

## FUNDED LEGAL EDUCATION PROGRAM

### Summary of Funded Legal Education Program Authority

You asked whether the Air Force could create a program to send a graduate of the U.S. Air Force Academy (USAFA) directly to law school under the Funded Legal Education Program (FLEP). We conclude most new USAFA graduates could not enter participate in such a program because cadet service does not count toward the two years of active duty service required before an officer may be detailed to FLEP.

Because you also asked about other options to send USAFA graduates to law school, we will take this opportunity to summarize and update our prior opinions on FLEP, including OpJAGAF 2009/19, *Steps Required to Implement Legal Education Program (LEP)*; OpJAGAF 2007/48, *The Commissioned Officer Legal Education Program (COLEP)*; OpJAGAF 2001/23, *Proposed USAFA Scholarship Program*; OpJAGAF 2000/22, *Funded Legal Education Program Age Requirement*; OpJAGAF 1987/63, *Funded Legal Education Program (FLEP) Eligibility*; OpJAGAF 1983/70, *Acceptance of Academic Award Money by AFIT Students*, and OpJAGAF 1976/58, *Legal Training–Bootstrap*.

As you recognize, the FLEP statute—10 U.S.C. § 2004—is the exclusive authority for the Air Force to detail officers to U.S. law schools as students pursuing the degree of bachelor of laws or juris doctor (J.D.). See OpJAGAF 2001/23 (specific authority in 10 U.S.C. § 2004 precludes use of the more general authority to detail students under 10 U.S.C. § 9301); OpJAGAF 2007/48.

The first issue, then, is whether cadet service counts toward the 10 U.S.C. § 2004(b)(1) requirement that, “[t]o be eligible for detail . . . an officer must . . . have served on active duty for a period of not less than two years nor more than six years.” While cadets may be treated as active duty for some purposes, 10 U.S.C. § 971(b) specifically prohibits counting USAFA cadet service toward fulfillment of statutory length-of-service requirements for an officer: “In computing length of service for any purpose, service as a cadet . . . may not be credited to . . . [a] commissioned officer of the . . . Air Force.” This conclusion is consistent with our past application of the statute in OpJAGAF 1990/42, *Military Service Status of a Foreign National AFA Cadet* (cadet service did not count as active duty for naturalization under 8 U.S.C. § 1440) and OpJAGAF 2002/51, *Interpretation of Department of Defense Instruction (DoDI) 1332.38* (cadet service did not count for purposes of computing the 180-day pre-existing medical condition presumption); see *Horner v. Jeffrey*, 823 F.2d 1521 (Fed.Cir.1987)(en banc)(cadet service not creditable for civil service or military service retirement). Thus, new USAFA graduates would not meet the FLEP active duty service requirement unless they had served on active duty prior to entering the Academy.

At the other end of the period of availability, counting cadet service toward the minimum two years of service would also mean having to count cadet service toward the six year upper limit—thereby making USAFA graduates eligible for FLEP only within two years of graduation. This would be inconsistent with past Air Force application of the statute to allow USAFA graduates to participate in FLEP up to six years after they were commissioned.

As currently implemented, FLEP provides for officers to attend law school in pursuit of a J.D. while receiving full pay and allowances and with the Government paying mandatory tuition and fees. DoDD 1322.12, *Funded Legal Education* (2004). As discussed above, the restrictions of 10 U.S.C. § 2004 apply to any such arrangement. Some other Air Force law school programs for officers, however, are not covered by the FLEP statute. Graduate law programs are not covered because attendance is not “training leading to the degree of bachelor of laws or juris doctor.”

Under the Excess Leave Program (ELP), officers attend law school in a non-pay status and are individually responsible for costs of the education. 37 U.S.C. § 502(b); AFI 51-101, *Judge Advocate Accession Programs* Ch. 3 (2000). Without the Air Force providing either pay or tuition, officers participating in ELP are not considered to be detailed as students within the scope of the FLEP statute and are thus not subject to the statute’s restrictions. Nor is ELP an educational leave of absence covered by 10 U.S.C. § 708, because participants do not receive even basic pay, as that statute would require.

The Air Force could allow new USAFA graduates to attend law school under ELP. AFI 51-101, *Judge Advocate Accession Program* ¶ 3.3.3 (2000) requires ELP applicants to have served on active duty for not less than two years as of the first day of classes. However, that restriction is not required by law or by DoD publication and could thus be waived by AF/JAX or AF/JA.

