

JUDGE ADVOCATES/PROFESSIONAL RESPONSIBILITY

The Air Force as Client for Air National Guard Judge Advocates

This is in response to a request for guidance on determining when the Air Force is a client for Air National Guard (ANG) judge advocates providing legal advice in a military status.

Background

In a complaint investigated by The Inspector General's Senior Official Inquiries Directorate (SAF/IGS), an ANG lieutenant colonel alleged that he was incorrectly placed in excess status and improperly discharged by two senior officers in his unit. The complainant was placed in excess status pursuant to ANG Instruction (ANGI) 36-2101, *Assignments Within the Air National Guard*, using the Form NGB 36-11, *Statement of Understanding – Excess/Overgrade Condition*. A personnel office within the National Guard Bureau approved the action. The order that discharged the complainant from the state ANG and Reserve of the Air Force cited Air Force Instruction (AFI) 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, as authority for the discharge and was done as a Special Order of the Departments of the Army and the Air Force, Joint Force Headquarters-Wyoming.

When the subject colonel was interviewed, she testified that she worked with an ANG judge advocate (JAG) on how to place the complainant in excess status. Neither the subject colonel nor the subject brigadier general testified as to what legal advice, if any, was provided on the discharge action.

As standard practice, the Investigating Officer (IO) contacted the JAG named by the subject colonel to determine what, if anything, he knew about the matters under investigation. The JAG confirmed that he did have knowledge of the matter. When the IO asked about the JAG's availability to schedule a formal witness interview, the JAG declined to be interviewed, stating the following:

Rule 1.6 of the Air Force Rules of Professional Conduct states "a lawyer shall not reveal information relating to representation of a client unless the client consents."
I am an ANG member, and my client is the state Military Department.
Without explicit consent from my client, I cannot reveal information concerning this matter. [The Adjutant General was subsequently briefed that the attorney-client privilege applied and refused to waive it.]

The JAG is employed full-time as an Active Guard Reserve (AGR). The AGR program was created under Title 10, United States Code; is authorized by Title 32, United States Code; and is implemented by ANGI 36-101, *Air National Guard Active Guard Reserve (AGR) Program*. Generally, National Guard AGRs are in Title 32 duty status.

Analysis

It has been established that SAF/IG authority extends to investigating allegations of misconduct by ANG personnel. See OpJAGAF 1998/65, 10 Jun 98, Air National Guard, *Authority to Investigate Misconduct by State Adjutants General and Other Air National Guard Members*. This authority is premised on the responsibility and authority of the Secretary of the Air Force for “all affairs of the Department of the Air Force” pursuant to Title 10, United States Code, Section 8013. Under Section 8020, SAF/IG’s authority covers the Air Force, including “the Air National Guard of the United States [ANGUS], the Air National Guard while in the service of the United States, and the Air Force Reserve.” 10 U.S.C. Sec. 8062(d). As succinctly put in OpJAGAF 1998/65, “ANG members, although they only exercise one status at a time [ANG of the State or ANGUS], effectively hold a dual status.” OpJAGAF 1998/65 also explains how and why Air Force regulations govern the ANG not in active Federal service.

The Air Force funds ANG activities under Title 32, United States Code for the purpose of training according to the standards prescribed by Congress and in conformity with the training of the Air Force. United States Constitution, Art. 1, Sec. 8; 32 U.S.C. Sec. 501. While ANG personnel in Title 32 status remain under the command and control of the state’s governor for operational purposes, operational command alone is not determinative of the applicability of Air Force standards in administering the ANG to maintain it as a Reserve Component of the Air Force. The actions being investigated in this case directly relate to administration of the ANG in accordance with federal laws and regulations to ensure that the ANG organization meets Air Force standards when called into active service as a Reserve Component of the Air Force.

The Air Force Rules of Professional Conduct, or Attachment 1 to TJAG Policy Memorandum: TJAGC Standard-2 (TJS-2), apply to ANG JAGs based on their designation as Air Force JAGs. Applicability does not depend on whether a JAG is in Title 10 or Title 32 status. As TJS-2 states, the Air Force Rules of Professional Conduct “apply to all military and civilian lawyers, paralegals, and nonlawyer assistants in The Judge Advocate General’s Corps (TJAGC).” TJS-2, para. 3. As the JAG in question cited the Air Force Rules of Professional Conduct, he presumably does not contest their applicability. The JAG correctly cited Rule 1.6 as the rule addressing confidentiality of information, or the attorney-client privilege. However, he incorrectly interpreted Rule 1.6 when he failed to account for Rule 1.13.

Rule 1.13, The Air Force as Client, states the following:

Except when authorized to represent an individual client or the government of the United States, an Air Force judge advocate or other Air Force lawyer represents the Department of the Air Force acting through its authorized officials.

