

## RESERVES

### Under Other Than Honorable Conditions Discharges for Reservist Conduct in the Civilian Community

You have asked whether a reservist may receive an under other than honorable conditions (UOTHC) discharge characterization based upon a civilian criminal conviction, when the direct impact on the military is limited to the reservist's inability to perform duties (*e.g.*, due to being incarcerated). We conclude that if a military member's conduct in the civilian community directly affects his or her ability to perform required military duties, those facts may be used to characterize the member's service as UOTHC, as long as 1) AFI 36-3209 authorizes a UOTHC characterization for the particular grounds for discharge being pursued, 2) the conduct in the civilian community rises to the level of seriousness warranting a UOTHC, 3) the conduct had a direct effect on the member's performance of the member's required military duties, and 4) that effect is more severe than simply an adverse impact on the effectiveness of the Air Force, military morale and military discipline.

Regulatory Overview: Regulatory guidance as to the availability and applicability of a UOTHC discharge characterization in the administrative discharge setting is fairly opaque and enlisted versus officer. For example, DoD Instruction 1332.14, *Enlisted Administrative Separations*, addresses the discharge of active and reserve enlisted members, but not officers. On the other hand, AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, addresses the discharge of reserve enlisted and officer members, but not those on active duty, and AFI 36-3208, *Administrative Separation of Airmen*, pertains to active-duty enlisted members as well as some reservists in particular circumstances, but not to officers. In some case, the regulations have fairly thorough descriptions as to when a UOTHC is appropriate (*e.g.* DoDI 1332.14, as discussed below). Others, such as AFI 36-3207, *Separating Commissioned Officers*, are vague and unhelpful.<sup>1</sup> The review below focuses on the more complete discussions of discharge characterizations in the various regulations as they pertain to the discharge of reservists.

Applicable DoD Regulations: DoD Instruction 1332.14, *Enlisted Administrative Separations*, Enclosure 4, sets out the authorized types of discharge characterizations at para. 3(b)(2). In short, they are: honorable, general and UOTHC. Underneath the heading, "Types of characterization," each of the three characterizations are discussed. The Instruction says a general discharge is appropriate when a service member's service has been "honest and faithful" and "when the positive aspects of the Service member's conduct or performance of duty outweigh negative aspects of the Service member's conduct or performance of duty as documented in their service record."

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<sup>1</sup> This AFI says a general discharge may be directed "if the military record is not sufficiently meritorious to warrant an honorable discharge but doesn't warrant a discharge under other than honorable conditions." Para. 1.7.2. Meanwhile, the AFI says a UOTHC is appropriate "if the military record doesn't warrant an under honorable conditions (general) discharge." Para. 1.7.3.

The Instruction establishes two circumstances in which a UOTHC may be issued. The first is when a “pattern of behavior . . . constitutes a significant departure from the conduct expected of members of the Military Services.” Para. 3(b)(2)(c)(1)(a). The second is when “One or more acts or omissions . . . constitute a significant departure from the conduct expected” of service members. Para. 3(b)(2)(c)(1)(b). That paragraph goes on to identify examples of factors that may be considered: “use of force or violence to produce serious bodily injury or death; abuse of a special position of trust; disregard by a superior of customary superior-subordinate relationships; acts or omissions that endanger the security of the United States or the health and welfare of other members of the Military Services; and deliberate acts or omissions that seriously endanger the health and safety of other persons.”

The next heading after “Types of characterization” is “Limitations on characterization.” This section addresses prior/pre-service activities; members tried by court-martial but who didn’t receive a punitive discharge; voluntary participation in drug or alcohol rehabilitation programs; and – most relevant to the instant question – reservist misconduct in the civilian community.” This paragraph reads, in total:

Conduct in the civilian community of a Service member of a Reserve component who is not on active duty or active duty for training may form the basis for characterization under other than honorable conditions only if such conduct affects directly the performance of the Service member’s military duties. Such conduct may form the basis of characterization as general (under honorable conditions) only if such conduct has an adverse impact on the overall effectiveness of the service, including military morale and efficiency. Para. 3(b)(3)(e).

