

PROBATIONARY OFFICERS

Involuntary Excess Leave for Probationary Officers

This opinion is in response to a request from AFPC/JA on whether probationary officers can be placed on involuntary excess leave. For reasons that follow, our opinion is that probationary officers may be placed on involuntary excess leave if a Board of Inquiry (BOI) determines the officer should be discharged from the service. Non-BOI probationary officers, however, cannot be placed on involuntary excess leave.

As per AFI 36-3207, *Separating Commissioned Officers*, a probationary officer is a regular officer with less than five years of active commissioned service, computed from the total active federal commissioned service date. Non-probationary officers are those with five or more years of active commissioned service. This distinction and the transition from probationary to non-probationary status are provided for in statute at 10 U.S.C. 630. In the statute, however, the transition from probationary to non-probationary status is after six years of active commissioned service not five. It is anticipated that the AFI will be changed to align with the statute, but as of the date of this opinion, that change has not occurred. As such, given the AFI does not violate the statute, the AFI is controlling.

A Show Cause Authority (SCA) must refer a non-probationary officer's case to a BOI. Probationary officers are only entitled to a BOI when the SCA recommends an under other than honorable conditions (UOTHC) service characterization, otherwise the right to a BOI is dependent on the SCA's determination that a BOI is appropriate.¹

Pursuant to 10 U.S.C. 1182(c)(2), an officer not recommended for retention on active duty by a BOI may be required to take leave pending the completion of the officer's case.² AFI 36-3003, *Military Leave Program*, paragraph 6.8.3 utilizes this authority for general considerations about involuntary excess leave. It states, "[W]ith the concurrence of the Show Cause Authority concerned, Commanders may place on involuntary excess leave, regular officers recommended for discharge by a BOI. The officer may be required to begin such leave at any time following the officer's receipt of the report of the board of inquiry including the board's recommendation for discharge/removal from active duty, and the expiration of any period allowed for submission by the officer of a rebuttal to that report. The leave may be continued until the date on which action by the Secretary of the Air Force (or designee) on the officer's case is completed or may be terminated at any earlier date."

According to the law, the prime factor when deciding whether an officer can be involuntarily placed on excess leave turns on whether a BOI recommended the officer be separated from the service.³ When a probationary officer is not given a BOI, there is no statutory authority to place the member on involuntary excess leave. However, the officer can still submit a voluntary

¹ See AFI 36-3206, paragraph 4.28.

² A member required to take leave under 10 U.S.C. 1182(c)(2) is not entitled to reemployment rights under 38 U.S.C. 4301 solely because of employment during the period of such leave. See 10 U.S.C. 706(c).

³ In cases where an officer submits a waiver of a BOI, and the waiver is accepted, that member does not qualify for involuntary excess leave.

request to be placed on excess leave.⁴ We therefore conclude that probationary officers may only be placed on involuntary excess leave if a BOI determines the officer should be discharged from the service.

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This opinion supersedes OpJAGAF 2014/22, 17 November 2014.

⁴ See AFI 36-3206, paragraph 6.8.6.