

## ***OpJAGAF 2018-3, 18 April 2018, CADET DISCHARGES***

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### ***TOPIC***

Application of recoupment laws to cadets who are involuntarily discharged based on serious misconduct in which they engaged during their fourth class (freshman) or third class (sophomore) years.

### ***TEXT OF THE DECISION***

You asked whether a cadet is subject to recoupment if he or she is involuntarily discharged based on serious misconduct committed during the cadet's fourth class (freshman) or third class (sophomore) years at the United States Air Force Academy (USAFA).<sup>1</sup>

### ***BACKGROUND***

The cadet in question entered USAFA in June 2014 as a member of the class of 2018. The alleged misconduct (commission of sexual assault) that served as the basis for his involuntary discharge occurred in February 2015 when he was in his freshman year and had not yet committed to the Air Force (commitment occurs in the fall of a cadet's junior year). Following the report of misconduct, the cadet was placed on administrative hold pending investigation and possible court-martial proceedings. The cadet committed additional misconduct during his freshman and sophomore year. He requested administrative turnback<sup>2</sup> on 20 June 2016, which was approved on 1 July 2016. Since approval of his administrative turnback, the cadet has not been paid nor has he received training/credits at USAFA. Because he went on turnback in June 2016, he never began his junior year and is still considered a sophomore cadet without an Active Duty Service Commitment (ADSC).

The cadet now faces administrative involuntary discharge under AFI 36-3206\_AFGM2017-01, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004 (incorporating through interim change 7, 2 July 2013) Chapter 3, paragraph 3.6.4, serious or recurring misconduct punishable by military or civilian authorities, and paragraph 3.6.8, which provides that involuntary discharge is appropriate for sexual assault or sexual assault of a child, as defined in paragraph 3.3. His notification for involuntary discharge informed him that he may be subject to recoupment if the involuntary discharge is approved.

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<sup>1</sup> A freshman cadet is also referred to as a "fourth class" or "fourth degree" cadet. However, to avoid confusion that is created by references to fourth-class cadets in their first year of school, we are using the terms: freshman, sophomore, junior, and senior. See DoDI 1322.22, *Service Academies*, 24 September 2015, Enclosure 3, paragraph 6.f(2).

<sup>2</sup> The Administrative Turnback program is for cadets who encounter a temporary hardship. It affords these cadets the opportunity to be away from the Academy for one or two semesters in order to resolve these hardships. It is designed to prevent resignations of cadets otherwise able to successfully complete graduation and commissioning requirements. See USAFAI 36-2007, *Application for and Administration of Cadet Turnback Program*, 18 April 2007, Certified Current 2 March 2012, paragraph 1.

Cadets must sign an agreement on a USAFA Form O-205, *Record of Acceptance, Obligation, and Oath of Allegiance*. The form has a section outlining the reimbursement obligation if the cadet fails to graduate. It reads:

As a condition of receiving advanced education as defined in Title 10, U.S.C. Section 2005 [*Advanced education assistance: active duty agreement; reimbursement requirements*], I agree:

- a. To complete the educational requirements specified in this agreement and to serve on active duty for the specified period in this agreement,
- b. That if I fail to complete the specified educational requirements, I will, at the option of the Secretary of the Air Force, either (1) serve on active duty, or (2) reimburse the United States for the entire cost of my education in the manner provided by statute.
- c. That if I voluntarily or because of misconduct fail to complete that period of active duty or fail to fulfill any term or condition prescribed by the Secretary of the Air Force, I will, as specified by the Air Force, reimburse the United States government for the percentage of my educational costs equal to the period of active duty I fail to complete, and,
- d. That only the Secretary of the Air Force or designee may excuse me from my obligation to serve on active duty for the period specified in this agreement....