While in an excess leave status, participants may be permitted to accept scholarships pursuant to JER 202(b). The requirements of 10 U.S.C. § 2603, as implemented by DoDI 1322.06, *Fellowships, Scholarships, Training With Industry (TWI), and Grants for DoD Personnel* (2007) and AFI 36-2302, *Professional Development (Advanced Academic Degrees and Professional Continuing Education)* (2001), have not been applied to scholarship offers during a period of excess leave, when the scholarship did not serve as the original basis for an officer’s request “to undertake the education or training contemplated by that fellowship, scholarship, or grant” under that statute. Consequently, a scholarship accepted by an ELP participant need not include an agreement to serve on active duty for a period at least three times the length of the period of the education or training, as 10 U.S.C. § 2603 would require if it applied.

Another conceivable full-time arrangement between the extremes of ELP and the current FLEP is pursuit of a J.D. while receiving pay and allowances, but with the member or an outside entity paying tuition and fees. While we recognize a potential argument to the contrary, we conclude that such an arrangement would remain subject to 10 U.S.C. § 2004.

According to the statute’s own terms, 10 U.S.C. § 2004 applies to any officer whom the Air Force *details* as a law student pursuing a J.D. The Merriam-Webster definition of “detail” is “to assign to a particular task.” In the military context, JP 1-02, *DoD Dictionary of Military and Associated Terms* (2010) uses “detail” this way in its definition of “assign,” which is consistent with the various Title 10, U.S.C., sections addressing detail of military personnel to particular duties or to other agencies. *E.g.*, §§ 375, 712, 713, 825. Applying this ordinary meaning of the term, if Air Force personnel are assigned to attend law school pursuing a J.D. degree in a pay status, they have been detailed as students. In contrast, ELP participants are not detailed or assigned, but are only permitted to attend law school in an unpaid leave status.

The legislative history of 10 U.S.C. § 2004 also indicates Congress intended it to apply broadly to any detail of commissioned officers to pursue a J.D. with DoD providing either military pay or tuition. Prior to the statute's enactment in 1973, every appropriation act since fiscal year 1954 included a prohibition on full-time paid legal training (off-duty assistance was permitted) for military personnel; the appropriation committee dropped that prohibition only because of the statute's enactment. H.R. Rep. No. 662, 93d Cong., 1st Sess., 224-25 (1973). The typical statutory language was, "None of the funds provided in this Act shall be available for training in any legal profession nor for the payment of tuition for training in such profession." DoD Appropriation Act, 1972, Pub. L. No 92-204, § 718, 85 Stat. 716, 730 (1971). OpJAGAF 1976/58 reports this history and purpose of the FLEP statute to limit full-time legal training due to enumerated abuses in the 1950s and notes the caution that if FLEP safeguards are not applied or new abuses are reported, Congress will reinstate the prior absolute prohibition of military personnel attending law school at government expense.

OpJAGAF 2001/23 considered whether 10 U.S.C. § 2603 could serve as an alternative to the FLEP statute if law school tuition and fees were paid through a scholarship or grant. That statute provides, in part, "Notwithstanding any other provision of law, a fellowship, scholarship, or grant may . . . be made by a . . . fund . . . operated primarily for scientific, literary, or educational purposes to any member of the Armed Forces, and the benefits thereof may be accepted . . . for development of his recognized potential for future career service." The statute places certain limits on benefits and requires a service commitment. The OpJAGAF distinguished FLEP as "legal education funded by the [G]overnment" versus 10 U.S.C. § 2603 as "privately funded tuition." We now question that distinction. Our preceding discussion of the legislative history of the FLEP statute and its application to any detail of officers to pursue a J.D. indicate that the FLEP statute should be applied to any officer pursuing a J.D. in a pay status. Furthermore, the proposed distinction fails to recognize that military pay costs of FLEP participation certainly exceed the cost of tuition and fees.

The remaining point of OpJAGAF 2001/23 and 10 U.S.C. § 2603 is the statute's use of the phrase "notwithstanding any other provision of law." Having more carefully considered the history of the FLEP statute, we are now reluctant to read the phrase more broadly than the language and purpose of 10 U.S.C. § 2603 require. As the prior OpJAGAF recognized, the statute is intended to create a path to accepting private benefits in addition to a member's pay and allowances. The specific phrase is placed in the sentence addressing the making and acceptance of the fellowship, scholarship, or grant—not in the later sentence addressing the effect on Government expenditures and not in subsection (b), addressing the active duty service commitment (three times the period of education or training) that is a condition of acceptance. The phrase can be given a logical meaning by applying it to any other provisions of law which would prohibit payments to military members in addition to their pay and allowances or which would otherwise be covered by appropriated funds. There is no indication that the phrase was intended to affect other military personnel laws, for example by superseding mandatory separation dates which might occur during a period of training or the associated period of active duty service commitment covered by 10 U.S.C. § 2603. Likewise, the phrase in this 1962 statute need not be read to alter the 1973 FLEP statute's limits on which officers may be detailed to law school to pursue a J.D. Instead, the statutes may be read and applied consistently, so that an

officer eligible under 10 U.S.C. § 2004 could be detailed as a law student in a pay status and could accept a scholarship under 10 U.S.C. § 2603, incurring that statute's longer service commitment. Accordingly, we now conclude that a scholarship payment pursuant to 10 U.S.C. § 2603 does not remove the personnel limits in 10 U.S.C. § 2004.