Applicable Air Force Regulations: AFI 36-3209 generally follows DoDI 1332.14, but it presents the guidance in an arguably less-straightforward manner. Attachment 2 to the AFI, “Guidelines for Separation and Service Characterization” has the heading “Types of Service Characterization” at para A2.2. Under that heading are three paragraphs describing each of the three characterization options. Para. A2.2.2 describes the general characterizations as this: “If a member’s service has been honest and faithful, but significant negative aspects of conduct or performance of duty outweigh positive aspects of the member’s military record.” This description is followed by a “note” which closely tracks the DoDI language: “Use conduct in the civilian community of a member who is not on active duty or [Active Duty for Training (ADT)] to characterize service as General only if the conduct has an adverse impact on the effectiveness of the Air Force, including military morale and efficiency.” Para. A2.2.2.

The following paragraph, para. A2.2.3, addresses UOTHC discharges. The first sentence guarantees an opportunity for a hearing. The second sentence follows the DoDI language: “conduct in the civilian community of a member not on active duty or ADT may be used to characterize service as UOTHC only if the conduct directly affects the performance of military duties.” Unlike the DoDI, the AFI gives examples of conduct that directly affect the performance of military duties, and they involve missing duty or offenses in which a military member (or the military itself) is a victim.

The next paragraph, para. A2.2.4, then sets out the general guidance for the types of conduct warranting a UOTHC characterization nearly word for word as it appears in DoDI 1332.14, para. 3(b)(2)(c)(1)(b).<sup>2</sup> Thus, the DoDI first explains when a UOTHC is applicable in general, then it limits the applicability of the discharge with respect to reservists. The AFI, however, starts discussing the general UOTHC provisions, shifts to discussing the reservist limitation, then returns to discussing general UOTHC applicability.

**Other Services' Regulation:** The Navy, Marine Corps and Army regulations follow the DoDI 1332.14 model and indicate a general discharge is appropriate for non-active-duty reservists when the conduct in question "adversely affects the overall effectiveness of [the service] including military morale and efficiency." UOTHCs are only authorized when the conduct "directly affects the performance the members' military duties." See, e.g., SECNAVINST 1920.6C, *Administrative Separation of Officers*, Enc. 5; MCO P1900.16F, *Marine Corps Separation and Retirement Manual*, Ch. 2; Army Regulation 135-178, *Army National Guard and Army Reserve, Enlisted Administrative Separations*, Ch. 2.

**Discharge Review Board Regulations:** Per 32 CFR § 70.9, *Discharge Review Standards*, "a General Discharge for an inactive reservist can only be based upon civilian misconduct found to have had an adverse impact on the overall effectiveness of the military, including military morale and efficiency," while "an Under Other Than Honorable (formerly undesirable) Discharge for an inactive reservist can only be based upon civilian misconduct found to have affected directly the performance of military duties."

**Discussion:** The issue at hand is not a new one, but it has caused no small amount of consternation over the years. The typical scenario is one in which a reservist who is neither on active duty nor ADT ends up incarcerated or otherwise unable to perform reserve duty due to off-duty misconduct. The question becomes whether the characterization of the discharge can be based on the underlying misconduct, or if the Services are limited to looking at the mission impact (*i.e.*, the duty that cannot be performed). When presented with this question in 1980, the U.S. District Court for the District of Columbia held that the discharge authority should focus on the direct impact, if any, on the military service and the deficiency in the performance of military duties, and not solely the nature of the underlying misconduct. *Wood v. Secretary of Defense*, 469 F.Supp. 192. The Court held that "a general discharge can only be based upon conduct found to have had an adverse impact on the overall effectiveness of the military, including military morale and efficiency," and "an undesirable [now referred to as a UOTHC] discharge can only be based on conduct found to have affected directly the performance of military duties." 469 F.Supp. at 198.

