

TOPIC

Whether the final denial or revocation of a security clearance by appropriate authorities acting pursuant to Department of Defense Manual (DoDM) 5200.02, *Procedures for the DoD Personnel Security Program (PSP)*, or when an Airman fails to apply for an initial or a reinvestigation for a clearance, may serve as a basis for discharge.

TEXT OF THE DECISION

For the reasons set forth below, an officer and enlisted member may be subject to discharge under AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, paragraph 3.6.12,¹ or AFI 36-3208, *Administrative Separation of Airmen*, Section 5I,² when the final denial or revocation of a security clearance by appropriate authorities acting pursuant to Department of Defense 5200.2-R occurs, or when an Airman fails to apply for an initial or a reinvestigation for a clearance.

BACKGROUND

In July 2004, AF/JAA responded to an inquiry from AF/DPPPA on whether it was permissible to create a new discharge provision permitting the involuntary separation of officers and enlisted members following the “permanent revocation” of a favorable personnel security clearance. Our office non-concurred with the proposal. We stated the Secretary of the Air Force “is not at liberty to create a new basis for discharge that does not meet [statutorily prescribed criteria].” Further we discussed how the Secretary of the Air Force must prescribe separation regulations consistent with the policies and procedures contained in DoDIs 1332.14, *Enlisted Administrative Separations*, and 1332.30, *Commissioned Officer Administrative Separations*, neither of which contained provisions for separating Airmen for the permanent loss of a security clearance.

Our office also took exception to the use of the term, “permanently revoked,” when describing the loss of a security clearance. Under prior provisions of the manual, the member could apply for reinstatement of his or her security clearance one year after it was revoked through the adjudication process. Consequently, the use of the phrase “permanently revoked,” was imprecise.

Additionally, the Consolidated Adjudication Facility’s (CAF) determination on revoking a security clearance is final and not subject to reversal by a Board of Inquiry (BOI). Accordingly, if the basis for discharge were “permanent revocation of a security clearance,” the BOI could not carry out its statutory responsibility of evaluating evidence and making a retention determination

¹ AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004 (Incorporating through interim change 7, 2 July 2013), as amended through Air Force Guidance Memorandum (AFGM) 2018-01, 14 June 2018, paragraph 3.6.12, permits the Show Cause Authority to initiate discharge action when “[r]etention is not clearly consistent with the interests of national security.”

² AFI 36-3208, *Administrative Separation of Airmen*, 9 July 2004 (Incorporating through change 7, 2 July 2013), as amended through AFGM 2018-01, 14 June 2018), Section 5I, paragraph 5.57, permits discharge of enlisted Airmen when “retention is clearly inconsistent with the interest of national security.”

because the BOI's decision must be deferential to the CAF on matters of granting and revoking a security clearance.

Likewise, SAF/GCM (now SAF/GCI) non-concurred with the proposed new separation basis. SAF/GCM similarly discussed CAF's authority in making the clearance determination. SAF/GCM opined in many cases the Airman loses the security clearance due to misconduct or mental health issues, which serve as independent bases for separation. Separation for loss of a security clearance for any other reason logically falls under the existing AFI 36-3206, paragraph 3.6.12, "... retention is not clearly consistent with the interests of national security." SAF/GCM concluded stating "[t]here would appear to be no reason for loss of a clearance to be a *separately stated basis* for separation." (*Emphasis added*)

GUIDANCE

Title 10, United States Code, Section 1181, provides the authority to establish procedures to consider the separation of officers for substandard performance of duty and for certain other reasons. The enumerated reasons are: (1) when the officer's performance of duty has fallen below standards prescribed by the Secretary of Defense;³ (2) misconduct; (3) moral or professional dereliction; and (4) because retention is not clearly consistent with the interests of national security.⁴ Title 10 does not contain similar provisions for enlisted members.

