OpJAGAF 2018/12, 25 July 2018, **RECOUPMENT OF EDUCATIONAL BENEFITS**

This is in response to your question whether a graduate of the United States Air Force Academy (USAFA), who is being separated as not medically qualified for retention while enrolled in medical school through the Armed Forces Health Professions Scholarship Program (HPSP), is subject to recoupment of educational benefits received during time enrolled in both USAFA and medical school (through HPSP).

Factual Background

For purposes of this opinion, the member was a cadet at USAFA from 2010-2014, earning selection into HPSP upon graduation to attend medical school from 2014 to an anticipated graduation in May 2018. The member commissioned as a second lieutenant upon graduation from USAFA, but was placed into the Individual Ready Reserve (IRR) as part of being accepted into HPSP. The member also signed a standard contract when entering HPSP, agreeing that she would "repay to the United States an amount equal to the unearned portion of any benefit under [HPSP] and reimburse the Air Force for all costs it incurred as determined by the Secretary of the Air Force." She also acknowledged that her active duty service commitment (ADSC) from her USAFA attendance (five years) would be served consecutively with her HPSP commitment (four years), and that "[i]f I am relieved of an ADSC by reason of my separation for any reason, including a physical disability, the AF may initiate discharge and recoupment action as appropriate, in accordance with 37 USC 303a(e)."

The member was diagnosed with a serious medical condition which unfortunately did not respond to treatment. Thus, in her third year of medical school, the Air Force Personnel Center found that the condition rendered her not medically qualified for retention. Command then initiated discharge for "physical disqualification" pursuant to AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, 20 Sep 11, para 2.16.

Standards

Each cadet at a Service academy signs an agreement promising to "complete the course of instruction," and upon graduation to accept (if tendered) an appointment as a commissioned officer, with an active-duty service commitment of at least five years. *See* 10 U.S.C. §9348(a)(2). Title 37, United States Code, Section 303a(e) provides authority for a Service Secretary to require repayment of educational benefits from a member who fails to complete his or her term of service:

> [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 and may not receive any unpaid amounts of the bonus or similar benefit after the member fails to satisfy the 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 interests of the United States.[1]

Likewise, 10 U.S.C. §2005 provides the Service Secretaries with the authority to require a member receiving advanced education assistance to enter into a written agreement providing for a commitment to extend his or her ADSC, as well as acknowledgement of potential recoupment under §303a(e).[2] Thus, generally, these statutory provisions require a member who receives educational benefits and stipends conditioned upon the fulfillment of specified service requirements to repay the United States any unearned portion of the benefit if that member fails to satisfy the service requirements.

The Department of Defense (DoD) Financial Management Regulation [FMR] 7000.14-R, Volume 7A, Chapter 2, *Repayment of Unearned Portion of Bonuses and Other Benefits*, July 2016, paragraph 020101, implements the recoupment process within DoD for these educational benefits. In so doing, the FMR 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," and then references the circumstances and specific Rules detailed in Table 2.1 for application of that general rule. *See* FMR, Volume 7A, Chapter 2, paragraph 020303 and Table 2.1.

Under FMR Rule 3, when the member "[i]ncurs an injury or illness, through no misconduct of the member, that precludes the member from fulfilling the service conditions specified in the written agreement," and is "separated … for medical reasons as a result of injury or illness," the presumption is that there will <u>not</u> be recoupment, "unless the Secretary of the Military Department concerned determines that repayment of the unearned portion is appropriate due to a personnel policy or management objective, equity or good conscience, or it is in the best interest of the United States."[3]

For cadets and midshipman, however, Department of Defense Instruction 1332.22, *Service Academies*, 24 Sep 15, para 6f(9a), provides a much more definitive recoupment forgiveness for educational benefits in cases where separation is the result of medical issues: "[p]ersons separated

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[1] 37 U.S.C. §303a(1)(A). Section 303a(5) defines "bonus or similar benefit" to include "educational benefit or stipend." There are exceptions (para (2) and (3)), but they relate to "sole survivorship discharge" and "combat-related disability," respectively, not relevant to this opinion.

