

PROMOTIONS

Proper Promotion Date (Date of Rank) for USAFA Department Head

This opinion responds to a request for clarification regarding the proper date of rank for a member who is promoted to the grade of colonel based on being a Department Head at the United States Air Force Academy (USAFA). For reasons stated below, it is our opinion that pursuant to 10 USC § 9333(b) and 10 USC § 9336(a), the effective date of rank is the date the member arrived station and assumed duties as a Department Head at USAFA.

Background

On 29 February 2016, Lt Col M was a squadron commander assigned to Base X but had been selected for an assignment to USAFA as a Department Head. Lt Col M was nominated for promotion to colonel based on Lt Col M's designation as a Permanent Professor and being named as a Department Head at USAFA. On 29 February 2016, the Senate confirmed the appointment. On 11 March 2016, the USAFA Superintendent signed a promotion order indicating that Lt Col M was promoted to the grade of colonel effective on 29 February 2016; however, Lt Col M's date arrived station at USAFA was 27 June 2016.

Law/Policy

The principle controlling authorities on this issue are the US Constitution art. II, § 2, cl.2, and case law construing that section; 10 USC § 624; 10 USC § 9333(b); and 10 USC § 9336(a).

Under the Constitution, the President is given the authority to appoint officers "by and with the Advice and Consent of the Senate." US Const. art. II, § 2, cl. 2.¹ The constitutional appointment process for Senate-confirmed officers of the United States is described in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). Three separate actions are ordinarily required for appointment under the US Constitution art. II, § 2, cl. 2. First, the President must nominate the individual to the post. *See id.* at 155-56. Second, the Senate must confirm the nominee. *Id.* Third, the President must appoint the officer. *Id.* As stated in *Dysart v. United States*, 369 F.3d 1303, 1311 (Fed. Cir. 2004), "[e]ach discrete action-nomination, confirmation, and appointment-must be made for a promotion to be effective."

The Appointments Clause applies to military officers. *See Weiss v. United States*, 510 U.S. 163 (1994) (involving the appointment of military judges). Consequently, the constitutional design of Art II § 2, cl. 2, is incorporated into 10 USC §624(c), which provides, in pertinent part, "[a]ppointments under this section shall be made by the President, by and with the advice and consent of the Senate, except that appointments under this section in the grade of first lieutenant

¹ The full text of art. II, § 2, cl. 2, provides, "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but 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."

or captain, in the case of officers of the Army, Air Force, or Marine Corps, or lieutenant (junior grade) or lieutenant, in the case of officers of the Navy, shall be made by the President alone. See *Schwalier v. Hagel*, 776 F.3d 832, 2015 U.S. App. LEXIS 331, 2015 WL 105873 (Fed. Cir. 2015).

10 USC § 9333(b) states, “[t]he permanent professors of the Academy shall be appointed by the President, by and with the advice and consent of the Senate.”

10 USC § 9336(a) provides, “A **permanent professor of the Academy who is the head of a department of instruction**, or who has served as such a professor for more than six years, **has the grade of colonel**. However, a permanent professor appointed from the Regular Air Force has the grade of colonel after the date when he completes six years of service as a professor, or after the date on which he would have been promoted had he been selected for promotion from among officers in the promotion zone, whichever is earlier. All other permanent professors have the grade of lieutenant colonel.” (Emphasis added.)

The first step in the analysis is statutory construction.² Any question of statutory interpretation begins with looking at the plain language of the statute to discover its original intent. To discover a statute's original intent, courts first look to the words of the statute and apply their usual and ordinary meanings. If after looking at the language of the statute the meaning of the statute remains unclear, courts attempt to ascertain the intent of the legislature by looking at legislative history and other sources. "It is well established that 'when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms.'" *Lamie v. United States Tr.*, 540 U.S. 526, 157 L. Ed. 2d 1024, 124 S. Ct. 1023, 1030 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 147 L. Ed. 2d 1, 120 S. Ct. 1942 (2000)).