DoDI 1332.30, paragraph 3.1, provides five exhaustive reasons for separation for substandard performance of duty.⁵ Paragraph 3.2 provides a list of potential bases for acts of misconduct or moral or professional dereliction.⁶ Finally, paragraph 3.3 states, "in accordance with DoD Manual 5200.02, a commissioned officer may be separated from military service when it is determined that the commissioned officer's retention is not clearly consistent with the interests of national security."

DoDI 1332.14, Enclosure 3, lists reasons to separate enlisted Airmen, which include unsatisfactory performance, drug abuse rehabilitative failure, alcohol abuse rehabilitative failure, misconduct,

³ 10 U.S.C. § 1181(a).

⁴ 10 U.S.C. § 1181(b).

⁵ A commissioned officer may be separated from a Military Service, in accordance with regulations prescribed by the Secretary of the Military Department concerned, when found to be substandard in: (1) performance of duty, including leadership; (2) efficiency; (3) response to training in the officer's assigned specialty; (4) attitude or character; or (5) maintenance of satisfactory progress while in an active duty status skills awarding program. DoDI 1332.30, Section 3, paragraph 3.1.

⁶ A commissioned officer may be separated from a Military Service, in accordance with regulations prescribed by the Secretary of the Military Department concerned, when found to have committed an act or acts of misconduct or moral or professional dereliction, which include (but are not limited to): (1) serious or recurring misconduct, punishable by military or civilian authorities; (2) discreditable mismanagement, whether intentional or not, of personal affairs, including financial affairs; (3) substance or drug abuse; (4) culpable failure to perform assigned duties or to complete required training; (5) culpable loss or compromise of professional status; qualifications or licensure; or certification required for performance of military duties; (6) intentional misrepresentation of facts in obtaining an appointment or in official statements or records; or (7) final conviction for rape or sexual assault, forcible sodomy, or an attempt to commit one of those offenses. DoDI 1332.30, Section 3, paragraph 3.2.

security, Secretarial plenary authority,⁷ and reasons established by the military departments.⁸ Enclosure 3, paragraph 12, basis of “Security” states a basis exists when “retention is clearly inconsistent with the interest of national security,” and the enlisted Service member “may be separated by reason of security and under conditions and procedures prescribed in DoDI 5200.02, *DoD Personnel Security Program (PSP)*.”

DoDI 5200.02, Enclosure 3, states the objective of the PSP is to ensure persons deemed eligible for national security positions⁹ remain reliable and trustworthy. Personnel security procedures for national security positions are set forth in E.O 10865 and DoDM 5200.02. When an unfavorable personnel security determination is rendered, Airmen cannot be appointed or assigned to national security positions. They will be immediately removed from the national security position and placed in an existing non-sensitive position if available. The individual is placed in an appropriate status until a final security determination is made. A final security determination is the granting, denial or revocation by an appropriate CAF or an appeal board decision, whichever is later. According to Enclosure 3, paragraph 4, individuals may elect to appeal unfavorable personnel security determinations.

DoDM 5200.02, Section 10, discusses an Airman’s opportunity to appeal the CAF’s unfavorable national security determination. If the Airman appeals, the Personnel Security Appeal Board will review the adjudicative file and any appeal matters and render a final decision. Commanders, not Airmen, may request reconsideration of an unfavorable national security determinations for

⁷ Notwithstanding any limitation on separations provided in DoDI 1332.14, the Secretary of the Air Force may direct the separation of any enlisted Airmen prior to expiration of term of service after determining it to be in the best interest of the Air Force. DoDI 1332.14, Enclosure 3, Paragraph 14.a.

⁸ The Air Force may establish additional reasons for separation for circumstances not otherwise provided for in DoDI 1332.14 to meet its specific requirements, subject to approval by the ASD(M&RA). DoDI 1332.14, Enclosure 3, Paragraph 15.a.