## **LAW**

### *Educational Assistance*

There are a number of statutes addressing education assistance and recoupment thereof. Title 10, United States Code (U.S.C.), Section 2005 permits the Secretary of the Air Force (SecAF) to require prospective cadets to sign an agreement in which the person shall agree: (1) to complete the educational requirements of the program and serve a period of active duty; (2) if the person fails to complete the educational requirements, to serve on active duty for a period specified therein; (3) “if the person does not complete the specified period of active duty specified in the agreement, *or* does not fulfill any term or conditions prescribed [to protect the interest of the United States], such person shall be subject to the repayment provisions of section 303a(e) or 373 of title 37.”<sup>3</sup> (*emphasis added*) In turn, 10 U.S.C. § 9348 requires each cadet to sign such an agreement.<sup>4</sup>

### *Recoupment*

Title 37, U.S.C. § 303a(e), states members who receive a bonus, special or incentive pay, educational benefits, stipend or similar payment conditioned upon the fulfillment of specified service requirements must repay the United States any unearned portion of the benefit if that member fails to satisfy the service requirements. SecAF may waive this requirement if she determines the imposition of the repayment and termination of the payment of unpaid amounts

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<sup>3</sup> 10 U.S. C. § 2005(a). See also USAFAI 36-3504, *Disenrollment of United States Air Force Academy Cadets*, 7 July 2017, paragraph 10.2.

<sup>4</sup> See 10 U.S.C. § 9348, *Cadets: agreement to serve as officer*, paragraph (a).

would be contrary to personnel policy or management objective, would be against equity and good conscience, or would be contrary to the best interests of the United States.<sup>5</sup>

According to Under Secretary of Defense for Personnel and Readiness Policy Directive, *Repayment of Unearned Portions of Bonuses, Special Pay, and Educational Benefits or Stipends*, issued 21 May 2008, “[a]ny failure to fulfill the service requirements specified in the written agreement may result in . . . the member’s repayment of an unearned portion of the pay or benefit.” The policy further directs that “[a]s a general rule, repayment will not be sought if the member’s inability to fulfill the eligibility requirements is due to circumstances determined reasonably beyond the member’s control.” DoD Financial Management Regulation 7000.14-R, Volume 7A, Chapter 2, sets forth conditions under which repayment will not be sought.<sup>6</sup> Generally, absent a specific condition set forth in DoD 7000.14-R, Volume 7A, Chapter 2, Table 2-1, repayment will be sought unless the Secretary of the Air Force determines recoupment “would be contrary to personnel policy or management objective, against equity and good conscience, or contrary to the best interests of the United States.” Rule 9.

#### *DoD and Air Force Policy on Active Duty Service Obligations when Disenrolled*

With regard to the service obligation, DoDI 1322.22, *Service Academies*, 24 September 2015, Enclosure 6.d, requires each USAFA cadet to enter into a written agreement in which he or she agrees: (1) to complete the course of instruction for graduation; (2) if he or she fails to complete these requirements in the agreement, he or she will serve on active duty for a specified period of time; (3) if he or she fails to complete the period of active duty in the agreement, he or she will reimburse the United States in accordance with 10 U.S.C. § 2005 and 37 U.S.C. § 303a.<sup>7</sup> Accordingly, there will be some cadets who are unwilling or unable to complete successfully the program of instruction at USAFA. Cadets identified as “deficient” in conduct, studies, or physical fitness may be disenrolled<sup>8</sup> from USAFA.

Ordinarily, if an appointment is terminated at any time before graduation due to a cadet’s breaching his or her agreement, he or she incurs an 8-year military service obligation (MSO) which will be

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<sup>5</sup> 37 U.S.C. § 303a(e).

<sup>6</sup> In general, the government will not pursue repayment in situations in which the member’s inability to fulfill specified service conditions related to a pay or benefit is due to circumstances determined reasonably beyond the member’s control. If a member dies, not due to his or her own misconduct, the government will not seek repayment of the unearned portion of the pay or benefit and any unpaid portion of the bonus, special pay, or student loan repayment will be paid in the member’s final pay. Additionally, if the member is directed to transfer into another military specialty or assignment rotation, the government will not seek repayment of the unearned portion of the pay or benefit, and any unpaid portion of the bonus, special pay, or student loan repayment will not be paid, unless SecAF makes a determination consistent with Table 2-1, Rule 9. DoDI 7000.14-R Volume 7A, Chapter 2; Table 2-1.

<sup>7</sup> DoDI 1322.22, paragraph 6.d(1)-(4).