Although court involvement in these cases is rare, *Wood* should not be viewed in isolation. In 1958, the Supreme Court held that a discharge characterization could not be based upon pre-service misconduct, but rather had to be derived from military service records. *Harman v. Brucker*, 355 U.S. 579, 583. In that case, the petitioner had engaged in pre-service subversive activities which later rendered him unfit for continued service when DoD security standards

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<sup>2</sup> AFI 36-3208, *Administrative Separation of Airmen*, para. 1.18.3, also sets out the same examples of conduct.

changed. The effect of the ruling was that the alleged subversive activities themselves could not factor in to the discharge characterization, as they had occurred prior to the petitioner entering the service. The following year, the Army published a comment in the *Military Law Review* in which the author presciently suggested, “that the courts probably will accept as conclusive a determination by the Secretary of the Army that certain conduct which occurs while the member is on active duty, or, in the case of reservists, conduct occurring during scheduled drills or during active duty for training periods, necessarily affects the quality of the service rendered and may properly be considered to constitute a part of his record of military service.” Miller, *Judicial Review of Administrative Discretion – Characterization of Discharge*, 4 Mil. L. Rev. 123 (1959). The *Harmon* case was decided primarily on the wording of a then-existing Army Regulation which said the purpose of the discharge certificate was to “reflect accurately the nature of the service rendered.” Current regulations, however, are not much different – AFI 32-3202, *Separation Documents*, says the discharge certificate, *inter alia*, “provides separating members with brief, clear records of their active military service.”

The *Wood* court derived its holding from a District of Columbia case, *Roelofs v. Secretary of the Air Force*, 628 F.2d 594 (D.C. Cir. 1980). *Roelofs* involved an active-duty service member who was convicted by a civilian court for a drug offense and sentenced to 18 months’ confinement. He was administratively discharged with an undesirable characterization, but the Discharge Review Board upgraded it to general. The appellant argued that he should receive an honorable discharge because all of his misconduct too place “outside” his military duties. The court conclude that military regulations which establish a presumptive undesirable discharge characterization for certain civilian criminal offenses were valid, but added a “service-impact” caveat. The court wrote: “The presumption that an undesirable discharge will result from a civilian conviction is warranted *if it results in deficiency in performance of military duties or has a direct impact upon military readiness*. A showing that negatives such a deficiency rebuts the presumption.” 628 F.2d at 599 (emphasis added).

The four plaintiffs in *Wood* were service members in the inactive reserves, each of who ran afoul of the law in the civilian community and was given an undesirable discharge (one of the plaintiffs was successful in later upgrading his discharge to general). During the discharge procedures, no finding was made that any of the alleged misconduct “affected the quality of the individual plaintiffs’ military service or the service generally.” 496 F.Supp. at 194. The *Wood* court pointed to *Roelofs* for the proposition that civilian misconduct could only justify a less than honorable discharge upon “a showing that the misconduct in some fashion adversely affects the military.” 496 F.Supp. at 195. The court then held that a general discharge “can only be based upon conduct found to have had an adverse impact on the overall effectiveness of the military, including military morale and efficiency,” and that an undesirable discharge “can only be based on conduct found to have affected directly the performance of military duties.” 496 F.Supp. at 198-99. It appears the *Wood* court doesn’t cite to any source (and we haven’t been able to locate one). But regardless of their genesis, these standards have been adopted by the Department of Defense and are included in the Discharge Review Boards’ regulations.<sup>3</sup> Although distinguished, the *Wood* standards have been cited in at least two cases as valid. *See, e.g.*,

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<sup>3</sup> The Boards’ regulations were amended in 1982 to specifically incorporate the *Woods* standards. 47 FR 37771 (Aug. 19, 1982).

*Snakenberg v. United States*, 15 Cl.Ct. 809 (Cl.Ct. 1988); *Gay Veterans Ass'n v. Secretary of Defense*, 668 F.Supp. 11 (D.D.C. 1987). Citing both *Harmon* and *Roelofs*, the *Gay Veterans* court held that “a less-than-honorable characterization of service may be issued only where the conduct that forms the basis of the derogatory characterization is contained in the service member’s military record and reflects accurately ‘the nature of the service rendered.’” 668 F.Supp. at 16. That court went on to require a causal relationship between the conduct and the quality of the military service itself.

