

RESERVES

Officer Grade Determination -- Non Status Misconduct for Reservist

This opinion responds to a request from SAF/MRBP on whether they can consider the out of status misconduct of a reserve officer during an Officer Grade Determination (OGD) when the misconduct does not appear to violate civilian law. For reasons that follow, it is our opinion that it is permissible, in this case, to consider for purposes of an OGD out of status non-criminal misconduct because the officer's civilian misconduct had an adverse impact on the effectiveness of the military, undermined good order and discipline, and brought discredit to the armed service.

The respondent is a 55-year-old, non-probationary officer who is married. Between on or about 4 August 2012 and 23 August 2012, the respondent engaged in consensual group sexual intercourse and oral sex with two subordinate enlisted members under his command. The group sex episodes occurred in the respondent's on-base billeting room. Additionally, respondent engaged in sexual intercourse and oral sex with one of the female enlisted members on or about 13 August 2012, 17 September 2012, and 19 October 2012. On 19 November 2012, respondent was given an order to have no contact with these female enlisted members. From 2-7 November 2012, respondent repeatedly instructed one female enlisted member not to cooperate with the investigation. The respondent also violated the no-contact order on 20, 28, and 29 November 2012 via text message and by telephone.

On 6 April 2013, respondent received a Letter of Reprimand (LOR) for the above mentioned misconduct of unprofessional sexual relations with enlisted members, fraternization, adultery, attempting to hinder an investigation, and violating the no-contact order. Respondent acknowledged receipt of the LOR on 6 April 2013 and provided a written response on 3 May 2013. Respondent took full responsibility for his misconduct and acknowledged that he engaged in a serious lapse in judgment by "failing to resist the advances" of the female enlisted subordinates under his command.

Officers are retired in the highest grade satisfactorily held. The term, "satisfactorily held" is not susceptible to a precise definition because it is ultimately a subjective determination reserved to the Service Secretary (10 U.S.C. § 1370(d)). The Secretary also has the authority to make grade determinations on reserve commissioned officers applying for retired reserve. (See 10 U.S.C. § 12771 and OpJAGAF 1997/51)

10 USC 12771 (d) allows reserve officers who apply for retirement to be "...credited with satisfactory service in the highest grade in which that person served satisfactorily at any time in the armed forces, as determined by the Secretary concerned..." This federal statute does not impose any restriction prohibiting the secretary from considering out of service misconduct that does not result in a criminal prosecution.

Since there are no such restrictions in law or otherwise present in the statutorily-driven grade determination by the Secretary, we find it best to view and consider Air Force policy and case law concerning civilian misconduct for reserve officers being discharged.

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, Attachment 2 outlines general considerations about service characterizations for members who are being separated from the Air Force. Conduct in the civilian community may be considered even if it is not subject to UCMJ jurisdiction or state military code in characterizing service (para. A2.1.3). For example, conduct in the civilian community that has an adverse impact on the effectiveness of the Air Force, including military morale and efficiency (para. A2.2.2). Case law makes clear that a discharge for civilian misconduct cannot be characterized as less than honorable absent a showing that the misconduct in some fashion “had an adverse impact on the overall effectiveness of the military, including military morale and efficiency.”¹ We interpret “military morale and efficiency” to include, but not limited to, misconduct that undermines good order and discipline or brings discredit upon the armed service.

Additionally, AFI 36-3209 para. 5.14.6.4 specifically allows conduct that results in an LOR to be considered when finding a basis for an OGD, even when said misconduct did not result in criminal prosecution. (*See also* OpJAGAF 2004/20 which reiterated the fact that “Air Force policy mandates an OGD when a sufficient basis exists including but not limited to misconduct that did not result in criminal prosecution but rather resulted in administrative action.”) There we found no indication that the underlying misconduct had to have been committed while the person was in status to be considered.

The above mentioned opinions and references demonstrate that past practice has focused neither on whether a member was prosecuted nor on whether the conduct was a crime under civilian laws, but rather whether the misconduct is sufficient to characterize the member’s service in their current grade as unsatisfactory and therefore retire the member at a lower grade.

The resolution of discharge characterization and an officer’s retirement grade determination are made for different purposes and the outcome of each is independent of the other.² While similar standards should be applied to these two processes, there are circumstances where the standards and outcome may be different.³ Indeed, it is not uncommon for an officer to serve for some period of time after having been found to have engaged in misconduct as superiors elect not to initiate or pursue an involuntary separation procedure. Those same superiors, however, are not charged with determining the appropriate retirement grade at the time the officer retires. That decision belongs to the Secretary. Often, officers who are subjected to adverse disciplinary actions elect to retire soon after the disciplinary process is complete and they are not subjected to involuntary separation. Allowing them to retire without having initiated an involuntary

¹ *See* Roelofs v. SecAF, 628 F.2d 594 and Wood v. SecDef, 496 F.Supp. 192 which established the guidance for using “non-status” misconduct by a reservist for characterizing the member’s service.

² OpJAGAF 2003/56, this case involved whether an OGD was arbitrary and capricious because it failed to render a rational judgment in light of a Board of Inquiry (BOI) recommendation that the applicant be discharged with an honorable discharge. We found that it was not arbitrary or capricious because the decision as to whether the officer held the highest grade in a satisfactory manner is not contingent upon the type of characterization the officer may have received.

³ For instance, we believe that the “Secretary has the discretion to rely on any misconduct in grade, even after an incident-free period of time, as being so egregious and despicable as to characterize as unsatisfactory the entire period of service in that grade.” OpJAGAF 2009/13

separation proceeding does not prohibit the Secretary from considering the misconduct in determining the highest grade satisfactorily held.

We therefore conclude that it is permissible under the laws, AFIs, and past practice to consider for purposes of an OGD this out of status non-criminal misconduct because, in this case, the misconduct had an adverse impact on the overall effectiveness of the military, undermined good order and discipline, and brought discredit to the armed service. Specifically, the referenced misconduct degraded officer-enlisted relationships and dishonored the officer's corps when he encouraged non-cooperation with law enforcement authorities and violated a military no-contact order.

OpJAGAF 2014/13 16 Sep 14