

TOPIC

Recoupment of advance education assistance for Applicant's tendering of resignation due to hardship.

TEXT OF THE DECISION

This opinion is in response to an inquiry regarding recoupment for an Applicant who filed a tender of resignation for hardship. For the reasons set forth below, we conclude it is legally permissible to support Applicant's tender of resignation and separate her under AFI 36-3209, paragraph 2.46.1.1, for hardship. Recoupment is *not* appropriate.

BACKGROUND

Applicant is a physician currently assigned to an Emergency Medicine residency program as part of the DoD's Joint Service Graduate Medical Education (GME) program. She entered the residency program in June 2015 and completed it on 30 June 2018. While in the program, Applicant is in obligated reserve status (ORS-RC) in the medical corps. Prior to this, Applicant was a participant and graduate of the Armed Forces Health Professions Scholarship Program (AFHPSP). After successfully completing the AFHPSP, Applicant served on active duty for 1 year, 11 months and 18 days before entering the residency program at Wright State University. Applicant incurred active duty service commitments (ADSCs) from both AFHPSP and her current residency training program.

On 8 January 2018, Applicant submitted a tender of resignation under AFI 36-3209, paragraph 2.46.1.1, for hardship. She requested, in the alternative, that her resignation be approved under paragraph 2.46.1.7, for miscellaneous reasons. Applicant's request is based on her status as the sole caregiver for her 16-year-old niece, who has been in Applicant's custody since 2014. Applicant's niece has been diagnosed with adjustment disorder, attention deficit hyperactivity disorder (ADHD), and post-traumatic stress disorder (PTSD) as a result of being raised in unsuitable living conditions by two parents with a long history of criminal charges and incarceration. In addition, Applicant's sole caregiver status of her special needs niece was exacerbated on 12 August 2017, when Applicant's then-husband was accused of sexually assaulting the niece. Applicant sought and received a divorce shortly thereafter. Applicant also has a 10-year-old biological daughter.

On 9 January 2018, the Chief of the Physician Education Branch recommended Applicant be discharged, with recoupment, in accordance with her tender of resignation.

On 7 February 2018, after carefully reviewing Applicant's case file, the Command forwarded a memo to the SAF Personnel Council recommending approval of Applicant's request for resignation from the Air Force for hardship. Command recommended separation with an Honorable discharge characterization, pursuant to AFI 36-3209, paragraph 2.46.1.1. Command also recommended recoupment of \$143,834.89 from Applicant for benefits she received while in

the AFHPSP program. With respect to the recoupment, Command concluded, “[b]ecause the hardship leading to her resignation will not affect her future ability to benefit from her education, the equities in this case favor recoupment of the funds expended on her behalf.”

GUIDANCE

Reserve officers may tender resignation based on undue hardship per paragraph 2.46.1.1 of AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, 14 April 2005 (incorporating through change 3, 20 September 2011). A hardship “[e]xists when retaining the member causes undue hardship either to the member or to members of the officer’s family. Members may be separated on presentation of conclusive evidence of...undue hardship.” AFI 36-3209, paragraph 2.46.1.1.

DISCUSSION

Resignation for hardship is authorized when it is determined that: (1) genuine hardship exists; (2) the hardship is not temporary; (3) conditions have arisen or have been aggravated to an excessive degree since military service began; (4) the member has made every effort to remedy the situation; and, (5) separation will eliminate or materially alleviate the condition and there are no other means of alleviation reasonably available. AFI 36-3209, paragraphs 2.46.1.1.1.5.

Resignation for miscellaneous reasons under paragraph 2.46.1.7 is authorized for “[a]n officer not eligible to resign under any other criteria contained in this section...such applications will be approved only if discharge or separation of the officer is in the best interests of the service.”

Applicant is suffering hardship that interferes with her ability to continue service in the Air Force primarily because she is the sole caregiver for her niece. Her niece requires constant and continuing care, and Applicant is the only member of her family able and willing to provide that care. Applicant sees the only alternative of foster care for her niece as unacceptable. Her conclusions are supported by the documentation she attached to her request. We agree with the recommendation of the chain of command and subordinate legal offices that Applicant meets the criteria of paragraph 2.46.1.1.1.5., “Separation or discharge of members will eliminate or materially alleviate the condition and there are no other means of alleviation reasonably available.”