Internally, the Air Force has followed the *Wood* standard for misconduct that occurs when reservists are neither on active duty nor active duty for training. OpJAGAF 1997/8 dealt with a drunk-driving pilot sentenced to a year of confinement for a civilian vehicular manslaughter conviction. The decedent was another Air Force pilot. The opinion explained that the misconduct “clearly had an adverse impact on the overall effectiveness of the Air Force” on account of the death of another Air Force pilot, but “it did not directly affect the performance of [the reservist’s] military duties.” Therefore, only an honorable or general discharge was authorized. In OpJAGAF 2000/17, an ANG flight surgeon was discharged after he admitted to taking indecent liberties with a child. Because there was no evidence that his conduct directly affected the performance of military duties, the opinion concluded a UOTHC was not authorized. In OpJAGAF 2003/28, a reservist was convicted in civilian court of the felony of attempted sexual abuse. He was sentenced to probation and required to register as a sex offender, but he was not given any jail time. The opinion cited *Wood* and found a UOTHC characterization unavailable on account of the lack of any evidence his misconduct directly and adversely impacted his military duties or his base’s mission and the fact the member wasn’t on active duty or in training status at the time of the offense. The opinion found a general discharge was an option because the member had to be reassigned to the Non Affiliated Reserve Section, which meant he could not complete reserve tours and could not perform his civil engineer duties. OpJAGAF 2004/5 presented a case wherein a reservist radiologist ingested cocaine prior to performing a Unit Training Assembly. Since there was no evidence the drug use “directly impeded the proper execution of his military duties,” a UOTHC was not permitted. A general discharge, however, was supportable due to the “indirect adverse impact on the overall effectiveness of military operations,” which included his inability to provide medical care, along with the impact on the efficiency of military operations.

The most recent relevant OpJAGAF, 2007/42, deviates somewhat from the above precedent. In this case, a reservist was convicted of intent to manufacture of a drug. Although the member didn’t receive any jail time, he was required to participate in a “Drug Court” program in which he had to get the court’s permission before leaving the local area. The member’s group commander recommended a UOTHC based upon the member’s inability to mobilize outside of the area without first obtaining court permission (in the end, he received a general discharge). The OpJAGAF opines that a UOTHC was available under the theory that “one could reasonably find the Drug Court restriction to constitute a direct affect negatively impacting performance of those duties.” Ultimately, however, the OpJAGAF agrees that a general discharge is appropriate based upon the member’s “otherwise satisfactory 13 years’ service and the civilian nature of his misconduct.” Unlike three of the four previous OpJAGAFs, 2007/42 makes no reference to *Wood*, and relies entirely upon the language in AFI 36-3209. What makes this especially problematic is that 2007/42 seems to suggest the member had not actually been called up for

mobilization (rendering the duty-impact somewhat speculative), and *Wood* expressly rejected the argument that “maintain[ing] availability for service in the event of call up” could be used to negatively characterize a member’s discharge. 496 F.Supp. at 196-97. To the extent the opinion could be interpreted otherwise, we find OpJAGAF 2007/42 should not be read to authorize a UOTHC for conduct in the civilian community without a showing of a direct effect on the member’s assigned duties. Reviewers should apply the standards set out in this legal review and the other OpJAGAFs cited above.

Given the importance the military places on both accountability and consistency, it may often be difficult to understand why service status may drive significantly different results, when the underlying misconduct is the same. That is, why should a member on active-duty who uses a controlled substance receive a worse discharge characterization (or jail time) than a reservist who commits the same offense in civilian status? The answer is found in the fundamental difference between reserve service and active-duty service. As the Secretary of Defense averred in interrogatories for the *Wood* case, “A reservist is primarily a civilian and secondarily a military person. The Military Departments are concerned with his activities as a reservist and not with his activities as a civilian.” 496 F.Supp. at 196. The same philosophy is found in court-martial jurisdiction, wherein an active-duty member’s conduct is subject to the military justice system all day, every day,<sup>4</sup> while a reservist must be engaged in “active service” at the time of the relevant conduct, even if the two members commit the exact same crime. *See, e.g., United States v. Phillips*, 58 M.J. 217 (C.A.A.F. 2003), *cert. denied*, 540 U.S. 880 (2003). Reservists are generally only subject to military standards during periods of active duty, unless non-active-duty conduct has a direct effect on the member’s duties.