[2] 10 U.S.C. §2005(d): "In addition to the requirements of paragraphs (1) through (4) of such subsection, the agreement shall specify that, if the person does not complete the education requirements specified in the agreement or does not fulfill any term or condition prescribed pursuant to paragraph (4) of such subsection, the person shall be subject to the repayment provisions of section 303a(e) …."

[3] If the member were to tender a resignation after being notified of discharge for "physical disqualification" under AFI 36-3209, para 2.16, then FMR Rule 9 would reverse the presumption. In other words, when the member "does not fulfill the service conditions for the pay or benefit under any other circumstances," then the presumption is that there <u>will</u> be recoupment, again "unless the Secretary of the Military Department concerned, at some point in the process makes a case-by-case determination that to require repayment of an unearned portion of the benefit would be contrary to a personnel policy or management objective, equity or good conscience, or it is in the best interest of the United States."

for being medically disqualified from further Military Service will be separated and will not be obligated for further Military Service or for reimbursing education costs …."

Headquarters United States Air Force Academy Instruction (USAFAI) 36-3504, *Disenrollment of United States Air Force Academy Cadets*, 7 Jul 17, para 5.2. implements this for USAFA by providing that a disqualifying medical condition that results in a cadet leaving USAFA early results in forgiveness of educational benefits:

> In accordance with DoDI 1322.22, paragraph 6f(9a), cadets separated as a result of being found medically disqualified for further military service, not due to the cadet's misconduct, shall be separated and shall not be obligated further for Military Service or for reimbursing education costs (absent evidence of fraud, concealment, gross negligence, intentional misconduct, or misrepresentation).[4]

But once a cadet graduates, they accept an appointment as a commissioned officer and incur at least a five-year ADSC. *See* 10 U.S.C. §9348(a)(2). They are no longer "cadets" falling under the definitive-forgiveness sanctuary of USAFAI 36-3504 for medical disqualification, as that Instruction applies specifically only when they are in "cadet" status.[5] Rather, they are then a commissioned officer for whom recoupment, and forgiveness thereof, is guided by the application of 37 U.S.C. §303a(e), 10 USC §2005, and the FMR.

Analysis

If a person is a fourth-year cadet when the disqualifying medical condition is discovered, he or she **would be** safe from recoupment of educational benefits as a result of the definitive-forgiveness sanctuary of DoDI 1322.22 and USAFAI 36-3504 (and could be "permitted to complete the academic course of instruction with award of an academic credential without commission" under the same authorities).

But if a member were to have graduated USAFA, been commissioned for one, or two, or three or more years, and in IRR status in HPSP when the disqualifying medical condition was discovered, he or she **could be** safe from recoupment of USAFA educational benefits as a result the discretion provided by 37 U.S.C. §303a(e) and the FMR. Absent some unusual circumstance, the presumption against recoupment of FMR Rule 3 would likely push a normal case closer to a determination of no or reduced recoupment of educational benefits, at least for USAFA time.

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[4] Additionally, USAFAI 36-3504, para 28.2.1.1.: "According to DoDI 1322.22, *Service Academies*, paragraph 6f(9c) cadets who become medically disqualified for appointment (including pregnancy) as a commissioned officer during their senior year, who otherwise would be qualified to complete the course of instruction and be appointed as a commissioned officer, and who are capable of completing the academic course of instruction with their peers, may be permitted to complete the academic course of instruction with award of an academic credential without commission."

[5] *See* USAFI 36-3504, *Preamble* ("This instruction … provid[es] direction for administratively disenrolling, transferring, and discharging cadets from the United States (US) Air Force Academy, for those cadets who do not satisfy the conditions of enrollment and/or commissioning."); para 1 ("The purpose of this instruction is to provide procedural guidance to address the disposition of cadets who fail to meet United States Air Force Academy standards."); para 6.1; Atch 1, *Terms* ("**Graduate**—One who satisfactorily completes academic, aptitude, conduct, athletic, and military training requirements and receives a degree.").