Other rules of statutory interpretation include, but are not limited to:

- (1) Statutes should be internally consistent. A particular section of the statute should not be inconsistent with the rest of the statute.
- (2) When the legislature enumerates an exception to a rule, one can infer that there are no other exceptions.
- (3) When the legislature includes limiting language in an earlier version of a statute, but deletes it prior to enactment of the statute, it can be presumed that the limitation was not intended by the legislature.
- (4) The legislature is presumed to act intentionally and purposely when it includes language in one section but omits it in another.
- (5) Where legislation and case law conflict, courts generally presume that legislation takes precedence over case law.
- (6) A court may also look at: the common usage of a word, case law, dictionaries, parallel reasoning, and punctuation.³

² Statutory construction. (1813) 1. The act or process of interpreting a statute. 2. Collectively, the principles developed by courts for interpreting statutes. — Also termed statutory interpretation. See CONSTRUCTION (2). [Cases: Statutes 174–247.] Black's Law Dictionary (9th ed. 2009).

³ "Statutory Construction." *LII / Legal Information Institute*. N.p., n.d. Web. 16 Sept. 2014.

10 USC § 9336(a) clearly indicates that the member is promoted to the grade of colonel based on holding the position of “head of a department of instruction.” Also, 10 USC § 9333(b) unambiguously states, “[t]he permanent professors of the Academy shall be appointed by the President, by and with the advice and consent of the Senate.”

It is also well-established that Congress may create temporary promotions. 10 USC § 741(d)(2), provides, “[e]xcept as otherwise provided by law, the date of rank of an officer who holds a grade as the result of a promotion is the date of his appointment to that grade. (Emphasis added.) In that vein, 10 USC § 8033 (b), provides, “[t]he Chief of Staff, *while so serving*, has the grade of general without vacating his permanent grade,” and 10 USC § 8034(b) states, “[t]he Vice Chief of Staff of the Air Force, *while so serving*, has the grade of general without vacating his permanent grade.” (Emphasis added.) Additionally, general officers in 10 USC §601 positions hold the grade only while in the § 601 position. 10 USC § 601(b)(1) provides, “[a]n officer who is appointed to the grade of general, admiral, lieutenant general, or vice admiral for service in a position designated under subsection (a) or by law to carry that grade shall continue to hold that grade *while serving in that position*.” (Emphasis added.)

Specifically regarding USAFA, 10 USC § 9336(b) clearly provides that the Senate’s confirmation does not automatically allow the service member to promote to that grade on the date of confirmation; the member must assume the position before being promoted to the grade. For example, the Dean of Faculty of USAFA must serve as the Dean of Faculty to hold the grade of brigadier general (10 USC § 9335(b)).⁴

On 29 February 2016, Col M was not head of a department at USAFA but was a squadron commander at Base X. From the member’s personnel records, it appears that Col M arrived at USAFA on 27 June 2016 to assume her duties as department head. Applying the above authorities to the clear language of the statutes, the member is promoted to the grade of colonel when she was actually in the position of department head.

Furthermore, promotions granted earlier than authorized award benefits to members that cost federal dollars without the required statutory authority. The Air Force (or any federal agency) is not entitled to award benefits costing federal dollars without specific statutory authority. See *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).

This opinion has been coordinated with the Office of the Deputy General Counsel for Intelligence, International and Military Affairs (SAF/GCI).

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⁴ For example, Lt Gen Ervin J. Rokke (ret), served as the USAFA Dean of Faculty from July 1983 through November 1986. During this timeframe, he held the grade of O-7, but then, as reflected in his Air Force bio, reverted to his previous grade of O-6 on November 17, 1986 at the conclusion of his tenure as Dean. See <http://www.af.mil/AboutUs/Biographies/Display/tabid/225/Article/105791/lieutenant-general-ervin-j-rokke.aspx>.