Key to the “direct effect” analysis is the identification of the reservist’s assigned duties. This illuminates the significance of the distinction between a member being unable to report for duty on account of being incarcerated and one being deemed unfit for continued service based upon a civilian conviction. The first case involves a situation of self-incapacitation for duty, while the second turns on a discretionary command decision to relieve the member of his or her duties. In *Wood*, the Secretary of Defense explained,

If a reservist is sentenced to imprisonment for certain criminal acts, committed while in civilian status, which preclude him from attending required training or which significantly affect his qualifications for military service, he will be discharged administratively. In this event, discharge is based on the reservist’s non-attendance and failure to perform which, in turn, result in his failure to maintain his military proficiency. Thus discharge is based on his unsatisfactory military performance and his unavailability for military service in case of a need for his service on active duty. 496 F.Supp. at 196.

Another reason the administrative discharge process seems to be a poor fit for serious criminal misconduct resulting in incarceration is the availability of another, perhaps more fitting remedy:

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<sup>4</sup> At least since the Supreme Court overruled the 1969 case of *O’Callahan v. Parker* in *Solario v. United States*, 483 U.S. 435 (1987).

dropping the member from the rolls.<sup>5</sup> This action is appropriate in cases of members who are convicted by civilian courts and sentenced to a period of confinement. Although rare, there is OpJAGAF precedent for such an action: ANG member sentenced to five years' confinement for sale of cocaine dropped from the rolls (1989/86); reservist sentenced to four months for misapplying bank funds (1990/26); reservist sentenced to five years for reckless homicide (1994/32); reservist sentenced to five years for sexual offenses upon a child (1998/82); officer sentenced to 30 years for attempted murder (2005/40). When a member's absence is due to incarceration in a civilian penal institution, we recommend consideration of dropping the member from the rolls rather than initiating administrative discharge proceedings.

Turning to the applicability of the *Wood* standards, which have been incorporated in DoDI 1332.14, CFR § 70.9, AFI 36-3209, and the relevant regulations from the other Services, a general discharge must be based upon conduct that has had an adverse impact on the overall effectiveness of the military, including military morale and efficiency. Based upon *Wood* and the historical application of the general discharge standard, "overall effectiveness" of the military includes indirect impacts on the military in general, such as the member's inability to perform his or her job due to the Service's decision to remove him or her from those duties (OpJAGAF 2003/28, 2004/5) conduct which tends to lower morale (OpJAGAF 2000/17), unintentionally rendering another service member unable to perform his or her military duties (OpJAGAF 1997/8), receiving a felony conviction (*Roelofs*, "the military has an overall interest, in terms of morale and efficiency, in insisting on a corps of servicemen who abstain from serious criminal activity") and bringing discredit upon the Service (*Snakenberg*). A UOTHC requires a finding of a direct effect on the member's performance of his or her duties. AFI 36-3209, paras. A2.2.3.1 and A2.2.3.2, states that a member who misses required training due to his or her misconduct can trigger the possibility of receiving a UOTHC for non-active-duty conduct.<sup>6</sup> However, simply reading these paragraphs to authorize a UOTHC for missing training ignores the following paragraph, A2.2.4, which explains that a UOTHC is appropriate in cases of serious misconduct. In order to give meaning to both provisions in the AFI, and to harmonize the AFI with case law and DoD regulations, a UOTHC requires showing both serious misconduct and a direct effect on military duties.<sup>7</sup> With respect to a direct effect on military duties, the member must be under a requirement to perform a particular duty. Thus, situations in which the Service has decided to remove the member from his or her duties typically serve to relieve the member of his or her duties, making them unavailable for the "direct effect" analysis. Command action cannot create the "direct effect," since the discharge action – by definition – is designed to remove the service member from their duties (indeed, from the entire service), thereby rendering the *Wood* criteria

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<sup>5</sup> This is authorized for active-duty enlisted (AFI 36-3208, para. 6.48); active-duty officers (AFI 36-3207, Ch. 4); and reserve officers and enlisted (AFI 36-3209, paras. 2.3.6.6 and 3.26, respectively).

