

RESERVES

Sanctuary Waiver Legal Opinion

This responds to your request for our opinion on a number of questions regarding the application of Air Force guidance on sanctuary waivers to various situation in which members of the Air Force reserve components could be entitled to sanctuary protection. You expressed concerns about the impact of these cases on Air Force active duty end strengths, as recent situations have resulted in an increasing number of individuals getting sanctuary.

You asked: (1) Whether the orders of an individual, regardless of whether that person was activated voluntarily or involuntarily, put forth a contractual obligation with a definite start and end date, the ending of which constitutes the voluntary release from active duty; (2) whether the failure of an individual, who has been involuntarily activated and properly briefed, to make a sanctuary election at least 45 days before he/she demobilized constitutes a voluntarily release from active duty; and (3) whether an individual who has elected sanctuary can later change his/her mind and decline an active duty assignment.

As provided in 10 U.S.C. § 12686, there are limitations on involuntary release from active duty of reservists who are on active duty at the time they achieve a total of 18 years of service, i.e., they are within two years of retirement eligibility. Specifically, it states that such individual “may not be involuntarily released from that duty before he becomes eligible for that pay, unless the release is approved by the Secretary.” 10 U.S.C. § 12686(a); see also 10 U.S.C. § 12646(e).

The statute sets out a waiver provision for those reservists voluntarily ordered to active duty pursuant to 10 U.S.C. § 12301 for less than 180 days, who would achieve 18 years of service during the period of service. In such situations, the Service Secretary may make the issuance of such orders to active duty conditional on the member’s signing a waiver of sanctuary protection “for the period of active duty covered by that order” 10 U.S.C. § 12686(b) (emphasis added). In order to be valid, any such waiver must cover the period of the orders issued and the period of the deployment orders which would carry the officer beyond 18 years of service and cannot be made conditional upon the receipt of a sanctuary waiver and any such waiver would be invalid. It is not permissible to achieve this result by requiring multiple waivers during the period of a 365 day deployment order as the statute only allows for a waiver in the case of orders which do

not exceed 179 days. This does not preclude the issuance of sequential orders of up to 179 days in duration.

AFI 36-2131, Administration of Sanctuary in the Air Reserve Components, establishes the Air Force's guidance and procedures of administering sanctuary. The provisions of AFI 36-2131 applicable here are found in chapters 3 and 4. Paragraph 3.1 and its subparagraphs state that for members being placed in a voluntary order status (MPA, RPA/ADOC, Title 32 ADOS or Title 32 ST Tour) for a period of less than 180 days, and who are or will be in the sanctuary zone at the end of the orders, a waiver of sanctuary protection is required prior to the orders being issued (emphasis added). If a published order of less than 180 days currently covered by a waiver is extended (or a new order is given), an additional waiver for the period of extension is required before the amendment (or new order) can be published, and any such extension (or new order) cannot exceed 179 days of duration.

Paragraph 4.2 and its subparagraphs state that members who have been involuntarily mobilized, who would achieve sanctuary during the period of their involuntary mobilization, must be counseled immediately upon notification of mobilization on the option to decline or invoke sanctuary zone protection. At 60 days before demobilization, the member is to be recounseled, ensuring members know they have until NLT 45 calendar days before the demobilization date to either claim or decline their sanctuary protection. Those who opt to decline sanctuary protection sign a declination statement. Those who wish to invoke sanctuary sign a "Request to Invoke Sanctuary" statement and complete an assignment worksheet.

With regards to your question whether orders can be viewed as a pseudo "contract" between the Air Force and the recipient, with acceptance of the end date viewed as a voluntary release from active duty, it is our opinion that they cannot. We can find nothing in the language of 10 U.S.C. § 12686 or § 12646 that would allow for such interpretation. For those on voluntary orders, it is telling that the federal statute provides for a waiver, should a Service Secretary choose to exercise such authority (as SecAF has done in AFI 36-2131).

You then asked whether those who, after appropriate counseling at the 60-day point, wait until they are past the 45-day window before demobilization before making a decision to invoke sanctuary, have waived their sanctuary protection. If all the requirements of AFI 36-2131, paragraph 4.2 and its subparagraphs, have been complied with, we conclude that such individuals have, in fact, waived their sanctuary protection. The written materials provided to the member at the 60-day point must make clear that the member's failure to submit a written invocation of their sanctuary claim by the 46th day before the

end of their period of active duty service amounts to a waiver of their sanctuary protection. In the absence of such written evidence of waiver, a claim of sanctuary should be deemed to have been invoked. Of course, if, before the end of the period of service, the member waives his/her sanctuary protection in writing, and he/she has not already invoked sanctuary, such waivers can be accepted.

Finally, you asked whether a member who has requested sanctuary can change his/her mind and decline an active duty assignment. As soon as a member has claimed sanctuary, he/she is in an active duty status until eligible for retirement pay. Any member who has invoked sanctuary may, at any time thereafter, only be separated if he/she “voluntarily separates; is medically disqualified for continued service; or is separated or discharged for cause.” See AFI 36-2131, para 1. Any such member would be subject to the normal separation requirements applicable to any other active duty member at the time of their application for separation or retirement. There may be other considerations preventing Separation before achieving 20 years total service could result in loss of both active duty and reserve retirement eligibility.

In the case of enlisted members who have invoked sanctuary, AFI 36-2131, para 5.2, controls:

5.2. Enlisted Eligibility: Reserve members in an active status who are selected may be involuntarily separated (other than for physical disability or for cause) or whose term of enlistment expires and who are denied reenlistment (other than for physical disability or for cause), and who on the date on which the member is to be discharged or transferred from an active status are entitled to be credited with at least 18, but less than 20 years of service computed under Title 10 U.S.C. § 12732, may not be discharged, denied reenlistment, or transferred from an active status without the member’s consent.

Finally, upon attaining 20 years of service, officers who have invoked sanctuary have the following options pursuant to AFI 36-2131, paragraph 4.4, which states:

4.4 Options at 20 Years TAFMS. The following options are available to the member upon completion of 20 years TAFMS:

4.4.1. Request a voluntary active duty retirement via AF Form 1160, Military Retirement Actions through Virtual Military Personnel Flight (vMPF).

4.4.2. USAFR only: Forego active duty retirement and request reassignment back to a Reserve unit by contacting a Reserve recruiter for

initiation of AF Form 1288. If the member is a prior Air Reserve Technician (ART), he/she may request restoration back to ART status by contacting AFRC/A1CS, DSN 497-1332 or DSN 497-1331.

4.4.3. ANG only: Members are not eligible to return to the ANG. Members should request a voluntary active duty retirement via AF Form 1160 through vMPF.

For specific requirements pertaining to release from active service after having invoked sanctuary, consult with your personnel office.

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