In OpJAGAF 2007/48, we considered whether FLEP participants could be required to pay for their own law school tuition and fees. The obvious potential barrier to such a condition is the 10 U.S.C. § 2004(d) provision that "Expenses incident to the detail of officers under this section shall be paid from any funds appropriated for the military department concerned." "Shall" is generally read as mandatory language. However, DoD has applied the FLEP statute and similar statutes so as to limit exactly which expenses must be paid as incident to detail of officers as students. In DoDD 1322.2, *Funded Legal Education* ¶ E1.2.1 (2004) DoD specifically limits Service payments for books to \$150 annually. More generally, DoDI 1322.10, *Policy on Graduate Education for Military Officers* ¶ 5.2.7, E2.4 (2008) includes a category of partially funded full-time graduate education, under which an officer "receives full pay and allowances with the majority of tuition and other schooling costs paid by the officer from personal funds and/or benefits." This regulatory provision exists despite provisions in 10 U.S.C. § 9301(g) and 10 U.S.C. § 4301(g) basically identical to that in 10 U.S.C. § 2004(d) and applicable Air Force and Army members detailed as students at civilian educational institutions. Both the DoDD and DoDI provisions thus open the possibility that "shall be paid" serves to direct which military department's funds will be used, rather than directing that all law school expenses be covered by Government funds. In any case, as we noted in OpJAGAF 2009/19, an explicit requirement that FLEP attendees pay their own tuition and fees would require DoD approval to deviate from the DoDD 1322.12 ¶ E1.2.1 requirement that the military departments shall pay mandatory tuition and fees. This DoDD provision is particularly important as 10 U.S.C. § 2004(c) requires an implementing DoD regulation.

As discussed above, FLEP participants may accept grants and scholarships under 10 U.S.C. § 2603, DoDI 1322.06, and AFI 36-2302. This is the likely chain of authority for the other USAFA privately-funded (non-legal) graduate studies programs you noted. Additionally, in OpJAGAF 1983/70, we concluded that a scholarship could effectively reduce the tuition which would be billed to the Government as an expense incident to the FLEP participant's detail to the school.

The final possible combination of military pay and school costs for an officer pursuing a J.D. would be for the Air Force to pay school costs for an ELP participant in a non-pay status under 37 U.S.C. § 502. The potential tuition funding authorities—10 U.S.C. § 2004 and 10 U.S.C. § 9301—however, apply only to members detailed as students. We do not believe the Air Force could contend both that a member was on excess leave for the purpose of terminating entitlement to military pay entitlement and that the member was detailed as a student for the purpose of justifying payment of his tuition expense. Accordingly, we do not find a legal basis for this combination.

To review our remaining OpJAGAFs addressing FLEP: An officer must meet the minimum of two and maximum of six years of service on active duty as of the beginning of the law school training to which the officer has been detailed under FLEP. 10 U.S.C. § 2004(b)(1); OpJAGAF

2000/22; OpJAGAF 1987/63. Since OpJAGAF 2000/22 discussed the maximum age limit for FLEP, 10 U.S.C. § 532 has been amended to allow appointment of a person able to complete 20 years of active commissioned service before age 62. But some relevant Air Force regulations retain the prior age limit of 55.

Apart from full-time law school attendance, members may receive GI Bill or Post 9/11 GI Bill payments to attend law school during off-duty time. Title 38, U.S.C., Ch. 30, 33. Were it not for the Air Force limit on post-master's programs, members could also receive tuition assistance for law school. 10 U.S.C. § 2007; DoDI 1322.25, *Voluntary Education Programs* (1997); AFI 36-2306, *Voluntary Education Program* ¶ 5.5.14 (2010).

In sum, we find 10 U.S.C. §2004 applicable to officers detailed to law school to pursue J.D. degrees, regardless of any non-Federal payment of tuition and fees. Few recent USAFA graduates will meet the statute's two year minimum term of active duty service requirement.

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