⁹ DoDI 5200.02 defines a “national security position” as: Any position in a department or agency, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security. Such positions include those requiring eligibility for access to classified information. Other such positions include, but are not limited to, those whose duties include: protecting the nation, its citizens and residents from acts of terrorism, espionage, or foreign aggression, including those positions where the occupant’s duties involve protecting the nation’s borders, ports, critical infrastructure or key resources, and where the occupant’s neglect, action, or inaction could bring about a material adverse effect on the national security; developing defense plans or policies; planning or conducting intelligence or counterintelligence activities, counterterrorism activities and related activities concerned with the preservation of the military strength of the United States; protecting or controlling access to facilities or information systems where the occupant’s neglect, action, or inaction could bring about a material adverse effect on the national security; controlling, maintaining custody, safeguarding, or disposing of hazardous materials, arms, ammunition or explosives, where the occupant’s neglect, action, or inaction could bring about a material adverse effect on the national security; exercising investigative or adjudicative duties related to national security, suitability, fitness or identity credentialing, where the occupant’s neglect, action, or inaction could bring about a material adverse effect on the national security; exercising duties related to criminal justice, public safety or law enforcement, where the occupant’s neglect, action, or inaction could bring about a material adverse effect on the national security; or conducting investigations or audits related to the functions described above as “other such positions,” where the occupant’s neglect, action, or inaction could bring about a material adverse effect on the national security. The requirements of this definition apply to positions in the competitive service, positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and career appointments in the Senior Executive Service within the executive branch. Departments and agencies may apply the requirements of this definition to other excepted service positions within the executive branch and contractor positions, to the extent consistent with law.

individuals within their command to address specific mission needs after the passage of 1 year following a denial or revocation. Reconsideration is not a personal right or entitlement.

As provided in AFI 36-3206, paragraph 3.6.12, an officer may be separated when “[r]etention is not clearly consistent with the interests of national security. NOTE: The Show Cause Authority initiates action only after ensuring required actions under AFI 31-051, *Personnel Security Program Management*,¹⁰ have been completed.”

Similarly, AFI 36-3208,¹¹ addresses discharges in the interest of national security in Section 5I. An Airman whose retention is clearly inconsistent with the interest of national security may be discharged, but the discharge may not be started until: (1) all the actions required by DoDD 5200.2-R¹²/DoDM 5200.02_AFMAN 16-1405, *Air Force Personnel Security Program*, 1 August 2018, are completed, and (2) the Air Force Security Clearance Office has recommended discharge processing. The General Court-Martial Convening Authority is the separation authority for recommendations for discharge in the interest of national security.

Although not directive, it is instructive to review how the Army addresses the final denial or revocation of security clearances vis-à-vis discharges. Army Regulation (AR) 135-185, *Separation of Officers*, 29 November 2017, Section II, paragraph 2-11.b., states Army officers must hold a security clearance of at least secret. An officer whose security clearance has been withdrawn or withheld due to unfavorable information regarding loyalty, subversion, or security violations may be processed for involuntary separation under AR 380-67, *Personnel Security Program*, 24 January 2014. However, the officer should first be considered for discharge under AR 135-185; Section 1-6 states a discharge for final revocation of a security clearance, not due to misconduct, will be characterized as honorable.

Section 2-13 provides a list of acts of misconduct or moral or professional dereliction which provide a basis for discharge, and the basis found at subparagraph m is: “The final denial or revocation of an officer’s Secret security clearance by appropriate authorities acting pursuant to Department of Defense Directive (DODD) 5200.2-R and AR 380-67 or failure of the officer to apply for an initial or reinvestigation for a clearance.”

Further, the final denial or revocation of an officer’s secret security clearance by appropriate authorities acting pursuant to DoDD 5200.2-R and AR 380-67, or a failure of the officer to apply for an initial or a reinvestigation for a clearance requires that separation action be initiated under section 2-15, discharge in the interest of national security.

¹⁰ DoDM 5200.02_AFMAN 16-1405, *Air Force Personnel Security Program*, 1 August 2018, superseded AFI 31-501.

¹¹ AFI 36-3208, *Administrative Separation of Airmen*, 9 July 2004, Incorporating Through Change 7, 2 July 2013, as amended by Air Force Guidance Memorandum 2018-01, 14 June 2018.

