

AIR FORCE RESERVE OFFICER TRAINING CORPS (AFROTC)

Nullification of Officer Commission

We have reviewed the determination by Air Force Reserve Officer Training Corps (AFROTC) that Respondent was erroneously commissioned which led AFROTC to nullify her commission and return her to cadet status. We believe the AFROTC determination in this case, which was based on AFROTC policy, was done without any lawful authority and, therefore, was not legally permissible or effective. Upon her acceptance of a tendered Secretary of Defense appointment by her completion of the oath of office on 8 July 2011, Respondent became a commissioned second lieutenant in the Reserve of the Air Force. At that time, Respondent was formally transferred to Headquarters, Air Reserve Personnel Center (HQ ARPC) and AFROTC lacked any legal authority to accomplish any administrative matter regarding Respondent, let alone any legal authority to nullify or revoke her commission. Accordingly, Respondent remains a second lieutenant, U.S. Air Force Reserve, assigned to HQ ARPC in an inactive reserve status.

Background

Prior to her commissioning, Respondent was a cadet at AFROTC Detachment X, in State X. She participated for five years in the AFROTC program while pursuing a degree in nursing, and Respondent received an AFROTC scholarship beginning in Fall Semester 2007. In order to accept the offered AFROTC scholarship, Respondent enlisted in the Air Force Reserve and became a contract cadet on 24 August 2007.

In anticipation of her expected graduation and completion of the AFROTC program, SAF/MR forwarded a recommendation to the Secretary of Defense proposing the original appointment of a list of officers and officer candidates as commissioned officers once they had satisfied all prerequisites to be able to accept the tender of such appointments. Along with other AFROTC commissioning candidates, Respondent was recommended for appointment as a second lieutenant in the Reserve of the Air Force. On 8 March 2011, the Secretary of Defense signed the scroll order enabling the Air Force to tender an appointment to Respondent as a second lieutenant in the Reserve of the Air Force upon her completion of all prerequisites to qualify for such appointment.

Respondent graduated from University with a Bachelor's Degree in Nursing on 22 May 2011. On 25 June 2011, she passed The National Council Licensure Examination for Registered Nurses (NCLEX-RN), which enabled her to obtain her permanent licenses as a registered nurse from State X. On 8 July 2011, Respondent completed an AF Form 24, *Application for Appointment as Reserve of the Air Force or USAF without Component*, in anticipation of her commissioning ceremony. As a result, the AFROTC detachment determined Respondent had completed all prerequisites to qualify to be tendered the Secretary of Defense-approved commission as a second lieutenant in the Reserve of the Air Force.

On 8 July 2011, Respondent was tendered the Secretary of Defense-approved commission. She executed the oath of office as a second lieutenant in the Reserve of the Air Force as a member of

the Nurse Corps. Respondent's father, a Navy Captain, administered the oath, and both signed an AF IMT 133, *Oath of Office (Military Personnel)*, following the ceremony. The appointing order, Reserve Order R-007, was published on 8 July 2011. This order memorialized the appointment of Respondent as a Reserve of the Air Force in the grade of second lieutenant, effective 8 July 2011, and assigned her to HQ ARPC. The order further honorably discharged her from USAFR status, enlisted grade E-2, effective the day preceding acceptance of commission. Respondent was issued a DD Form 1AF, *Certificate of Commission*, on 8 July 2011.

On 11 July 2011, Respondent contacted her Nurse Transition Program (NTP) coordinator and reported that she was pregnant. Respondent was scheduled to attend NTP in August, and she asserts she was concerned of the possibility the pregnancy would preclude her from completing the program. The coordinator contacted the Nursing Accessions Branch at the Air Force Personnel Center (AFPC), which in turn informed AFROTC that Respondent was pregnant.

Based on this new information, AFROTC and AFPC Medical Officer Accessions personnel determined Respondent's medical status would have made her ineligible for commissioning had she disclosed her pregnancy prior to accepting her commission. On 21 July 2011, Respondent was notified in writing by her detachment commander via an AFROTC Form 16, *Officer Candidate Counseling Record*, that AFROTC had determined her commissioning on 8 July 2011 was erroneous. The notification stated Respondent's commission was "without effect" and nullified. Accordingly, Respondent was returned to cadet status and notified she was being evaluated for placement on medical recheck status.