<sup>6</sup> Interestingly, the Naval Personnel Manual contained a provision effective for at least two years in the 1990s that provided the example of "incarceration, prohibiting a member from participation in drills or being mobilized" as an example of a "direct effect," but that provision has since been removed.

<sup>7</sup> We find it difficult to conceive of a scenario in which a reservist simply missing training, without some degree of aggravating or unique circumstances, would warrant a UOTHC discharge.

meaningless. In other words, there must be a causal relationship between the misconduct and the poor duty performance as explained in *Gay Veterans*. It is also important to keep in mind that the member must actually miss duties and not just be in a situation where they *might* miss duties in the event that they happened to be called up (as was the case of the inactive reservists in *Wood*).

**Example Scenarios:** In order to further illuminate our view on this issue, we provide the following illustrations of how conduct in the civilian community plays into discharge characterizations:

Criminal conviction with no direct effect on member's duties. While not on active duty for training or otherwise on duty, a reservist commits an offense and is convicted in civilian court; he neither misses training nor any assigned duties. Administrative discharge is authorized under AFI 36-3209, para. 2.36, conviction by civil authorities. Because the conviction reflects poorly on the Air Force, and the Air Force has an interest in maintaining a corps of law-abiding members, the conviction has an adverse impact on military effectiveness, morale and efficiency. An honorable or general discharge is permissible.

Criminal conviction resulting in missed duties due to command directive. While not on active duty for training or otherwise on duty, a reservist commits an offense and is convicted in civilian court; his command orders him to stop participating in scheduled training. Administrative discharge is authorized under AFI 36-3209, para. 2.36. Because the conviction reflects poorly on the Air Force, and the Air Force has an interest in maintaining a corps of law-abiding members, the conviction has an adverse impact on military effectiveness, morale and efficiency. The member's command, however, has relieved the member of his duties, so there are no duties for the conviction to directly effect. An honorable or general discharge is permissible.

Criminal conviction resulting in missed training, but no assigned duties, due to incarceration. While not on active duty for training or otherwise on duty, a reservist commits an offense and is convicted in civilian court; the reservist misses inactive duty training or annual training, but has not been directed to perform any specific duties during those training days. Administrative discharge is authorized under AFI 36-3209, para. 2.36, and/or para. 2.24, unsatisfactory participation. Because the conviction reflects poorly on the Air Force, and the Air Force has an interest in maintaining a corps of law-abiding members, the conviction has an adverse impact on military effectiveness, morale and efficiency. The member's failure to participate in training similarly negatively impacts military effectiveness, morale and efficiency. The member, however, does not have any specific duties for the conviction to directly effect. The typical outcome of unsatisfactory participation is a "bad year" impacting the member's retirement benefits or administrative discharge. An honorable or general discharge is permissible.

Criminal conviction resulting in a direct adverse effect on assigned duties. While not on active duty for training or otherwise on duty, a reservist commits an offense and is convicted in civilian court; the reservist is under orders to perform specific duties which the reservist fails to perform because of the conviction. The reservist's leadership can show an adverse impact on those duties (e.g., they didn't get accomplished, thereby impeding the unit's mission). Administrative discharge is authorized under AFI 36-3209, para. 2.36, and/or para. 2.24, unsatisfactory



participation. If the conviction is for an offense rising to the level of seriousness warranting a UOTHC and the impact on the unit is more than an impact on military effectiveness, morale and discipline, then the discharge may be characterized as honorable, general or UOTHC.

Conclusion: If a military member's conduct in the civilian community directly affects his or her ability to perform required military duties, those facts may be used to characterize the member's service as UOTHC, as long as: 1) AFI 36-3209 authorizes a UOTHC characterization for the particular grounds for discharge being pursued, 2) the conduct in the civilian community rises to the level of seriousness warranting a UOTHC, 3) the conduct had a direct effect on the member's performance of the member's required military duties, and 4) that effect is more severe than simply an adverse impact on the effectiveness of the Air Force, military morale and military discipline.

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