

RECOUPMENT

Recoupment of Advanced Education Assistance for Officers Discharged for Failure to Complete Initial Skills Training (IST)

This is in response to your request for our opinion as to the recoupment liability of officers discharged for failure to complete initial skills training IAW AFI 36-3207, *Separating Commissioned Officers*, AFGM.¹ Your specific question is whether an officer discharged under the aforementioned AFGM is subject to recoupment if the officer entered into an agreement for educational assistance, special pay or bonus prior to 1 Apr 06. In this opinion, we will address that question as well as the broader issue of the rules and policies that govern recoupment of educational assistance provided to officers who are discharged as training eliminees.

We begin with an examination of the law and governing directives that were in place before 1 Apr 06. Section 2005 of Title 10, United States Code (prior to its amendment by the 2006 National Defense Authorization Act), provided that if a person receiving education assistance, special pay, or a bonus specified in the law “voluntarily or because of misconduct, fails to complete the period of active duty specified in the agreement, or fails to fulfill any term or condition prescribed pursuant to paragraph (4), such person will reimburse the United States in an amount that bears the same ratio to the total cost of advanced education provided such person as the unserved portion of active duty bears to the total period of active duty such person agrees to serve . . .”² The contract entered into by persons entering the Air Force Academy during this period (USAFA Form 0-205) included a provision which adopted the statutory language virtually verbatim. The ROTC contract used at the same time (AF 1056) included the following provision at paragraph 13i

- i. I understand that if I voluntarily, or because of misconduct, or other circumstances within my control, fail to complete the period of active duty specified in this contract, either as an officer or in enlisted status, I will reimburse the United States in an amount that bears the same ratio to the total cost of advanced education provided to me as the unserved portion of active duty bears to the total period of active duty I agreed to serve. Misconduct separation may be initiated by the Air Force in accordance with its governing directives for substandard duty performance, unacceptable conduct, moral or professional

¹ We note that certain correspondence circulating within the personnel community and Secretariat suggests that the reclassification and discharge of training eliminees pursuant to the AFGM is a force reduction program. Just to clarify, it is not part of the Air Force’s FY10/11 force management program, but is a permanent program designed to recommend whether officers eliminated from initial skills training (IST) should be reclassified into a new career field or discharged.

²The current law now provides “that if a person does not complete the period of active duty specified in the agreement, or does not fulfill any term or condition prescribed in paragraph (4), such person shall be subject to the repayment provisions of section 303a(3) of Title 37 . . .” 10 U.S.C. 2005 (a)(3). 37 U.S.C. 303a (3)(1)(A) is reproduced elsewhere in this opinion.

dereliction, or in the interest of national security. This includes sentence by court-martial or separation in lieu of trial by court-martial.

Although the recoupment provisions of 10 U.S.C. 2005 were superseded/repealed by the 2006 NDAA, they remain in effect, pursuant to a “savings clause,” for monies obligated to be paid by the government prior to 1 Apr 06. Public Law 109-163, Section 687 (f), 119 Stat. at 3336, recorded at 10 U.S.C. 510 note. One of the provisions of that law quoted above is that recoupment is provided in the event the member should fail to fulfill any term or condition prescribed by the contract to protect the interests of the United States. In this regard, the officers who are eliminated from training and who have received financial educational assistance are obligated by law and contract to complete a specified number of years on active duty.

In our opinion, the statutory language in the previous version of 10 U.S.C. 2005 – “or fails to fulfill any term or condition prescribed pursuant to clause (4)” – coupled with the provisions incorporated into the USAFA and ROTC contracts, provides sufficient authority to recoup from training eliminees who have failed to fulfill their contractual service obligation. We do not agree that the language in the first part of paragraph (a)(3) of Section 2005 (voluntarily or because of misconduct, fails to complete the active duty specified in the agreement . . .) restricts the basis for recoupment solely to clearly voluntary requests or criminal misbehavior. Indeed, the provision in the ROTC contract states that “if I voluntarily, or because of misconduct, or *other circumstances within my control*, fail to complete the period of active duty specified . . .” [emphasis added] he/she “will reimburse the United States . . .” Thus, it is our opinion that officers who are eliminated from training for behavior or other circumstances within their control are subject to recoupment IAW the previous 10 U.S.C. 2005. We note at this point that the USAFA contract does not contain the additional language of “other circumstances within my control.” Nevertheless, we believe the same rationale applies, as Section 2005 provides for recoupment for failure to fulfill any term or condition prescribed by the Secretary concerned.