<sup>8</sup> It is important to note USAFAI 36-3504 differentiates between disenrollment and discharge. USAFAI 36-3504, Attachment 1 defines discharge as a “complete severance from military status, active or otherwise.” It defines disenrollment as:

A consequence of the decision authority’s determination that a cadet is not qualified for commissioning or graduation. A cadet is disenrolled when the decision authority decides the cadet is unfit or unsuited for graduation and/or commissioning, or otherwise fails to meet graduation and/or commissioning standards, approves the cadet’s resignation from the USAFA or the cadet is dismissed pursuant to sentence of a general court-martial.... Disenrollment, alone, does not constitute discharge or transfer, but may result in either.

fulfilled by the member being ordered to serve on active duty or in the Reserve component in an applicable enlisted status.<sup>9</sup> There are exceptions to this general rule. For instance, a freshman or sophomore who is disenrolled retains their MSO but does not have an active duty service obligation.<sup>10</sup> Additionally, a cadet who resigns before the start of the junior academic year or is disenrolled for cause resulting from misconduct that occurred before the start of the junior academic year will be disenrolled as if he or she were a sophomore.<sup>11</sup>

Per DoDI 1322.22, Enclosure 3, paragraph 6(f)(6), cadets who are not ordered to active duty due to their misconduct *must* reimburse the United States in accordance with 37 U.S.C. § 303a(e) for education costs commensurate with time spent at the academy. (*emphasis added*) However, SecAF may remit or cancel any part of the indebtedness if doing so is consistent with existing statutory requirements, personnel policies or management objectives, equity and good conscience, and is in the best interest of the United States. Such circumstances may include, but are not limited to, a cadet's death, illness, injury, or other impairment that is *not the result* of the cadet's misconduct; or needs of the Service.<sup>12</sup> (*emphasis added*)

### *Record of Acceptance, Obligation, Reimbursement and Oath of Allegiance*

The USAFAI states each cadet who enters the Academy signs the *Record of Acceptance, Obligation, Reimbursement and Oath of Allegiance* agreeing to: (1) complete the course of instruction; (2) serve as a commissioned officer for at least five years; (3) accept an appointment in the Regular Air Force or Air Reserve Component and an MSO not to exceed eight years of service from the Total Active Military Service Data; and (4) if *disenrolled* prior to graduation, serve on active duty as an enlisted member or, “at the election of [SecAF], reimburse the United States for education costs” when SecAF determines fulfillment of the active duty service obligation would not be in the best interests of the Air Force, due to serious misconduct on the part of the cadet that results in the cadet's involuntary discharge.<sup>13</sup> (*emphasis added*)

### *Consequences of Breach of Agreement*

Similarly, Chapter 10 of the USAFAI discusses how active service is the primary means of *reimbursement* for USAFA education, but SecAF may direct monetary recoupment when she determines the cadet's record at USAFA renders the cadet unsuited for active service, or that active service otherwise is not in the best interest of the Air Force. “All such cadets who have incurred a military commitment and are *disenrolled or resign* under circumstances amounting to a breach of the 10 U.S.C. § 9348 agreement, will be discharged from the service, and may be subject to monetary recoupment.”<sup>14</sup> (*emphasis added*) Per the terms of the agreement, cadets agree to complete their educational requirements and serve on active duty, and if they fail to complete the specified educational requirements, they will either serve on active duty or reimburse the United States the cost of their education.<sup>15</sup>

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<sup>9</sup> DoDI 1322.22, at paragraph 6.f(2).

<sup>10</sup> *Id.*, at paragraph 6.f(2)(a).

<sup>11</sup> *Id.*, at paragraph 6.f(2)(b).

<sup>12</sup> *Id.*, at paragraph 6.f(6).

<sup>13</sup> USAFAI 36-3504, paragraphs 6.1.1 – 6.1.4.1.

<sup>14</sup> *Id.*, at paragraph 10.1.

<sup>15</sup> See USAFA Form O-205.

