

**TOPIC**

Request for Drop from the Rolls of the Air Force following civilian conviction.

**TEXT OF THE DECISION**

We have reviewed the below case and for the following reasons we find it legally sufficient to support the recommendation of the General Court-Martial Convening Authority (GCMCA) to drop Respondent from the rolls of the Air Force pursuant to AFI 36-3207, *Separating Commissioned Officers*, paragraph 4.2.1.1 (9 July 2004), for his conviction in federal district court, which has become final, and for which Respondent was sentenced to confinement in a federal penitentiary.

**BACKGROUND**

The Bureau of Alcohol, Tobacco, Firearms, and Explosives began an investigation into Respondent's criminal activities in early 2007. Eventually, the Air Force Office of Special Investigations (AFOSI) and the Internal Revenue Service (IRS) jointly took over the investigation. In 2008, AFOSI conducted extensive surveillance at several night clubs owned by Respondent and his father. In early 2009, AFOSI and Immigrations and Customs Enforcement agents executed federal search warrants on Respondent's residence and his two night clubs. In some of the seized financial records, the IRS discovered a substantial amount of unreported income from the clubs. The agents also detained and interviewed 21 illegal aliens who worked as dancers at the clubs.

As a result of this extensive investigation, Respondent was prosecuted in the United States District Court. On 17 July 2009, he pled guilty to three counts of filing fraudulent and false statements on his U.S. income tax returns in violation of 26 U.S.C. § 7206(1), and one count of harboring illegal aliens for commercial or private financial gain in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), (a)(1)(A)(v)(II), and (a)(1)(B)(i). On 1 October 2009, the U.S. District Court Judge sentenced Respondent to 21 months confinement in the custody of the United States Bureau of Prisons, three years supervised release upon release from prison, a \$400.00 special monetary assessment, and \$60,786.33 restitution to the IRS. Respondent began serving his confinement at the U.S. Federal Penitentiary on 30 December 2009. Respondent appealed the severity of his sentence to the United States Court of Appeals. The Circuit Court affirmed the conviction and sentence on 10 August 2010. Respondent did not file a writ of certiorari with the United States Supreme Court within the statutorily required timeframe. This federal conviction and accompanying confinement serve as the basis for this action.

*Case Processing*

On 28 September 2010, the Respondent's Commander recommended the GCMCA initiate action to drop Respondent from the rolls of the Air Force under AFI 36-3207, paragraph 4.2.1.1. Though the Circuit Court affirmed Respondent's case on 10 August 2010, the GCMCA/JA waited until 11 November 2010 to forward the package with the legal review to the GCMCA. The GCMCA/JA held the case to wait for Respondent's filing deadline with the United States Supreme Court to

pass, ensuring his conviction was final.<sup>1</sup> On 15 November 2010, the GCMCA initiated action to drop Respondent from the rolls.

On 6 December 2010, the Respondent's Vice Commander notified Respondent, in accordance with AFI 36-3207, paragraph 4.2.3, of the proposed action to drop him from the rolls because of his federal conviction<sup>2</sup> and subsequent sentence to confinement under AFI 36-3207, paragraph 4.2.1.1. The notification also informed Respondent of his right to present matters for consideration by the Secretary of the Air Force. On 19 January 2011, Respondent's counsel requested an extension to submit matters until 26 January 2011 from Respondent's Unit JA.<sup>3</sup> On 1 February 2011, Respondent's Unit JA forwarded this case file to HQ AFPC for processing. As of that date, Respondent had not submitted matters for the Secretary to consider.

Respondent submitted a two-page letter, dated 8 March 2011, for consideration by the Secretary on 9 March 2011.<sup>4</sup> In his submission, Respondent notes he has nearly 18 years of service in the Air Force and it is difficult for him to "accept the fact that the Air Force wants to 'Drop' [him] from the Rolls as if [he] never existed." He requests a discharge proceeding under AFI 36-3206 so he may have a board hearing in which to plead his case. He notes that he will be released from prison and placed in a halfway house on 6 May 2011 so logistically it would not be a problem for him to attend a hearing.

## ***GUIDANCE***

AFI 36-3207, *Separating Commissioned Officers*, paragraph 4.2.1.1 (9 July 2004)

## ***DISCUSSION***

AFI 36-3207, paragraph 4.2.1.1 permits the Secretary to drop an officer from the rolls when the officer has been found guilty of an offense by a court (other than a court-martial or other military court), has been sentenced to confinement in a federal penitentiary, and the conviction has become final.

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<sup>1</sup> Under 28 U.S.C. § 2101(c), a petitioner has 90 days from the date a judgment is entered in the lower court to file a writ of certiorari.

<sup>2</sup> The notification letter incorrectly states the conviction occurred on 17 July 2010. We find this error harmless as the rest of the letters in the package as well as the certified copy of the conviction and sentence contained in the file pursuant to AFI 36-3207, paragraph 4.2.2.9, all show the date of conviction as 17 July 2009.

<sup>3</sup> The case file contains no signed receipt for the Respondent's Vice Commander notification letter from Respondent. Respondent's Unit JA treated the phone call from the defense counsel requesting an extension on behalf of Respondent as constructive service on him. Also since no written request for an extension was contained in the case file, we confirmed with the unit JA that this extension was handled verbally.

<sup>4</sup> Since this case involved constructive service of the notification letter on Respondent, we contacted his defense counsel. The defense counsel confirmed Respondent wanted to respond to the notification letter but experienced difficulty communicating with counsel because of the prison system. We informed counsel we would hold the package for a reasonable period of time to give Respondent an opportunity to respond.

Respondent pled guilty in U.S. District Court and was sentenced to 21 months confinement in a federal penitentiary. As the Circuit Court affirmed the conviction and the filing deadline for the United States Supreme Court has passed, Respondent's conviction is final. The case file from the GCMCA contained all the necessary supporting documentation for this action.<sup>5</sup> Respondent's Vice Commander notified Respondent of the action, gave him an opportunity to respond, and forwarded the file to HQ AFPC. Accordingly, there is a lawful basis for this action. Thus, we concur with the GCMCA's recommendation to drop Respondent from the rolls of the Air Force.

### ***CONCLUSION***

For the aforementioned reasons, the evidence is legally sufficient to support dropping Respondent from the rolls of the Air Force pursuant to AFI 36-3207, paragraph 4.2.1.1.

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<sup>5</sup> AFI 36-3207, paragraph 4.2.2 lists the required contents for the case file.