

Discharge characterization options for Reservists

This is in response to a request for an advisory opinion regarding whether the Air Force can discharge a Reservist with an Under Other than Honorable Conditions (UOTHC) discharge when the member committed misconduct during a prior, active-duty enlistment and during the current, reserve enlistment but not while on an active duty tour or active duty for training (ADT), and the misconduct resulted in a civilian conviction and a 145-year-to-life sentence to confinement. For the following reasons, we find it is not legally permissible to characterize this member's service with a UOTHC, and recommend instead, returning the file to the unit requesting they consider the more appropriate course of action – initiating a “drop from the rolls” removal case.

BACKGROUND

The Respondent in this case enlisted in the Air Force in April 2009 and served on active duty until 1 October 2012, when Respondent received an honorable discharge and immediately transferred to the Air Force Reserve Corps (AFRC). In March 2013, several children accused Respondent of sexually molesting them between 2008 and 2013. This date range includes time prior to Respondent's active duty service (November 2008 - April 2009), during Respondent's active duty service (April 2009 - October 2012), and following Respondent's entry into AFRC, but not when Respondent was in active duty status (October 2012 – March 2013). On 21 May 2015, a civilian court found Respondent guilty of seven counts of sexual misconduct with minors; on 23 June 2015, the judge sentenced him to 145 years to life in prison. On 2 May 2017, Respondent's appeal was denied and the case was finalized.

On 2 May 2017, Respondent's command initiated a discharge action under AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, paragraph 3.21.3.1 (commission of a serious offense, sexual deviation) and paragraph 3.21.4 (civilian convictions for which a punitive discharge would be authorized, and offenses involving moral turpitude). Respondent's command recommended a UOTHC separation. Respondent waived his rights to 1) counsel, 2) submit a response for consideration, and 3) an administrative discharge board. The servicing legal offices and higher headquarters agreed Respondent's unconditional waiver and separation with a UOTHC characterization were legally sufficient and appropriate. SAF Personnel Council recommended Respondent be discharged with a UOTHC characterization, with commission of a serious offense as the primary basis.

LAW

Can the separation authority consider prior service conduct for purposes of discharge characterization?

Does a Reservist's conviction and subsequent confinement for misconduct in the civilian community, when the member was not on active duty or ADT, directly affect the performance of the member's military duties?

DoD Instruction 1332.14, *Enlisted Administrative Separations*, Incorporating Change 3, Effective March 22, 2018, restricts circumstances in which AFRC members can receive UOTHC service characterizations. DoDI 1332.14, Enclosure 4, paragraph 3.b.(3)(a) states "prior service activities...including commission of other offenses for which punishment was not imposed will not be considered on the issue of characterization." According to DoDI 1332.14, Enclosure 4, paragraph 3.b.(3)(e):

Conduct in the civilian community of an enlisted Service member of a Reserve Component who is not on active duty or active duty for training may form the basis for characterization under other than honorable conditions *only* if such conduct directly affects the performance of the enlisted Service member's military duties. Such conduct may form the basis of characterization as general...only if such conduct has an adverse impact on the overall effectiveness of the service, including morale and efficiency. (emphasis added)

In contrast, DoDI 1332.14, Enclosure 4, paragraph 3.b.(1)(b) notes the quality of service of AFRC members who *are* on active duty or ADT "is adversely affected by conduct that is of a nature to bring discredit on the Military Services or prejudicial to good order and discipline... Characterization may be based on conduct in the civilian community, and the burden is on the respondent to demonstrate that such conduct did not adversely affect the respondent's service."

AFI 36-3209 contains similar language limiting the imposition of a UOTHC characterization. It lays out three requirements prior to impositions. First, the separation authority must give the member the opportunity for a board hearing.¹ Second, "conduct in the civilian community of a member *not on active duty or ADT* may be used to characterize service as UOTHC *only if* the conduct directly affects the performance of military duties."² (emphasis added) The AFI provides a non-exclusive list of "conduct which directly affects the performance of duty," including missing musters, screenings, Initial Active Duty Trainings, Unit Training Assemblies, or Active Duty for Training tours, and offenses which involve either a military member or DoD agency as a victim.³ Third, the separation authority must base the characterization on conduct "that constitutes a significant departure from the conduct expected."⁴ Finally, the separation authority can only consider conduct in the current enlistment; prior service characterization "shall not be considered on the issue of characterization."⁵

¹ AFI 36-3209, paragraph A2.2.3

² *Id.*

³ *Id.* at paragraph A.2.2.3.1 – A.2.2.3.3

⁴ *Id.* at paragraph A2.2.2.4. A list of examples follows, including use of force to produce serious injury or death; abuse of positions of trust; disregard by a superior of customary superior-subordinate relationships; and conduct that endangers the security of the United States, the health and welfare of other members of the Air Force, or the health and safety of other person.