On 22 July 2011, AFROTC initiated a disenrollment investigation of Respondent based on her failure to disclose that she was pregnant. The investigation officer (IO) determined Respondent learned she was pregnant on 9 March 2011, with a due date of 11 November 2011. The IO determined Respondent received a pre-enlistment brief on 24 August 2007 where she initialed acknowledgment that she was required to report changes in medical status, to include pregnancy. She also signed AFROTC Form 16 forms each semester of the program, which included an acknowledgment that the cadet had been counseled to report any changes in medical status immediately. Respondent signed her Spring 2011 counseling form on 21 March 2011. Respondent made oral and written statements during the investigation that she was not aware of the requirement to report a pregnancy, and she indicated she did not realize she was breaking any rules. She stated she had been concerned about the viability of her pregnancy and procrastinated telling anyone that she was pregnant. She told the IO she was afraid of a negative impact to her life plan. She said she knew she would have to bring up her pregnancy eventually, but she did not know of a clear timeline for reporting. She stated she was worried Air Force guidance might result in direction to have an abortion.

On 8 August 2011, the AFROTC Registrar directed Respondent's disenrollment from AFROTC for "failure to maintain military retention standards (fraudulent commission)." Respondent was disenrolled from AFROTC on 13 September 2011, and Reserve Order CC-67, 8 October 2011, relieved Respondent from her assignment as an E-2, HQ ARPC (AFROTC), effective 13 September 2011.

Law/Regulation/Policy

Appointment Authority for Commissioned Officers: Section 3 of Article II of the United States Constitution provides that the President “shall Commission all the Officers of the United States.” Under Section 2 of Article II, “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”

In 10 U.S.C. § 12203(a), Congress vested authority in the President alone to make all original appointments of Reserve officers in commissioned grades of lieutenant colonel and commander or below. By Executive Order 13358 (28 September 2004), the President delegated his authority to make these Reserve appointments to the Secretary of Defense. The President directed that this appointment authority could not be further redelegated.

Paragraph 6.1.3 of DoD Instruction 1310.02, *Appointing Commissioned Officers*, restates that all appointments of military officers provided for under Presidential delegation shall be made by the Secretary of Defense, noting that no redelegation of this authority is authorized. Under paragraph 4.2, “[e]ach Military Service will use an effective and impartial system to identify and select for appointment as commissioned officers the best-qualified persons available who possess the skills necessary to meet the needs of the Military Service concerned.” The Secretaries of the Military Departments must further “[p]rovide for the appointment of officers in accordance with this Instruction” (paragraph 5.2.2) and “[d]etermine the means by which persons are considered and selected for appointment” (paragraph 5.2.3).

Selection of Individuals for Appointment: To be eligible for appointment as a Reserve officer, Congress established qualification criteria in 10 U.S.C. § 12201. Among these criteria are citizenship, age, moral character, physical qualification, and other special qualifications as determined by the Secretaries of the Military Departments. The statutes provide that some qualification criteria are subject to regulation by the Secretaries of the Military Departments.

According to DoD Instruction 1215.08, *Senior Reserve Officers’ Training Corps (ROTC) Programs*, paragraph E3.4, ROTC graduates may be appointed as commissioned officers in the appropriate Military Service upon successful completion of the required course of instruction. According to Air Force Instruction (AFI) 36-2011, *Air Force Reserve Officer Training Corps (AFROTC) Program*, the Commander, AFROTC (AFROTC/CC) is responsible for developing and implementing policies and procedures to execute the ROTC program in accordance with DoD and Air Force policy. Paragraph 7.1, further provides that the Secretary of the Air Force, upon recommendation from AFROTC/CC, recommends to the Secretary of Defense those AFROTC cadets who successfully complete the military and academic requirements of the AFROTC program for appointment as second lieutenants.

Once the Secretary of Defense approves nominated appointees for commission, DoDI 1310.02, paragraph 6.4, requires that those persons selected shall be notified as soon as practicable, and the appointment should be made expeditiously under procedures prescribed by the Secretary of the Military Department concerned. To ensure AFROTC cadets selected for appointment meets commissioning prerequisites, AFROTC Instruction 36-2011, *Cadet Operations*, directs

AFROTC detachments to review cadet qualifications in the weeks prior to commissioning. All cadets must complete an application for appointment (paragraph 12.5), and detachments must ensure cadets meet medical, security clearance, character, and fitness requirements (paragraph 12.6) prior to commissioning. In addition, cadets must complete the entire AFROTC program and all degree requirements for graduation. Nurse candidates must also pass the NCLEX-RN prior to commissioning. On the day of commissioning, AFROTC cadets who meet all commissioning prerequisites are recertified on restrictions on personal conduct in the Armed Forces, involvement with civil, military, or school authorities/law enforcement officials, dependent care responsibilities, and drug and alcohol abuse (paragraph 12.9.1).