## *Disenrollment*

Disenrollment from USAFA is governed by two instructions: AFI 36-3504 and USAFAI 36-3504, both entitled *Disenrollment of United States Air Force Academy Cadets*. According to AFI 36-3504, when cadets enter USAFA, they must sign an agreement that if they are subsequently disenrolled or resign during their junior or senior year, they may be required to either serve as an enlisted member or reimburse the government for education costs when fulfilling the active duty service obligation would not be in the best interest of the Air Force.<sup>16</sup>

## *Disenrollment versus Involuntary Discharge*

It is important to note, AFI 36-3504 and USAFAI 36-3504 define disenrollment as the voluntary or involuntary termination of cadet status.<sup>17</sup> Disenrollment is a “consequence of the decision authority’s determination that a cadet is not qualified for commissioning or graduation.”<sup>18</sup> A cadet is disenrolled when the decision authority “decides the cadet is unfit or unsuited for graduation and/or commissioning, or otherwise fails to meet graduation and/or commission standards, approves the cadet’s resignation from the USAFA or the cadet is dismissed pursuant to sentence of a general court-martial.”<sup>19</sup> Further, “[d]isenrollment, alone, does not constitute discharge or transfer, but may result in either.”<sup>20</sup> Both AFI 36-3504 and USAFAI 36-3504 define *discharge* as a “complete severance from military service, active or otherwise.”<sup>21</sup>

The USAFAI addresses grounds to *disenroll* cadets, which include conduct, *minor* misconduct, and/or failing conduct probation;<sup>22</sup> deficiency in aptitude and/or failing aptitude probation;<sup>23</sup> deficiencies in academic performance and/or failing academic probation;<sup>24</sup> deficiencies in summer training;<sup>25</sup> and deficiencies in physical fitness, physical education, intramural training, and/or failing athletic probation.<sup>26</sup>

## *Disenrollment Decision Authority*

The Superintendent/Disenrollment Authority makes the final decision to retain or disenroll, and *if the decision is to disenroll*, the disenrollment authority will also: (1) determine the service characterization for the cadets; and (2) recommend service as an enlisted member or discharge (to fulfill their active duty service obligation), service characterization, and recoupment of the costs of education incurred for *junior or senior cadets* (in cases in which the cadet is not ordered to active duty to fulfill their active duty service obligation).<sup>27</sup> (*Emphases added*) Based on the

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<sup>16</sup> AFI 36-3504, *Disenrollment of United States Air Force Academy Cadets*, 9 July 2013, paragraph 3.1.

<sup>17</sup> AFI 36-3504, Attachment 1; USAFAI 36-3504, Attachment 1. *See also* DoDI 1322.22, Glossary, Part II.

<sup>18</sup> AFI 36-3504, Attachment 1; USAFAI 36-3504, Attachment 1.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> USAFAI 36-3504, at paragraph 18.

<sup>23</sup> *Id.*, at paragraph 19.

<sup>24</sup> *Id.*, at paragraph 20.

<sup>25</sup> *Id.*, at paragraph 21.

<sup>26</sup> *Id.*, at paragraph 22.

<sup>27</sup> *Id.*, at paragraph 23.9.

Disenrollment Authority's decision, the former cadet receives a DD 214, *Certificate of Release or Discharge from Active Duty*; and if his or her service is characterized as honorable, the cadet will also receive a DD Form 256AF, *Discharge Certificate, Honorable*.

### *Involuntary Discharge*

In the same vein, the USAFAI discusses *involuntary discharge* based on *serious* misconduct. If the underlying misconduct is serious enough to potentially warrant an under other than honorable conditions discharge characterization, involuntary discharge action should be initiated under AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, AFI 36-3207, *Separating Commissioned Officers*, and AFI 51-602, *Boards of Officers*; and SecAF or her designee approves or disapproves the discharge.<sup>28</sup> These instructions do not provide recoupment exemptions for freshman or sophomore cadets who are involuntarily separated for serious misconduct.

## **DISCUSSION**

### *Active Duty Service Obligation versus Military Service Obligation*

The cadet in question committed the offenses underlying his involuntary discharge during his freshman and sophomore years, prior to him incurring an active duty service obligation. USAFA Form O-205 puts the cadet on notice of the potential obligation to reimburse the United States for the entire cost of his or her education and does not carve out any exception to the reimbursement rule. The provisions of DoDI 1322.22, Enclosure 3, paragraph 6.f(2)(a) waive a freshman or sophomore's active duty service obligation (the commitment of *active* military service for a specified period of time)<sup>29</sup> but not their military service obligation (the commitment of military service for a specified period of time).<sup>30</sup> Accordingly, if *disenrolled*, the cadet would not be required to perform *active service* or be subject to recoupment to reimburse the United States for the education costs received during his freshman and sophomore years. However, SecAF may transfer a cadet who breaches his agreement to the Air Force Reserve in an appropriate enlisted grade,<sup>31</sup> and the military service obligation would be served in the Reserve Component.<sup>32</sup> Involuntary discharge of a cadet due to serious misconduct ends the cadet's military service obligation.<sup>33</sup>