On the fact pattern presented here, if properly notified of the potential, the member is subject to recoupment for unearned portions of her USAFA and HPSP commitments, just as she agreed in her HSPS contract. Because her illness renders her "physically disqualified," precluding her from fulfilling her service commitments, and she is being "separated … for medical reasons as a result of injury or illness," the presumption is that there will not be recoupment. *See* FMR Rule 3. To overcome this presumption, the Secretary (here the Personnel Council) will have to find that considerations of "equity or good conscience, or [what] is in the best interest of the United States" necessitate recoupment, either in part or for the entirety of educational benefits previously accrued.[6]

Disability and IRR versus Active-Duty Status: If the member were on active duty, not in the IRR, then the result might be different in cases where the medical condition resulted in disability as opposed to physical disqualification. FMR Rule 2 provides that in cases where the member "[i]ncurs an injury or illness, through no misconduct of the member, that precludes the member from fulfilling the service conditions specified in the written agreement," and is "separated or retired for disability under 10 U.S.C. Chapter 61," then there would be no recoupment of educational benefits. A member who is in the IRR, and thus not eligible for basic pay, is not eligible for retirement or separation for disability under Chapter 61. *See* 10 U.S.C. §1203; 10 U.S.C. §10144(b)(4)(members in the IRR are not eligible to basic pay). Interestingly, USAFA cadets are eligible under Chapter 61. *See* 10 U.S.C. §1217.

Thus, for individuals in different statuses suffering the same medical disability, the results as to recoupment can be substantially different, and to the detriment of the individual in the IRR. For the cadet, they would not be subject to recoupment under DoDI 1322.22, USAFAI 36-3504, and 10 U.S.C. §1217. Likewise, for the active-duty member, they would not be subject to recoupment under 10 U.S.C. Chapter 61 and FMR Rule 2. But for the member in HPSP and IRR, because they are not eligible under 10 U.S.C. Chapter 61 and FMR Rule 2, they are subject to recoupment under FMR Rule 3. This may not seem fair, but it is the result dictated by a plain reading of the various authorities.[7]

But this does not mean that the member in HPSP and IRR will have to necessarily repay educational benefits incurred while attending both USAFA and medical school (HPSP). They are only "subject to" this recoupment. Certainly the Personnel Council can and should take all circumstances into account when determining whether recoupment is equitable--whether "equity or good conscience" or "the best interest of the United States" require recoupment in a specific instance. The Council should consider circumstances, among others, such as disparate impact on similarly-situated individuals, the member's ability to secure gainful civilian employment given

[6] Though "personnel policy or management objective" is also a consideration, that consideration appears subsumed by the application of the presumption for or against recoupment laid out in the FMR and discussed above.

[7] In the similar context of statutory construction, the Supreme Court has long held that interpretation necessarily begins and may end "with the language of the statute itself. … If 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.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S. Ct. 2297, 85 L. Ed. 2d 692 (1985)); *see also State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 699 (1st Cir. 1994) ("In the game of statutory interpretation, statutory language is the ultimate trump card.").

the disqualifying medical condition, the earning potential in the career field related to the awarded degrees, the member's personal and family situation, the length and quality of the member's service as a cadet or while on active-duty, and the failure, if any, of Air Force medical personnel to diagnosis the disqualifying condition in a timely fashion. Given the presumption against recoupment detailed in FMR Rule 3, and lacking any unusual circumstances, recoupment will not likely be the outcome in most cases.

Conclusion

A graduate of USAFA, commissioned but placed in IRR status, who is being separated as not medically qualified for retention while enrolled in medical school through HPSP, is subject to recoupment of educational benefits received during time enrolled in both USAFA and medical school (HPSP). Though in the normal case such recoupment is not the likely outcome, it is a possible one dependent on the factors discussed above.

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