Effecting an Officer Commission: A commission becomes effective at the point in time that a Secretary of Defense-approved tender of a commission (i.e., an offered appointment) is accepted.¹ In *Marbury*, the Supreme Court found three separate actions were required to complete a commissioning appointment that was subject to Senate confirmation: (1) the President's nomination, (2) confirmation by the Senate, and (3) the President's appointment. Where an appointment must be evidenced by a public act, the performance of that act creates the officer.² Once an officer is created, he is no longer removable at the will of the Executive. At the point in time where the constitutional power of appointing a commissioned officer has been fully exercised (at the moment it is accepted), the authority of the Executive over the officer's appointment ends, unless the law provides a means by which the Executive may also remove the officer.³ More recent military promotion cases have applied *Marbury* to find that all required actions for an appointment must be complete for the promotion (i.e., appointment to the higher grade) to become effective.⁴

To become a Reserve commissioned officer, DoDI 1310.02, paragraph 6.2.2.1, provides that a person must be appointed in a grade authorized and subscribe to the oath of office prescribed in 5 U.S.C. § 3331. According to paragraph 3.9.2 of AFI 36-2005, *Appointment in Commissioned Grades and Designation and Assignment in Professional Categories – Reserve of the Air Force and United States Air Force*, “[e]xecuting and returning the oath of office constitutes a formal acceptance of appointment.”⁵ Once the oath of office is administered, the individual commissioning and the officer administering the oath sign the AF Form 133. The date the AF Form 133 is signed is the effective date of appointment (AFROTCI 36-2011, paragraph 12.9.2). A memorandum of appointment, DD Form 1AF, memorandum of instruction, Reserve appointment order, health insurance statement are prepared following administration of the oath of office, and the AF Form 24 Commissioning Package is prepared and forwarded to AFPC/DPSIPV within five workdays after the appointment.

¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155-56 (1803).

² *Id.* At 157.

³ *Id.* At 162.

⁴ See, e.g., *Dysart v. United States*, 369 F.3d 1303, 1312-13 (Fed.Cir. 2004); *Schwalier v. Panetta, et al.*, 839 F.Supp.2d 75, 85 (D.C.Cir 2012).

⁵ AFI 36-2005 provides guidance for direct appointment of persons as commissioned officers in the professional categories, but the finality described in this instruction regarding completion of an officer's commission based on execution of the oath of office is also instructive for other categories of appointments.

Removal of Appointees and AFROTC Procedures to Resolve Commissioning Discrepancies: Following the standard established in *Marbury* for determining when a commission is complete, the United States Court of Claims has held that an officer's name may be removed from a promotion list "at any time before the appointment is consummated,"⁶ and the power to "recommend a promotion . . . implies a power to withdraw the recommendation at any time before it is acted upon."⁷ However, once a commission has been finalized through completion of all "conditions precedent to the complete investiture of the office . . . all that the Executive can do to invest the person with his office has been completed."⁸

Once a commission is complete, distinct statutory authority and regulatory guidance governs removal of a commissioned officer from office. Under the authority of 10 U.S.C. § 14503, the Secretaries of the Military Departments may discharge Reserve officers with less than six years active commissioned service. DoD Instruction 1332.3, *Separation of Regular and Reserve Commissioned Officers*, provides reasons for separating officers on the Active Duty List and Reserve Active Status List. One reason, described in Enclosure 2, paragraph 2.f, states that commissioned officers may be separated for "[i]ntentional misrepresentation of facts in obtaining an appointment or in official statements or records." This basis for discharge is restated in AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, paragraph 3.6.7, and AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, paragraph 2.29.5.

