

*TOPIC*

Permissibility of accessing a twice-deferred officer into the Air National Guard.

*TEXT OF THE DECISION*

We have been asked whether a State Air National Guard may select an officer, who was twice deferred for promotion, as part of their Pilot Hiring Board. In accordance with Title 10, United States Code, Section 14701, *Selection of officers for continuation on the reserve active-status list*, this request is legally permissible.

*BACKGROUND*

Applicant served in the Regular Air Force from 2002 through 2008 as an instructor pilot and then as a mission pilot. In 2008, he entered the Inactive Ready Reserve under a voluntary separation program. While in the Inactive Ready Reserve, he met mandatory promotion boards in 2012 and 2013. The promotion quota for members of the Inactive Ready Reserve was one person from a pool of 700-800 candidates when he met his promotion boards in 2012 and in 2013. He was non-selected for promotion at both boards and received an honorable discharge from the Inactive Ready Reserve in 2013.

In April 2018, his Commander requested a waiver of the provisions of Air Force Instruction 36-2005, *Officer Accessions*, August 2, 2017, Attachment 3, Table A3.1, Rule 4. This rule states there is no waiver allowed to appoint to the Air National Guard Air Force Reserve officers from the Air Force Reserve who were twice non-selected for promotion. After considering Applicant's record and the needs of the squadron, his Commander supports Applicant's pursuit to join the State Air National Guard as a pilot. His entire chain of command concurs with the recommendation.

*LAW*

Pursuant to Title 10, United States Code, Section 12201 (a) (1):

To become an officer of a reserve component a person must be appointed as a Reserve of an armed force in a grade corresponding to a grade authorized for the regular component of the armed force.... In addition, to become an officer of the ... Air National Guard of the United States, he must first be appointed to, and be federally recognized in, the same grade in the ... Air National Guard....

Additionally, the Secretary of Defense, under Executive Order 13384, approves or denies the original appointments of second lieutenant, first lieutenant, and captain in the Regular Air Force,

and original appointments in the grades of lieutenant colonel and below in the Air Reserve Component.

Title 10, United States Code, Section 14701 (a) (2), provides:

A reserve officer who holds the grade of captain in the ... Air Force, ... and who is subject to separation under section 14513 of this title [Title 10, United States Code, Section 14513] may not be continued on the reserve active-status list under this section for a period which extends beyond the last day of the month in which the officer completes 20 years of commissioned service.

Title 10, United States Code, Section 14513, *Failure of selection for promotion: transfer, retirement, or discharge*, states:

Each reserve officer of the ... Air Force ... who is in an active status and whose removal from an active status or from a reserve active status list is required by section 14504, 14505, or 14506 of this title [Title 10, United States Code, Sections 14504, 14505, or 14506] shall (unless the officer's separation is deferred or the officer is continued in an active status under another provision of law) not later than the date specified in those sections –

- (1) be transferred to an inactive status if the Secretary concerned determines that the officer has skills which may be required to meet the mobilization needs of the officer's armed force;
- (2) be transferred to the Retired Reserve if the officer is qualified for such transfer and does not request (in accordance with regulations prescribed by the Secretary concerned) not to be transferred to the Retired Reserve; or
- (3) if the officer is not transferred to an inactive status or to the Retired Reserve, be discharged from the officer's reserve appointment.

Title 10, United States Code, Section 14505, *Effect of failure of selection for promotion: reserve captains of the Army, Air Force, and Marine Corps and reserve lieutenants of the Navy*, provides:

Unless retained ..., a captain on the reserve active-status list of the ... Air Force ... who has failed of selection for promotion to the next higher grade for the second time and whose name is not on a list of officers recommended for promotion to the next higher grade and who has not been selected for continuation on the reserve active-status list under [Title 10, United States Code, Section 14701], shall be separated in accordance with [Title 10, United States Code, Section 14513] not later than the first day of the seventh month after the month in which the President approves the report of the board which considered the officer for the second time.

Department of Defense Instruction 1200.15, *Assignment to and Transfer Between Reserve Categories, Discharge from Reserve Status, Transfer to the Retired Reserve, and Notification of Eligibility for Retired Pay*, March 13, 2014, prescribes no Department of Defense policy constraints with respect to selecting twice deferred officers for assignment in the Reserve Components.

## *DISCUSSION*

As we stated in our June 15, 2001, memorandum to AF/REP, in analyzing the issue of whether a twice deferred Reserve officer can be reappointed in the Reserves, it is important to understand the reasons why, under both the Defense Officer Personnel Management Act (DOPMA) and the Reserve Officer Personnel Management Act (ROPMA), officers who are twice non-selected for promotion are required to separate unless selected to continue on active duty or in inactive status. In the memorandum, we discussed the following:

By way of background, the up-or-out promotion system has formed the basis for the management of officer personnel for nearly 55 years. Selective continuation procedures and mandatory separation and retirement were an integral part of DOPMA and its principles were carried over into ROPMA. With these programs, Congress recognized that ‘if the system is working right, it will, of necessity, result in Passover of promotion of officers who are fully qualified to serve in the next higher grade. This is because the function of the up-or-out system is to provide at each grade more officers who are qualified to serve in the next grade than the billets require.’ *Defense Officer Personnel Management Act, Report of the Committee on Armed Services, November 13, 1980.* In reading the committee report, it is evident that Congress did not envision that a member who was required to separate and sever all military ties would return to military service.

Nevertheless, Congress left much to the discretion of the Service Secretaries in determining the qualifications for appointing Reserve officers. The statutory requirements are contained in 10 U.S.C. § 12201 and relate to age and citizenship. The remaining qualifications regarding physical, mental, moral, professional, and age are left to the Secretary.<sup>1</sup> While there is no specific statutory prohibition against reappointing a twice deferred officer as a Reserve officer, there is a policy prohibition contained in AFI 36-2005. We surmise that the basis for this prohibition is consistent with Congressional intent that these officers would not serve again as officers. But because the prohibition is regulatory and not statutory, the Secretary may permit such officers to be reappointed in the Reserves.

The Wing hired Applicant as part of its prior-rated Pilot Hiring Board to fly. The Commander states Applicant was “selected above other applicants for his unique and potent military flight instructor expertise combined with his major weapons systems aircraft commander know-how.” Further, the Commander states “Applicant’s selection is strategic to the Wing’s blueprint to address the national pilot shortage while broadening its foundation for veteran pilots.” It is unclear how large the Wing’s pilot shortage is, or how this one hire will address the “national pilot shortage,” as opposed to addressing any Wing pilot shortage specifically. However, the chain of command considers hiring Applicant to be “strategic” to the Wing’s plans, which may justify granting this request.

## *CONCLUSION*

Although Congress likely did not envision this situation, there are no statutory prohibitions against such an appointment. It is legally permissible to permit the Wing to hire Applicant to fly.

---

<sup>1</sup> 10 U.S.C. § 12201 (b).

However, we urge careful selectivity in waiving this policy, as there could be unintended consequences for the reappointment of this officer. Granting this exception to policy would only waive the Air Force policy of not permitting twice-deferred officers from accessing. The Air Force would still need to recommend the Secretary of Defense appoint him as a captain in the Air National Guard.

OpJAGAF 2019-18 27 March 2019