over a general one).

<sup>21</sup> e.g. B-272191.

<sup>22</sup> *Id.* (citing: See 59 Comp. Gen. 528 (1980)).