Moreover, even if we were restricted to “misconduct” as a basis for recoupment, we note that term as defined in OpJAGAF 1989/35, includes “professional derelictions and substandard duty performance when the performance is within the member’s ability to control.” Whether a trainee’s elimination is the result of outright misconduct or other behavior or circumstances within the officer’s control, we believe that recoupment is authorized in conjunction with a training eliminee discharge even when the officer executed a contract prior to 1 Apr 06.

Having answered that, the tougher question may be what *are* “circumstances within the officer’s control?” Unfortunately, a precise laundry list to include every circumstance is not possible; a determination will have to be made on a case by case basis. Certainly, where the officer’s behavior or decision making was a voluntary act not controlled by outside influences or sources we would normally characterize that behavior as within the officer’s control. The best advice we can provide is to consult with this office where any question remains.

One other issue that has been raised with regard to recoupment from training eliminees is the broader issue of when recoupment is appropriate. In our view, the statute and regulatory guidance addresses that issue. Section 303a of Title 37, United States Code, states the following at paragraph (e)(1)(A) and (B):

(e) Repayment of Unearned Portion of Bonuses and Other Benefits When Conditions of Payment Not Met; Termination of Entitlement to Unpaid Amounts.

(1)

(A) Except as provided in paragraph (2) a member of the uniformed services who receives a bonus or similar benefit and whose receipt of the bonus or similar benefit is subject to the condition that the member continue to satisfy certain eligibility requirements shall repay to the United States an amount equal to the unearned portion of the bonus or similar benefit if the member fails to satisfy the eligibility requirements, unless the Secretary concerned determines that the imposition of the repayment requirement and termination of the payment of unpaid amounts of the bonus or similar benefit with regard to the member would be contrary to a personnel policy or management objective, would be against equity and good conscience, or would be contrary to the best interest of the United States.

(B)[1] The Secretary concerned may establish, by regulations, procedures for determining the amount of the repayment required under this subsection and the circumstances under which an exception to the required repayment may be granted. The Secretary concerned may specify in the regulations the conditions under which an installment payment of a bonus or similar benefit to be paid to a member of the uniformed services will not be made if the member no longer satisfies the eligibility requirements for the bonus or similar benefit. For the military departments, this subsection shall be administered under regulations prescribed by the Secretary of Defense.

In our opinion, this provision makes clear that the presumption regarding recoupment is that recoupment *will* be sought in most cases where an officer fails to fulfill the contractual requirement(s). It is only if the Service Secretary were to determine that the impositions of the repayment requirement would be contrary to a personnel policy or management objection, would be against equity and good conscience, or would be contrary to the best interest of the United States, that recoupment would not be pursued. The implementing guidance issued by DoD mirrors that approach. The 21 May 08 DoD policy memorandum on the subject provides as follows:

Pursuant to this policy memorandum, a member who fulfills the requirements specified in a written agreement related to the member's receipt of a pay or benefit is entitled to the full amount of the pay or benefit specified under that agreement. (37 U.S.C. § 303a(e); DSD policy memorandum, dated April 8, 2005.) Any failure to fulfill the service requirements specified in the written agreement may result in termination of the agreement and the member's repayment of an unearned portion of the pay or benefit. As 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.

The memorandum then goes on to specify certain exceptions where recoupment should not be sought. Additional exceptions were added by the DoD memorandum dated 6 Feb 09. The latest provision of the DoD Financial Management Regulation (DoD FMR) reiterate this policy, to include Table 1, where it is made clear that the ultimate decision whether to recoup will be subject to the discretion of the Secretary concerned.

So what does all this mean with regard to the policy that should apply to recoupment of educational assistance paid to training eliminees? The AFI 36-3207 AFGM dated 13 Apr 10 states:

Unless waived by SecAF or delegee, officers separated under this provision are subject to recoupment of educational assistance, special pay or bonus money received. Nothing in this AFGM changes existing recoupment criteria and procedures.

Thus, as with other separations involving officers who have received educational assistance and failed to fulfill contract requirements, the presumption with training eliminees is that recoupment will be pursued unless a valid reason exists not to do so. The ultimate decision whether to recoup belongs to the Secretary. In that regard, we would caution against the use of blanket exceptions being created as opposed to what we believe would be a more appropriate case by case analysis. Certainly, AFPCI 36-112, paragraphs 2.3.1.6 and 3.2.3.2, provide that the panel members who make up the reclassification boards will consider the educational investment made by the Air Force and made a recommendation as to recoupment in every case, as appropriate, where discharge is recommended. We believe that such an individual analysis of each case is the proper methodology to be used in recommendations to, and determinations by, the Secretary.

This opinion has been coordinated with HQ USAF/JAA.

OpJAGAF 2010/8 22 June 2010