

OpJAGAF 2018-16, 1 August 2018, Recoupment following Resignation under Miscellaneous Reasons

TOPIC

Recoupment of advanced education assistance after Applicant's tendering of resignation fails to meet criteria of resignation for hardship.

TEXT OF THE DECISION

This opinion is in response to an inquiry regarding recoupment if Applicant who has filed a tender of resignation fails to meet the criteria of resignation for hardship. For the reasons set forth below, we conclude it is legally permissible to support Applicant's tender of resignation under paragraph 2.46.1.7, Miscellaneous Reasons, subject to recoupment.

BACKGROUND

Applicant is a participant in the Physician Deferment Program attending from 1 July 2014 to 30 June 2018. Applicant was formerly a member of the Health Professions Scholarship Program (HPSP) from 2011 to 2014. A total of \$157,865.69 in tuition, fees, reimbursable funds, stipend, and Reserve appropriation expenses has been expended on his behalf.

On 20 February 2018, Applicant submitted his tender of resignation for hardship. He married his wife, who had children from a prior relationship, in 2016. Shortly thereafter, his wife's ex-partner took them to family court for custody of their children. The judge awarded both biological parents joint custody. Accordingly, the children split time during the week (and year) at each biological parent's home. Applicant and his wife also have one child together. If Applicant stays in the Air Force, he would likely have to live without his family throughout the duration of his time on active duty.¹ This would create a financial burden to maintain two separate households during this time, as his wife is the primary caregiver for their child, and she does not work outside the home. The career field supports his tender of resignation and recommends approval and recoupment.

GUIDANCE

AFI 36-3209, Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members, 14 April 2005 (incorporating through interim change 3, 20 September 2011)

DISCUSSION

The right of an officer to resign is subject to certain restrictions. AFI 36-3209, paragraph 2.40. The Secretary of the Air Force, through the Air Force Personnel Council, determines whether the resignation is acceptable. If his tender is accepted, he will receive an honorable service characterization. Separation under paragraph 2.46.1.1 is appropriate when there is: (1) a genuine dependency or undue hardship; (2) the dependency or hardship is not temporary; (3) conditions

¹ The record does not indicate whether Applicant has received orders to a follow-on assignment.

have arisen or have been aggravated to an excessive degree since military service began; (4) the member has made every reasonable effort to remedy the situation; and (5) separation or discharge will eliminate or materially alleviate the condition and there are no other means of alleviation reasonably available. In this case, Applicant does not meet all these criteria.

Applicant entered the Physician Deferment Program in 2014 and was married in 2016. His wife was sued in state court for custody of her children from a previous relationship, and the judge ordered joint custody. Accordingly, she cannot move from the state with her children without a court order. He and his wife challenged the custody proceedings, but must abide by the judge's ruling. As a result, Applicant will likely have to choose to live without his family for his entire active duty service obligation or tender his resignation. If he were stationed away from his family, it might present a financial difficulty for them. However, based on the facts presented, it does not meet the AFI definition of hardship.

The record does not indicate whether Applicant has an assigned duty location, but he could inform his functional manager of his situation, and they might be able to accommodate and assign him to an Air Force installation close to his current place of residence. The two closest Air Force installations to his current place of residence are 86 miles and 138 miles from Applicant's apartment. It would be possible for Applicant to commute to either location and serve his active duty service obligation. Certainly, the 2 hour, 10 minute trip or 3 hour, 11 minute trip each way might have a negative impact on Applicant's home life. But this does not meet the definition of hardship. In fact, with the new alignment of the service medical corps under the Defense Health Agency, he might even be able to get an assignment closer. As of right now, however, Applicant relies on a hypothetical hardship, not an actual one.

Moreover, military members are subject to remote tours, deployments, and multiple TDYs. Each situation results in prolonged absences from family members. The Air Force does not permit these officers to resign for "hardship" when these contingencies arise. The hardship is not the result of death or disability of someone in Applicant's family. If the facts were different, for example if Applicant's children were suffering from a life-threatening illness and they could only receive care at a local hospital, this would constitute a hardship.

With regard to the financial hardship, AFI 36-3209, paragraph 2.24.1.1.6.2 requires Applicant to list the "names, ages, occupations, locations, and monthly incomes of the family members, and tell why they cannot provide the necessary care or support that must be furnished. Evidence of prospective civilian employment is required if the hardship is basically financial, and must show that the member will be able to exceed military pay if separated." Applicant did not provide this information in support of his argument for a financial hardship.

Recoupment

Title 37 U.S.C. § 303a(e) states in the absence of Secretarial excusal, a person who receives a bonus or similar benefit (to include an educational benefit or stipend) conditioned upon the fulfillment of specified service requirements, as permitted by 10 U.S.C. § 2005, must repay to the United States any unearned portion of the benefit if that member fails to satisfy the service

requirements. Recoupment can be waived in good conscience, equity, and in the best interest of the Air Force if the right conditions are present.

Applicant has received educational benefits which render him subject to recoupment. He signed several documents indicating he understood his indebtedness of \$157,865.69 and does not dispute the debt. Pursuant to DoD 7000.14-R, *Financial Management Regulation*, Volume 7A, Chapter 2, Table 2.1, Rule 8, if a member is separated from service under a hardship separation, recoupment will not be sought. However, if separated under miscellaneous reasons, recoupment will be sought, unless SecAF determines requiring recoupment in this case would be contrary to a personnel policy or management objective, against equity or good conscience, or contrary to the best interest of the United States.²

Applicant will be able to use his education provided by the USAF after he separates. The USAF, however, is losing an officer with an ADSC. We do not believe Applicant has established a hardship. Therefore, the only available reason to approve Applicant's tender of resignation is under miscellaneous reasons. Equity and fairness suggest the United States recoup at least a portion of its substantial investment in Applicant if he is separated for miscellaneous reasons. If the Board determines Applicant has not met his burden to establish hardship, it must direct recoupment unless it determines Applicant's circumstances warrant waiver pursuant to DoD 7000.14-R, Volume 7A, Chapter 2, Table 2-1, Rule 9. Such recoupment would be based on the unserved portion of the ADSC.

CONCLUSION

Based on the foregoing, we conclude it is legally permissible to support Applicant's tender of resignation under paragraph 2.46.1.7, Miscellaneous Reasons, subject to recoupment.

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² DoD 7000.14-R, *Financial Management Regulation*, Volume 7A, Chapter 2, Table 2-1, Rule 9.