AFROTC has established its own procedures for resolving errors, fraud, and administrative discrepancies discovered once commissioning occurs in AFROTCI 36-2011, paragraphs 12.12 and 12.13. According to the instruction, HQ AFROTC/RRFP is the office of primary responsibility for resolving commissioning discrepancies for AFROTC. Erroneous commissions are those "the Air Force should not have accepted but do not involve fraud. Errors occur in the commissioning process when the Air Force does not have the true facts or does not take the correct actions." The AFROTC instruction provides that erroneous commissions require immediate HQ AFROTC/RRFP notification and approval. Fraudulent commissions involve "deliberate material misrepresentation, omission, or concealment that, if known at any time in the commissioning process, might have resulted in rejection." Under paragraph 12.13.2.2, fraudulent commissions discovered prior to entry to active duty "will normally result in the commissions being voided. Process all request through HQ AFROTC/RRFP for approval." According to paragraph 12.13.2.3, administrative errors in the commissioning process on the part of the Air Force can be corrected by the detachment. Paragraph 12.14 notes that commissionees awaiting their order to active duty are in an inactive reserve status and belong to HQ ARPC following commissioning but prior to reporting for active duty.

⁶ *D'Arco v. United States*, 441 F.2d 1173, 1175 (Ct.Cl. 1971).

⁷ *Doggett v. United States*, 207 Ct.Cl. 478, 482 (1975).

⁸ *United States v. Le Baron*, 60 U.S. 73, 78 (1856).

Discussion

According to this legal and policy framework, we now consider whether AFROTC had authority to nullify Respondent's commission once she accepted a tendered Secretary of Defense appointment. To determine if AFROTC's action was permissible, we first assess the status of Respondent's commission at the time it was revoked. Second, we consider what authority AFROTC had over Respondent once she executed her oath of office and received orders assigning her to HQ ARPC. Third, we consider whether AFROTC or any other official had legal authority to nullify a commission once it was tendered and accepted by the cadet.

Respondent's Status When Her Commission Was Revoked: If Senate confirmation is not required, two actions are necessary to appoint a commissioned officer—(1) appointment by the Secretary of Defense to an authorized grade, and (2) tender and acceptance of the appointment. For individuals tendered a commission in the uniformed services, acceptance of the tendered commission is signified by execution of the oath of office,⁹ because 5 U.S.C. § 3331 requires all individuals appointed to an office of the uniformed service to complete an oath. As noted in AFI 36-2005, the execution and return of this oath of office constitutes formal acceptance of an appointment.

It is worth noting that efficient implementation of the appointment process requires some modification from a strictly linear "offer-acceptance" model. When the Secretary of Defense selected Respondent to be appointed a second lieutenant in the Reserve of the Air Force on 8 March 2011, she did not yet meet all of the statutory and Service qualifications criteria that are prerequisites for appointment as a commissioned officer. She had not yet completed her degree or the AFROTC program. She had not yet taken her professional licensing examination, which was a prerequisite for appointment to the Air Force Nurse Corps. She had not received final physical clearance or completed her application for appointment. In sum, as noted in SAF/MR's appointment recommendation memorandum to the Secretary of Defense, additional requirements remained to be completed by both the appointee and the Air Force prior to tender of the commission.

To ensure individuals appointed for commission are properly qualified to serve, AFROTC guidance details the steps taken by the agency on behalf of the Secretary of Defense prior to tendering any approved commission. These requirements are solely the responsibility of the Air Force, not the cadet. AFROTC followed its own guidance in this case to ensure Respondent was properly qualified for service as a commissioned officer.¹⁰ After AFROTC received notice of her approval for tender of commission, Respondent's detachment required her to complete an appointment application, verifying her qualifications to ensure she was properly suited for commissioning. Had any issues arisen during this period, case law and regulation indicate that AFROTC could have acted on behalf of the Secretary of Defense and simply delayed the actual

⁹ See DoD/GC Memorandum, 24 March 2005, *Air Force Board for the Correction of Military Records (AFBCMR) Decision – Brig Gen Terrl J. Schwalier, United States Air Force (Ret.)*.

¹⁰ It is unclear whether AFROTC actually accomplished the required pre-commissioning physical of Respondent, which would have disclosed her ineligibility for commissioning if accomplished after she became pregnant.

tendering of the Secretary of Defense-approved commission until she met all prerequisites.¹¹ Finding no evidence to the contrary, however, AFROTC tendered the Secretary of Defense-approved commission on 8 July 2011.

Respondent executed the oath of office on that same day, which signified her acceptance of the appointment. Upon completion of the oath, Respondent became a commissioned second lieutenant in the Reserve of the Air Force. Respondent and her father, who administered the oath, memorialized her acceptance of the appointment by signing the AF Form 133. AFROTC then issued Reserve orders to Respondent, honorably discharging her from Reserve enlisted status and assigning her to HQ ARPC, effective 8 July 2011.

