

## Adverse Administrative Action Against Title 32 Military Member

This opinion discusses the extent to which a commander on Title 10 orders may take adverse administrative action against an Air National Guard (ANG) member in Title 32 status. In short, a Title 10 commander generally cannot take action against an ANG member for misconduct that occurred while the ANG member was in Title 32 status. The Title 10 commander may, however, take administrative action against a member in Title 32 status for misconduct occurring while the member was on Title 10 orders.

### BACKGROUND

A number of ANG members from the same unit are alleged to have submitted fraudulent TDY and/or BAH claims several years ago. All members were on Title 10 orders at the time of the alleged offense(s) but since returned to Title 32 status. The XX MSS/CC, a Title 10 commander, recently engaged the members' ANG wing commander and requested that he take administrative action in the form of Letters of Reprimand (LORs) for the alleged misconduct. After reviewing the evidence and seeking counsel from the Staff Judge Advocate, however, the Title 32 wing commander declined to take administrative action. As a result, the XX MSS/CC elected to take action as the members' Title 10 commander at the time of the alleged misconduct and requested Title 32 wing leadership serve the LORs. This opinion is in response to your request for clarification on whether a Title 10 commander may take adverse action against ANG members in Title 32 status.

### LAW AND ANALYSIS

The Secretary of the Air Force (SECAF) is “responsible for, and has the authority necessary to conduct, all affairs of the Department of the Air Force” and may “prescribe regulations” necessary to carry out that responsibility.<sup>1</sup> This broad statutory authority applies, inter alia, to the regulation of “ANG activities.”<sup>2</sup> Among the regulations prescribed by SECAF, Air Force Instruction (AFI) 36-2907, Unfavorable Information File, provides that “[c]ommanders, supervisors, and other persons in authority can issue administrative counseling, admonitions, and reprimands.”<sup>3</sup> The ultimate issue, therefore, is whether a Title 10 commander has the requisite authority to take adverse administrative action against ANG members currently in Title 32 status.

The answer hinges on the ANG member's status at the time of the alleged offense. A Title 10 commander generally may not take disciplinary and/or administrative action against an ANG member in Title 32 status for misconduct that took place while the ANG member was on Title 32 orders. Federal authority to exercise discipline over National Guard personnel attaches only when the member is in federal (i.e. Title 10) status.<sup>4</sup> Status is determined at the time of the alleged

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<sup>1</sup> 10 USC § 8013(b) and (g)(3); *see also* OpJAGAF 1998/65.

<sup>2</sup> OpJAGAF 1998/65.

<sup>3</sup> Paragraph 4.1. (emphasis added).

<sup>4</sup> *See* OpJAGAF 1998/65 (citing 10 USC § 802).

offense.<sup>5</sup> The only exception to this general rule is SECAF's broad authority to take administrative action against ANG officers regardless of their status (i.e. Title 10 or Title 32).<sup>6</sup>

If, however, an ANG member's misconduct occurred while he or she was on Title 10 orders, a Title 10 commander may pursue administrative action regardless of the member's subsequent return to Title 32 status. In *US v. Ferrando*, the Air Force Court of Criminal Appeals held that the US Air Force retains personal jurisdiction for offenses that occur while a member is in active duty status.<sup>7</sup> While there are substantial differences between judicial proceedings and administrative action,<sup>8</sup> the underlying policy remains the same. Title 10 commanders retain the authority to ensure good order and discipline by addressing misconduct occurring on active duty. Failure to retain such ability endangers command authority and significantly hinders good order and discipline. For these reasons, a commander on Title 10 orders may take administrative action against an ANG member in Title 32 status if the member's misconduct occurred while he or she was on Title 10. Since the ANG members at issue in this case were in federal status at the time of the alleged offenses, the Title 10 commander is authorized to pursue administrative action despite the Title 32 wing commander's contrary decision.

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<sup>5</sup> See generally *US v. Ferrando*, 77 MJ 506 (AFCCA 2017); see also 10 USC §§ 802, 803.

<sup>6</sup> OpJAGAF 2014/6 recognized the authority of the Vice Chief of Staff of the Air Force (via SECAF delegation) to take administrative action against an ANG officer—regardless of duty status at the time of the offense—so long as the ANG officer is federally recognized and the offense has a federal nexus (i.e. violation of federal law or federal military standards). This delegation, however, only pertains to officers “above the grade of colonel.”

<sup>7</sup> See *supra*, note 5. Also confirming the alternative, the Air Force Court of Criminal Appeals held that the Air Force does not maintain jurisdiction over offenses that occurred while a reserve member was not on active duty. See, e.g., *US v. Hale*, ACM 39101 (AFCCA 19 January 2018) (unpublished opinion).

<sup>8</sup> For example, ANG members facing courts-martial or nonjudicial punishment require placement on Title 10 orders. Lesser administrative actions generally do not require a member's re-activation.