¹² DoDI 5200.02, *Personnel Security Program (PSP)*, March 21, 2014, Incorporating Change 2, Effective May 11, 2018, reissued DoDD 5200.2 as a DoDI, and incorporated and cancelled DoDIs 5210.25 and 5220.28. DoDM 5200.02, *Procedures for the DoD Personnel Security Program (PSP)*, April 3, 2017, incorporated and cancelled DoD 5200.2-R, *Personal Security Program*, January 1987.

AR 135-178, *Enlisted Administrative Separations*, 7 November 2017, paragraph 14-1.h permits discharge of enlisted Soldiers for security reasons, and the Soldier will be discharged in accordance with AR 380-67.

DISCUSSION

Our prior opinion related to creating a basis for discharge not promulgated by statute or DoDI. Although our July 2004 memorandum has been interpreted as prohibiting separation based on the final denial or revocation of a security clearance, the opinion addressed the appropriateness of adding a basis stemming from the “permanent revocation” of a security clearance. As explained in the personnel security regulations above, a security clearance does not become “permanently revoked.” Even after the CAF issues a final denial to the Airman, the Airman may appeal the decision. If the appeal is denied, the commander may request reinstatement after one year. Accordingly, it is improper to create a basis for “permanent revocation.”

In many circumstances, if an Airman loses his or her security clearance, it will be because of misconduct or a medical condition which would support an independent basis for discharge. If it does not, SAF/GCM points out the commander could initiate discharge under the provisions for “national security.”

Although CAF is the ultimate decision maker on whether an Airman will receive a security clearance, and that decision cannot be reversed by a discharge board, the lack of a clearance which affects that Airman’s ability to complete the mission and contribute to the lethality of our military force can lead a discharge board to determine a basis for discharge exists under the “national security” provisions. The board still has the ability to make an independent decision as to whether the Airman *should* be discharged, and how to characterize the Airman’s service appropriately. Under DoDI 1332.30, a “final conviction for rape or sexual assault, forcible sodomy, or an attempt to commit one of those offenses” is a basis for discharge.¹³ Similarly, DoDI 1332.14 permits discharge of enlisted Airmen for “conviction by civilian authorities.” In both cases, the boards do not have the authority overturn a final conviction.¹⁴ However, the boards still have the authority and discretion to determine whether the officer *should* be discharged. Accordingly, the fact the boards cannot overturn CAF’s decision does not mean a basis for discharge does not exist or that the boards cannot carry out their statutory functions.

We continue to see officer discharge cases in which legal offices cite the incorrect basis for discharge. Accordingly, legal offices and commanders must take care to use the appropriate bases for discharge, i.e., AFI 36-3206, paragraph 3.6.12; or AFI 36-3208, paragraph 5.57. For instance, it would not be proper to use AFI 36-3206, paragraph 3.6.6,¹⁵ to discharge an officer for the final denial or revocation of a security clearance. A security clearance is not a professional status. That provision relates to professional officers, such as doctors and lawyers who lose their professional licensure.

¹³ DoDI 1332.30, paragraph 3.2.h.

¹⁴ DoDI 1332.14, Enclosure 3, paragraph 10.a(4).

¹⁵ AFI 36-3206, paragraph 3.6.6, provides a basis for discharge for “misconduct resulting in the loss of professional status necessary to performance of military duties.”

CONCLUSION

Based on the foregoing, it is our conclusion that an Airman can be discharge for the final denial or revocation of a security clearance by appropriate authorities acting pursuant to Department of Defense 5200.2-R, or when an Airman fails to apply for an initial or a reinvestigation for a clearance. Legal offices should first consider whether the Airman can be discharged for the reasons underlying the denial or revocation. If there is not a supportable basis under a separate discharge provision, legal offices should use the bases under AFI 36-3206, paragraph 3.6.12; or AFI 36-3208, paragraph 5.57.

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