Paragraph 2.41.3 states resignations may be disapproved for a variety of reasons, including when the officer has an unfulfilled military service obligation, contract, or active duty service commitment. However, most officers tendering a resignation have an unfulfilled military service obligation, contract, or active duty service commitment. In this case, discharge under AFI 36-3209, paragraph 2.46.1.1, “[Hardship] Exists when retaining the member causes undue hardship either to the member or to members of the officer's family,” is appropriate. As provided in paragraph 2.46.1.1.8.1, indebtedness to the government does not preclude separation or discharge when the member is otherwise eligible. An Honorable service characterization is the only characterization available when the discharge basis is AFI 36-3209, paragraph 2.46.1.1. See AFI 36-3209, paragraph 2.46.1 and Table 2.1, Rule 38.

*Recoupment*¹

Title 37 U.S.C. § 303a(e) states in the absence of Secretarial excusal, a person who receives a bonus or similar benefit (to include an educational benefit or stipend) conditioned upon the fulfillment of specified service requirements, as permitted by 10 U.S.C. § 2005, must repay to the United States any unearned portion of the benefit if that member fails to satisfy the service requirements. Recoupment can be waived in good conscience, equity, and in the best interest of the Air Force if the right conditions are present.

Applicant requests waiver of recoupment as she has already amassed considerable debt from other related degrees and, given her sole caregiver status, she is not sure how she will be able to work. Upon acceptance into the AFHPSP program, Applicant committed (by written agreement) to a four-year active duty service obligation in exchange for the Air Force funding her medical education. The Air Force has expended considerable funds to train her to be the physician she is today. Command/JA argued “because the hardship leading to her resignation will not affect her future ability to benefit from her education, the equities in this case favor recoupment of the funds expended on her behalf.” We disagree.

As mentioned, 37 U.S.C. § 303a(e) gives SecAF (or her designee) the authority to waive recoupment under certain circumstances when recoupment would be contrary to personnel policy or management objectives, against equity and good conscience, or would be contrary to the best interests of the United States. Command/JA correctly states that pursuant to DoD 7000.14-R, *Financial Management Regulation*, Volume 7A, Chapter 2, paragraph 020101, if a member fails to fulfill the conditions specified in the written agreement it may result in termination of the agreement and the member may be required to repay the unearned portion of the pay or benefit. Such repayment will be pursued unless the member’s failure to fulfill the specified conditions is due to circumstances determined reasonably beyond the member’s control. However, Command/JA did not analyze whether Applicant’s condition fits the conditions set out in section 0203 (Repayment and Non-Repayment Conditions) for which recoupment will not be sought.

Paragraph 020303 specifically outlines the conditions under which recoupment will not be sought and includes separation under a hardship separation. Further, DoD 7000.14-R, Volume 7A, Chapter 2, Table 2.1, Rule 8, states if a member is separated from service under a hardship separation, recoupment will not be sought. However, if separated under miscellaneous reasons, recoupment will be sought, unless SecAF determines requiring recoupment in this case would be contrary to a personnel policy or management objective, against equity or good conscience, or contrary to the best interest of the United States.²

In this case, Applicant has certainly received the benefit of an education which she will be able to use throughout her life. However, she is also in the unenviable position of having to choose between resigning so she can care for her niece and her own child, or allowing her niece to go into foster care. All levels of command agree she has met her burden to establish a hardship. Accordingly, if the Board agrees Applicant has met her burden to establish a hardship, it cannot direct recoupment. If the Board determines Applicant has not met her burden to establish hardship,

¹ “ARPC ONLY. Cases are forwarded to the Air Force Personnel Council when recoupment of Advanced Education Assistance (Title 10 U.S.C., Sections 2005) funds are involved.” See Table 2.1, Note 4.

² DoD 7000.14-R, *Financial Management Regulation*, Volume 7A, Chapter 2, Table 2-1, Rule 9.

it must direct recoupment unless it determines Applicant's circumstances warrant waiver pursuant to DoD 7000.14-R, Volume 7A, Chapter 2, Table 2-1, Rule 9.

CONCLUSION

Based on the foregoing, we conclude it is legally permissible to support Applicant's tender of resignation and separate her under AFI 36-3209, paragraph 2.46.1.1, for hardship, with an Honorable service characterization.

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