Marbury and its case progeny make clear that the constitutional power of appointment has been fully exercised once the last act that is required has been performed. In this case, the Executive determination was made and the public act of acceptance was performed. As such, Respondent became a commissioned officer, appointed in the grade of second lieutenant in the Reserve of the Air Force, signified by her taking the oath and accepting her commission. Accordingly, the “power of the executive over [the] officer,”¹² at least in terms of the power of appointment, had ceased.

AFROTC’s Authority over Respondent after Commissioning: Until she executed the oath of office and became a commissioned officer, Respondent was an AFROTC cadet subject to the authority and administrative control of AFROTC. Once she completed her commission, however, AFROTC no longer retained authority over Respondent. AFROTC memorialized this transition on the day Respondent was commissioned by publishing Reserve Order R-007, which appointed Respondent a Reserve of the Air Force in the grade of second lieutenant, assigned her to HQ ARPC, effective 8 July 2011, and honorably discharged her from enlisted USAFR status, effective the day preceding acceptance of her commission.

The memorandum of instruction issued to Respondent by her AFROTC detachment on the day she commissioned notified her of her transfer to administrative control of HQ ARPC. The letter instructed Respondent that she was assigned to HQ ARPC and explained that her records were maintained by Headquarters, Air Force Personnel Center. The letter noted that Respondent’s affiliation with the AFROTC detachment had “technically ended,” although the letter requested Respondent to ensure AFROTC had accurate contact information for her in the event any issues arose prior to her entry to active duty.

Since Respondent was no longer assigned to AFROTC after she was commissioned, AFROTC officials and detachment staff no longer had authority over her for any purpose. As such, to the

¹¹ Under DoDI 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, Enclosure 4, paragraph 14.k, and AFI 48-123, *Medical Examinations and Standards*, paragraph 4.1, Respondent may have become fully qualified for a commission six months after completion of her pregnancy. Additionally, DoDI 6130.03, Enclosure 2, paragraph 3.b, provides that the Secretaries of the Military Departments shall “authorize the waiver of standards in individual cases for applicable reasons and ensure uniform waiver determinations.”

¹² *Dysart*, 369 F.3d at 1311.

extent that AFROTCI 36-2011 purports to authorize AFROTC officials to void a commission obtained by fraud, that authority is *ultra vires*, or beyond the power of AFROTC. Accordingly, any administrative actions AFROTC believed appropriate following Respondent's reassignment to HQ ARPC could only be accomplished by HQ ARPC, her new organization of assignment and chain of command.

Authority to Nullify a Completed Commission: Respondent accepted her appointment and became a commissioned officer, but it is clear that her medical status, if then known, would have precluded her eligibility for appointment. 10 U.S.C. § 12201 requires that appointees for Reserve officer commissions must be physically qualified, and DoD Instruction 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, Enclosure 4, paragraph 14.k, provides that current pregnancy is a disqualifying condition through six months after completion of the pregnancy. Since physical qualification is a prerequisite to commissioning, AFROTC determined that Respondent's physical condition invalidated her acceptance of the appointment. Accordingly, AFROTC determined Respondent's commission was a nullity.

The law recognizes the principle that an action, document, or transaction can be declared "void *ab initio*," meaning it is deemed an absolute nullity and treated as if it never existed or happened. Where a transaction contains a vitiating element that is fundamentally material to the transaction, the law permits declaration that the transaction is void *ab initio*, and the parties are returned to their respective pre-transaction positions.

Although the concept of void *ab initio* is well founded in law, application of the principle does not occur automatically. For a transaction or action to be deemed void *ab initio*, an appropriate authority must find that a prerequisite condition to the action does not exist. In most cases, this finding is made as part of judicial review, where a court of law assesses the prerequisites, finds a necessary prerequisite does not exist, and then declares the resulting action as a nullity due to the missing element. In *Knauer v. United States*¹³, the Supreme Court upheld a district court's order cancelling a man's certificate of naturalization on the grounds that it had been procured by fraud. The district court found Mr. Knauer violated the Nationality Act of 1940 by falsely taking an oath of allegiance renouncing his allegiance to the Third Reich. On review, the Supreme Court determined the court had proper authority to declare Mr. Knauer's certificate of a legal nullity, because the Act included a provision that permitted the court to cancel certificates that were procured by fraud.¹⁴

Knauer illustrates the principle of void *ab initio*, but it also demonstrates fundamental limits for applying the concept. To declare a transaction as a nullity, an agent vested with authority over the transaction must act according to specific authority to find the transaction is not valid. In this case, AFROTC had only ministerial authority to tender Respondent's commission on behalf of the Secretary of Defense. Because the Secretary of Defense was the only person with legal authority over the commission, no Air Force official, including AFROTC personnel, had authority to invalidate that commission directly by declaring it void *ab initio*.