⁵ *Id.* at paragraph A2.4.1.

These regulations reflect federal case law. In *Roelofs v. Secretary of the Air Force*,⁶ the District of Columbia Court of Appeals held that when the service seeks to discharge an active duty Airman for off-duty misconduct - Roelofs garnered a civilian conviction for drug possession with intent to distribute – it must show the acts in some way diminished the overall effectiveness of the military in order to support a general discharge.⁷ The service must show the off-duty misconduct was service related, when they seek to discharge a member with a UOTHC.⁸ Roelofs, who received a general discharge, challenged an Air Force regulation which stated that a member discharged for a civilian conviction should ordinarily receive an “undesirable” (now called UOTHC) characterization, unless the particular circumstances of the case warrant an honorable or general discharge. Roelofs sought an honorable discharge, arguing his misconduct occurred outside his military duties. According to the court, “an undesirable discharge indicates absence of good record of performance in the service. This is an adverse finding, over and above the stigma of a felony, because it is equivalent to a finding that the servicemen has performed inadequately on the job.”⁹ The court rejected Roelofs’ challenge to the regulation because he could and did rebut the presumptive UOTHC characterization; the regulation provided an opportunity for Roelofs to show his off-duty conduct was not service-related and did not simply mandate a UOTHC. However, the court added a service impact requirement to the regulation’s presumption in favor of a UOTHC: “the presumption...is warranted if it results in deficiency in performance of military duties or has a direct impact upon military readiness.”¹⁰

In *Wood v. Secretary of Defense*,¹¹ the District of Columbia District Court applied *Roelofs*’ holding to the cases of four inactive Reservists discharged with UOTHCs for varying degrees of criminal misconduct. The *Wood* court held that because inactive Reservists hold no military jobs or obligations,¹² including drill or training weekends, their civilian misconduct could not possibly result in “deficiency in performance of his military duties or have direct impact upon his military service,” and therefore the Air Force had no authority to issue undesirable discharges.¹³ The *Wood* court remanded the cases for review by the services holding, “an undesirable discharge can only be based on conduct found to have affected directly the performance of military duties; a general discharge can only be based upon conduct found to have had an adverse impact on the overall effectiveness of the military, including military morale and efficiency.”¹⁴

In *Doe v. Secretary of the Air Force*,¹⁵ the District of Columbia District Court applied the reasoning of *Roelofs* and *Wood* to the case of an active-duty major who received a UOTHC discharge for homosexuality, after it was discovered he had engaged in homosexual activity with the 15-year old son of a fellow Air Force officer. The *Doe* court held that while the record likely supported a finding that the member’s behavior reduced the overall effectiveness of the service (and would

⁶ 628 F.2d 594 (D.C. Cir 1980).

⁷ This can be shown through a civilian convictions (Roelofs) or simply that the conduct brought adverse publicity and discredit upon the service (*Snakenberg v. United States*, 15 Cl Ct 809, 815 (1988)).

⁸ 628 F.2d 594, 598.

⁹ *Id.* at 599.

¹⁰ *Id.*

¹¹ 496 F.Supp 192 (D.D.C. 1980).

¹² Other than keeping the military informed of their current addresses.

¹³ 496 F.Supp 192, at 196 (D.D.C 1980).

¹⁴ *Id.* at 198.

¹⁵ 563 F. Supp. 4 (D.D.C. 1982).

warrant a general characterization), by seeking a UOTHC, the Air Force obligated itself to show that the conduct was service-related and constituted inadequate performance of military duties, and they had not done so.¹⁶

ANALYSIS

Can pre-service or prior service conduct constitute a basis for a UOTHC characterization? No. Although DoDI 1332.14 and AFI 36-3209 provide limited authority for the separation authority to consider conduct in a preceding enlistment in determining whether a basis for discharge exists, both regulations prohibit considering prior service conduct for characterization purposes,¹⁷ and both regulations prohibit considering pre-service characterization for any purpose except in certain fraudulent enlistment cases.¹⁸ Because Respondent's conduct occurred during the active duty enlistment preceding the current enlistment, but was not known until after re-enlistment, the separation authority can consider Respondent's misconduct during both active duty and reserve enlistments when establishing whether a basis for discharge exists,¹⁹ but can only consider the misconduct in the current enlistment when determining the appropriate characterization.

