

## RESERVES

### Legal Review Regarding Retroactive Application of 10 U.S.C. § 10216(f)

We have reviewed your request to provide our legal opinion regarding the effect of statutory changes made to 10 U.S.C. § 10216(f) in the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012, which was enacted on 31 December 2011. Specifically, you asked whether the Commander, Air Force Reserve Command, has the discretion to approve or disapprove a mandatory separation date (MSD) extension request to age 60 when the request was submitted prior to 31 Dec 11. For the reasons discussed below, we believe the commander does have the discretion to approve or disapprove such a request.

#### Background:

On 14 October 2008, Congress provided as follows in 10 U.S.C. § 10216(f):<sup>1</sup>

Deferral of mandatory separation.—The Secretary of the Army and the Secretary of the Air Force *shall implement* personnel policies so as to allow a military technician (dual status) who continues to meet the requirements of this section for dual status to continue to serve beyond a mandatory removal date for officers, and any applicable maximum years of service limitation, until the military technician (dual status) reaches age 60 and attains eligibility for an unreduced annuity (*emphasis added*).

The FY 2012 NDAA changed the wording of 10 U.S.C. § 10216(f) so it now reads:

Authority for Deferral of mandatory separation.—The Secretary of the Army and the Secretary of the Air Force may each implement personnel policies so as to allow a military technician (dual status) who continues to meet the requirements of this section for dual status to continue to serve beyond a mandatory removal date for officers, and any applicable maximum years of service limitation, until the military technician (dual status) reaches age 60 and attains eligibility for an unreduced annuity. (*emphasis added*).

AFRC/JA opines, pursuant to the changes in the FY 12 NDAA, the AFRC/CC now has the discretion to approve or disapprove all MSD extension requests including those requests that were submitted to AFRC but not acted on prior to the effective date of the statute (31 Dec 11).

#### Discussion and Analysis:

The previous version of 10 U.S.C. § 10216(f) was not discretionary. Therefore, if an MSD extension request had been submitted prior to 31 Dec 11 involving a MSD in 2011, the commander would have been required to approve the request. According to AFRC/JA, there were 11 requests submitted during calendar year 2011 that had not been acted upon prior to 31

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<sup>1</sup> On 14 October 2008, the statute was amended to add “the Secretary of the Air Force” to this provision.

Dec 11. Of those 11 requests, none of them involved MSDs in calendar year 2011, in fact, the earliest MSD request was 7 Feb 2013. The recent amendment to 10 U.S.C. § 10216(f) included in the FY 12 NDAA provides the commander with discretion to grant MSD extension requests. Therefore, we believe the commander now has the authority to approve or disapprove a request for MSD extension when the MSD is after 31 Dec 11, regardless of when the request was submitted.

Conclusion:

We agree with AFRC/JA's conclusion that AFRC/CC has the discretion to approve or disapprove MSD extension requests when the MSD is 1 January 2012 or later.

OpJAGAF    2012/3            12 March 2012