¹³ 328 U.S. 654 (1946).

¹⁴ *Id.* At 671-73.

Further, it is not clear that even the Secretary of Defense would have had authority to unilaterally nullify Respondent's commission on grounds that she failed to disclose a change in her physical condition. The authority to declare a transaction void *ab initio* is an equitable power invoked cautiously, and rarely, by courts. Nothing provides that the Executive has similar equitable authority to independently revoke an officer's commission.¹⁵ Moreover, in judicial cases where courts have considered whether to exercise their equitable power, the strong preference has been to treat judgments as final once complete. Courts have overturned judgments on equitable grounds for fraud only after judicial review determined enforcement of judgment would be "manifestly unconscionable."¹⁶

To the contrary, as noted in *Marbury*, the appointment power of the Executive ends once the commission is executed, unless separate legal authority provides grounds for the Executive to take action on the completed appointment. In the case of officer commissions, no law provides specific authority for the Secretary of Defense to revoke or nullify a completed commission. Congress did, however, provide specific authority by which officer commissions may be terminated. Under 10 U.S.C. § 14503, the Secretaries of the Military Departments may separate junior Reserve officers. Based on this authority, the DoD and Air Force have implemented regulations that include procedures for separating commissioned officers who have procured a commission by fraud.¹⁷

While Respondent likely would not have been tendered a commission had her pregnancy been known, it does not follow that AFROTC had authority to nullify the commission. No statute authorized Respondent's commission to be declared void upon learning of a deficiency in a subjective requirement for the commission, and AFROTC does not have authority to independently declare on behalf of the Secretary of Defense, according to principles of equity, that her commission was nullified. Once Respondent accepted her commission and executed the oath of office, AFROTC had no legal authority to nullify the commission. As such, termination

¹⁵ Courts have looked to contract principles to find that enlistment contracts may be voided when they are based on misrepresentation. *See, e.g., In re Grimley*, 137 U.S. 147, 150-51 (1890); *U.S. v. Russo*, 1 M.J. 134, 136 (C.M.A. 1975). Officer commissions, however, which are constitutional appointments to office rather than contractual agreements between parties, differ fundamentally from enlistment contracts.

¹⁶ *See Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 244 (1944)(quoting *Pickford v. Talbott*, 225 U.S., 651, 657 (1912)).

¹⁷ DoDI 1332.30, *Separation of Regular and Reserve Commissioned Officers*, Enclosure 2, paragraph 2, provides that "[a] commissioned officer may be separated from the military service, under regulations prescribed by the Secretary of the Military Department concerned, when he or she is found to have committed an act or acts of misconduct or moral or professional dereliction." Paragraph 2.f states that "[i]ntentional misrepresentation of facts in obtaining an appointment" is such an act. Implementing instructions for the Air Force are found in AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, paragraph 3.6.7 ("[i]ntentionally misrepresenting or omitting facts in official statements, records, or commissioning documents" (emphasis added)), and AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, paragraph 2.29.5.

of her commission, if warranted, should have been accomplished through the administrative separation process provided by statute and regulation.

Conclusion

The AFROTC determination that Respondent's commission was null and void was without any lawful authority and it is, therefore, of no legal effect. As a result, Respondent's commission as a second lieutenant in the Reserve of the Air Force has not been terminated, and it remains in effect until such time as it is terminated by proper authority. Respondent was assigned to HQ ARPC on 8 July 2011 and has not been subsequently transferred from that assignment, so any administrative actions pertaining to her are within the authority of HQ ARPC or a superior command. If there are grounds to consider whether a Show Cause for retention action should be initiated to separate Respondent, the ARPC commander has that authority. Neither AFROTC nor any other Air Force official had legal authority to nullify Respondent's commission once it was tendered and accepted, and termination of a commission that is obtained by fraud must be accomplished by separation action through the Secretary of the Air Force. Accordingly, Respondent's records should be corrected to show that she was commissioned as a second lieutenant in the Reserve of the Air Force on 8 July 2011 and transferred to HQ ARPC in the Inactive Reserve.

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