Does a Reservist's conviction and subsequent confinement for misconduct in the civilian community, when that member was not active duty or active duty training, directly affect the performance of the member's military duties? Yes, but only if you determine the Reservist's conduct was service-related and directly constituted inadequate performance of military duties (and thus would warrant a UOTHC). Based on the evidence in this case, the case law and regulations supported an honorable, under general conditions discharge in this case. Respondent's misconduct led to a trial and conviction for sex offenses against minors, included publicity of Respondent's military affiliation, and resulted in a sentence to confinement precluding Respondent's ability to ever serve in uniform again. Respondent's misconduct impacted the overall effectiveness of the service and general military efficiency under the tests set out in *Roelofs*. Respondent's trial and conviction for sexual abuse of children, which publicized Respondent's military affiliation, caused discredit on the service. Respondent's lengthy sentence to confinement and subsequent inability to drill or serve with other units have diminished the effectiveness of the Air Force because Respondent is no longer available to contribute to the Air Force's mission. These factors support an honorable, under general conditions discharge characterization. The principal issue though, is whether these facts could also support a UOTHC characterization.

Respondent's case lies somewhere between the inactive Reservists with no military duties in *Wood*, and the active duty members *Roelofs* and *Doe*. In reviewing similar cases in the past, AF/JAA has applied the *Wood* standard to Reservists who commit misconduct when not on active duty or ADT and opined that unless there is evidence the misconduct or conviction directly affected the performance of military duties, a UOTHC characterization is prohibited.²⁰ Respondent repeatedly molested two minor boys during Respondent's current enlistment, but not

¹⁶ *Id.* at 9.

¹⁷ DoDI 1332.14, Enclosure 4, paragraph 3(b)(3)(a); AFI 36-3209, paragraph A2.4.1.

¹⁸ DoDI 1332.14, Enclosure 4, paragraph 3(b)(3)(b); AFI 36-3209, paragraph A2.4.2; see also *Harmon v. Brucker*, 355 US 579, 583 (1958).

¹⁹ See AFI 36-3209, paragraph 3.9.1.3.

²⁰ See OpJAGAF 1997/8, OpJAGAF 2000/17, OpJAGAF 2003/28, OpJAGAF 2004/5, OpJAGAF 2007/42, and OpJAGAF 2012/13.

while on active duty or an ADT. Respondent's acts endangered the health and safety of other persons,²¹ and Respondent likely missed some training requirements.²² Respondent's last EPR contains one line in each of the assessment blocks: "Member not rated for the period of 720 days due to being confined by civilian authority."²³ The EPR contains a generic job description, but no other evaluation of Respondent's duty performance, including, importantly, evidence that Respondent had any duties at all, including duties Respondent failed to perform.

A UOTHC is authorized only when the service can show a nexus between Respondent's misconduct and performance of military duties. Under the holdings in *Roelofs* and *Wood*, a UOTHC must be based on more than speculative future impact. The law requires the service show the member's misconduct led to a direct impact on the member's performance of his or her duties. Without showing that Respondent's unit actually required Respondent to perform particular duties, there can be no direct effect on those duties. As noted in *Roelofs*, a UOTHC would signify Respondent performed inadequately at assigned duties. This is echoed in DoDI 1332.14, which presumes that civilian misconduct adversely affects the quality of service of members on active duty or ADT, but presumes otherwise for members not on active duty or ADT. We continue to hold that in order to discharge a Reservist with a UOTHC who committed misconduct while not on active duty or ADT, the government must show specifically the member had assigned duties (beyond general annual training and participation requirements) and the misconduct, whether under either commission of a serious offense or civilian conviction bases, directly impacted the member's service and caused a deficiency in the performance of his or her assigned duties.

In this case, we do not believe a general discharge is an appropriate characterization for respondent's service during this enlistment. We recommend returning to the unit to consider the alternative (and more appropriate course of action) of them initiating a "drop from the rolls" removal case under AFI 36-3209, paragraph 3.26. According to AFI 36-2134, *Air Force Strength Accounting Duty Status Program*, paragraph 3.4, time Airmen spend in confinement is "considered non-creditable service—also referred to as lost time or 'bad' time. When lost time is charged, a member's service dates are adjusted forward by the number of days of lost time charged." We recently confirmed with AFRC/JA that Respondent's strength accounting duty status has been properly coded as "confined." Respondent is not receiving credit for the time being spent in confinement thus tolling Respondent's date of separation (DOS). Given Respondent's lengthy confinement sentence, Respondent will likely never return to good duty status and Respondent's DOS will likely never arrive, thus allowing time to complete a "drop from the rolls" removal action.

²¹ See AFI 36-3209, paragraph A2.2.4.6

²² See AFI 36-3209, paragraphs A2.2.2.3.1 – A2.2.3.2.

²³ Respondent's supervision did not rate Respondent's ARC service between reserve enlistments due to "no report required according to AFI 36-2406." Although no other explanation is provided, we note AFI 36-2406, paragraph 4.8 states that the first evaluation period of an ARC member who transfers from the RegAF is non-rated.

CONCLUSION

Based on the foregoing, we conclude it is legally impermissible for the separation authority to discharge Respondent with a UOTHC characterization and recommend returning to the unit to drop the Respondent from the rolls.

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