### *Not Ordered to Active Duty due to Misconduct*

DoDI 1322.22, Enclosure 3, paragraph 6.f(6), requires cadets who are *not ordered to active duty due to their misconduct* to reimburse the United States for education costs commensurate with their time spent at USAFA. The cadet in question has been recommended for involuntary discharge for serious misconduct and, therefore, will not be ordered to active service. Even if

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<sup>28</sup> USAFAI 36-3504, at paragraph 25.

<sup>29</sup> DoDI 1322.22, Glossary, Part II. Definitions.

<sup>30</sup> *Id.*

<sup>31</sup> See 10 U.S.C. § 9348(b).

<sup>32</sup> DoDI 1304.25, *Fulfilling the Military Service Obligation (MSO)*, 31 October 2013, Enclosure 3, paragraph 7.

<sup>33</sup> AFI 36-2115, *Assignments within the Reserve Component*, 8 April 2005, Certified Current 2 May 2008, paragraph 4.1.1.

SecAF waives the active duty service obligation, and thereby condition b(1) of the USAFA Form O-205 (the active duty service obligation), she is not required to waive condition b(2) (the recoupment obligation). Accordingly, the cadet is subject to recoupment for the two years of education costs, unless SecAF waives the requirement.

Neither version of AFI 36-3504 or USAFAI 36-3504 provides a blanket personnel policy recoupment waiver for all cadets involuntarily discharged during their freshman or sophomore years for serious misconduct. In fact, although the AFI 36-3504 states only cadets who are disenrolled or resign in their junior or senior years may be required to serve on active duty as an enlisted member or reimburse their educational costs, the provisions in the USAFAI provides no class-year restriction on who may be involuntarily discharged and subject to recoupment for serious misconduct. Moreover, each provision of the law, the DoDI, and the USAFAI state SecAF may direct recoupment for education benefits received, but she also has the authority to waive the recoupment requirement in certain circumstances.

However, none of the conditions set forth in DoD 7000.14-R, Volume 7A, Chapter 2, Table 2-1, regarding waiving recoupment apply in this case. SecAF may remit or cancel any part of the indebtedness under certain circumstances that are *not the result* of the cadet's misconduct. Here, the cadet's time at USAFA was curtailed *due to his misconduct*. He will not be allowed to fulfill his military service obligation in the Reserve component; rather, his discharge completely severs his ties to the Air Force. As a result of this involuntary discharge for serious misconduct, the cadet must reimburse the United States for his two years spent at the Academy unless SecAF determines waiving recoupment is in the best interest of the Air Force.

In this case, the allegations involved sexual misconduct with three different women, and the preponderance of the evidence supports the bases for involuntary discharge. There is nothing in the record indicating waiving recoupment is in the Air Force's best interest nor did the cadet contest his debt.

## ***CONCLUSION***

SecAF has the statutory authority to waive the active duty service obligation and recoupment for all cadets, and both DoD and AF policy<sup>34</sup> is to waive these requirements with respect to freshman and sophomore cadets who are disenrolled. However, SecAF also has the statutory and regulatory authority to require a cadet who is discharged (pursuant to AFI 36-3206 for serious misconduct) to reimburse the United States for education costs commensurate with time spent at USAFA.

Consequently, the case file remains legally sufficient to discharge the cadet with an Under Other Than Honorable Conditions characterization under AFI 36-3206, paragraphs 3.6.4 and 3.6.8, **subject to recoupment**. We recommend the unconditional waiver be approved, and that the cadet be discharged from the Air Force with an Under Other Than Honorable Conditions characterization, subject to recoupment for education costs commensurate with his time spent at USAFA.

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<sup>34</sup> See DoDI 1322.22, Enclosure 3, paragraph 6.f.(2)(a); AFI 36-3504, paragraph 3.1; and USAFAI 36-3504, Chapter 10.