The Discussion of Rule 1.13 explains as follows:

With limited exceptions [e.g., as defense counsel or legal assistance attorney], an Air Force lawyer represents the Department of the Air Force as it acts through its authorized representatives ... In representing the Air Force, counsel serves his or her client by interacting with Air Force officials, members, and employees. When

an Air Force official, member, or employee, acting within the scope of his or her official duties, communicates with an Air Force lawyer, the communication is confidential under Rule 1.6. Under these circumstances, the official, member or employee is, in essence, the Air Force ... When Air Force interests are or become adverse to those of an individual authorized to act on behalf of the Air Force, the lawyer must advise the individual concerning the conflict. In such circumstances, the advice should explain that the lawyer cannot represent the individual ... Care must be taken to ensure that the individual understands that when interests conflict, the Air Force lawyer represents the Air Force, not the individual, and discussions between the lawyer and the individual may not be privileged ...

The Discussion of Rule 1.13 demonstrates that the default position is that the Air Force is the client of the Air Force lawyer unless the lawyer is acting as a defense counsel or legal assistance attorney. The JAG in this case did not argue that one or both investigation subjects are his clients and thus his client communications are confidential. The JAG in this case did argue that his client is the state military department. However, as discussed below, the investigation is examining the subjects' exercise of authorities granted to them through the Air Force and ANG, not authorities derived from the state military department.

The Rules and Standards of Professional Conduct for Air Reserve Component Judge Advocates are provided in TJAG Policy Memorandum: Air Reserve Component-1 (ARC-1). ARC-1 applies to ANG JAGs "not in Federal service," or not in Title 10 status. [Note: this opinion does not address the fact that this limitation of "Federal service" to Title 10 status is inconsistent with other instances of including Title 32 status as "Federal service."] Rules 4, 5, 6, and 7 of ARC-1 address the situation when an ANG JAG in his civilian capacity represents or previously represented a client other than the Air Force, National Guard, or state military department. That is not the instant situation, as the JAG in question is a full-time AGR not engaged in practice in a civilian capacity.

Potential client conflicts were contemplated by the drafters of ARC-1. Rule 12 of ARC-1, Potential State/Federal Conflict, specifically addresses the instant situation and states:

An ANG judge advocate may represent both the state in which he or she serves as a member of the ANG and the Air Force when the state and federal interests coincide. In the event of divergent interests, the ANG judge advocate should represent his or her state. [There is no Discussion of Rule 12.]

In the instant case, state and federal interests coincide or are not divergent. More accurately, there are no separate state interests at stake and therefore no state interests that may possibly diverge. The investigation is an Air Force investigation of ANG subjects acting in their ANG capacities as an ANG commander and ANG staff member and performing their ANG duties pursuant to ANG authorities. Those ANG duties involve two ANG personnel actions – excess status pursuant to ANGI 36-2101 and discharge from the ANG and Reserve of the Air Force pursuant to AFI 36-3209 and a Special Order of the Departments of the Army and the Air Force, Joint Force Headquarters-Wyoming. Any legal advice provided by the JAG in question was provided in his capacity as an ANG lawyer about an ANG matter.

The only “state interests” here concern the qualification for funding under Title 32, United States Code, to train according to the standards prescribed by Congress and the Air Force as stipulated in applicable AFIs and ANGIs. At no point did the state or state military department have separate state-only interests involved. Neither the subjects under investigation nor the JAG were acting in a state capacity using duty titles of the state military department. Similarly, the actions being investigated were not taken relying on authorities granted by the state military department. Instead, the entire situation rests on administration of the ANG in accordance with Air Force standards found in the applicable regulations referenced above. Accordingly, the entire situation falls under the purview of the Air Force and is subject to investigation by SAF/IGS as an Air Force matter.

It follows that, with no state interests, divergent or otherwise, the JAG in question was operating as an Air Force lawyer with his client being the Air Force, including the ANG. There is no conflict of interest or attorney-client privilege to bar the Air Force investigator from learning what legal advice, if any, was provided to the client, as the client was, in essence, the Air Force.

Conclusion

In summary, the ANG JAG in the instant case was operating in an ANG capacity and providing legal advice on strictly ANG matters, those being ANG personnel actions. The federal and state interests here are the same: to ensure that the Wyoming ANG is operating in accordance with Air Force standards as it administers the Wyoming ANG as a Reserve Component using federal funds. To find otherwise would imply that the Wyoming ANG is not required to administer its force in accordance with Air Force standards, even while using Title 32, United States Code funds provided for this purpose by the Air Force. The JAG in question was operating as an Air Force lawyer with his client being the Air Force. There were no state interests posing a conflict and requiring the JAG to represent the state instead of the Air Force. The JAG did not represent either subject in a personal capacity. The JAG’s reliance on the Air Force Rules of Professional Conduct clearly acknowledges that the Rules apply to him in this case, and the situation must be evaluated in light of the standards set by the Rules. Under those standards, client confidentiality and the attorney-client privilege do not act as an absolute prohibition on an Air Force investigator learning what legal advice was provided on an Air Force matter from an Air Force lawyer to an individual representing the Air Force as client, with “Air Force” incorporating the ANG. Furthermore, no blanket prohibition exists, even when the lawyer and individual are not on Title 10 active duty orders and when the lawyer and individual might have positions, duties, and responsibilities originating with the state military department.

The Air National Guard Assistant to The Judge Advocate General concurs in this opinion.