

## AIR NATIONAL GUARD

### Authority to Impose Administrative Action against State Adjutants General and other Air National Guard (ANG) officers

This is in response to your request for our opinion as to whether, and to what extent, you have the authority to take administrative actions against State adjutants general (TAGs) and other Air National Guard (ANG) general officers. As discussed below, the Secretary of the Air Force (SECAF) has the authority to investigate ANG general officers<sup>1</sup> and impose administrative disciplinary actions against ANG general officers if a federal military nexus exists between substantiated misconduct by said officer and federal military standards. Because SECAF has delegated this authority to dispose of substantiated misconduct by ANG general officers to you,<sup>2</sup> we find that it is legally permissible for you to impose administrative disciplinary actions against ANG general officers.<sup>3</sup> SAF/GC and NGB/JA have reviewed and concur with this opinion.

**Law/Analysis:** The ANG is defined as "that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that -- (A) is an air force; (B) is trained, and has its officers appointed, under the 16th clause of Section 8, Article I, of the Constitution; (C) is organized, armed, and equipped wholly or partly at federal expense; and (D) is federally recognized."<sup>4</sup> When called to federal service, ANG members are part of the Air National Guard of the United States (ANGUS), one of the Air Force's two reserve components.<sup>5</sup> ANG members serve in three separate duty statuses: State Active Duty (SAD), Title 10, and Title 32.<sup>6</sup> When an ANG member is in SAD, the duty is purely a state function. When an ANG member is in Title 10 active duty status, the duty is purely federal service and the member is typically relieved of all National Guard duty.<sup>7</sup> Finally, when an ANG member is in Title 32 status, the duty is a mixture of federal and state service; training and other regulatory

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<sup>1</sup> 32 U.S.C. § 105 (...the Secretary of the [Air Force] shall have an inspection made by inspectors general...to determine whether—(3) the members of the [Air] National Guard meet prescribed physical and other qualifications).

<sup>2</sup> SecAF Memo to the Vice Chief of Staff, dated 26 July 2012, Subject: Authority to Take Administrative Disciplinary Action Against Air National Guard Officers, "I delegate, through the Chief of Staff of the Air Force, to the Vice Chief of Staff of the Air Force, the authority to take administrative disciplinary action against Air National Guard (ANG) officers, above the grade of colonel, where there is a nexus between substantiated adverse information against the Officer and the exercise of Federal authority by the officer. If any question arises in particular case as to whether there is an adequate nexus between the adverse information and the exercise of Federal authority, SAF/GC and AF/JA should be consulted." Signed Michael B. Donley

<sup>3</sup> Chief, National Guard Bureau Memo to SecAF, dated 1 August 2011, Subject: Air National Guard Disciplinary, "Request authority be given to the Vice Chief of Staff of the Air Force to discipline Air National Guard officers, above the grade of colonel, who have substantiated adverse [conduct]. As you know, T-32 Air National Guard general officer disciplinary matters are typically referred to the Adjutant General or Governor for resolution. However, recent events have highlighted the growing need to withhold Air National Guard adverse administrative authority to the Vice Chief of Staff level rather than at the state level for misconduct. The current paradigm does not yield uniform results across the Nation nor does it ensure that disciplinary actions are consistent with Air Force values. Army policy entrusts the Vice Chief of Staff to handle disciplinary matters for Army National Guard general officers on T-32. This method ensures the Vice Chief has oversight on disciplinary actions affecting senior Army officers in the Active, National Guard and Reserve components. I am familiar with both the Army and Air procedures and I am convinced that the Army system yields far more consistent and appropriate results." Signed Craig R. McKinley, General, USAF, Chief, National Guard Bureau.

<sup>4</sup> 32 U.S.C. § 101(6). For ease of reference, this opinion will collectively refer to the several States and Territories, Puerto Rico and the District of Columbia as the "States" and their leaders as "Governors".

<sup>5</sup> 32 U.S.C. § 101(7). See also 10 U.S.C. 10111.

<sup>6</sup> See DoDD 5105.83, *National Guard Joint Force Headquarters*, 5 January 2001 (Glossary); accord *Air National Guard Commander's Legal Deskbook*, 2 February 2013, 11-5, p. 1.

<sup>7</sup> 32 U.S.C. § 325(a).

standards are set by SECAF and funding is provided by the federal government.<sup>8</sup> The ANG member in Title 32 status reports to the Governor, but may also perform specified federal missions.<sup>9</sup>

All ANG officers (including TAGs and ATAGs) are appointed by their respective states. That appointment authority arises from various federal statutes which provide for appointment of ANG officers (including TAGs and ATAGs) as commissioned officers in the Reserve of the Air Force in the grade in which they are federally recognized.<sup>10</sup>

It is important to note, however, that an ANG member is not guaranteed federal recognition. A Federal Recognition Board must be convened pursuant to 32 U.S.C. § 307 to examine the officer's qualifications and determine the officer's eligibility for federal recognition. Federal Recognition Boards are further required to certify that officers recommended for federal recognition, including those who had adverse information furnished to the board, meet the exemplary conduct requirements of 10 U.S.C. § 8583.<sup>11</sup> The term "federal recognition" means an acknowledgment by the federal government that an officer appointed or promoted in the ANG meets the prescribed federal standards for the grade and position to which appointed or promoted by the State. Finally, federal recognition is not granted until nominations have been approved by the President and, if necessary, confirmed by the Senate.<sup>12</sup>

The promotion of officers in the ANG is a function of the State. However, an ANG officer's promotion by the State must also be "federally recognized" in order for the officer to be appointed in the next higher grade in the Reserve of the Air Force.<sup>13</sup> While Regular Air Force and Air Force Reserve promotions are governed by Title 10, United States Code, and require Presidential action to deny promotion to an officer favorably recommended for promotion by a selection board, denial of federal recognition and thus Reserve of the Air Force promotion of ANG officers do not. Accordingly, SECAF has discretion, even after Senate confirmation, to refuse to extend federal recognition to an ANG officer when it is in the best interest of the Air Force.<sup>14</sup> Indeed, even after approving federal recognition, the SECAF can revoke it for cause.<sup>15</sup> Additionally, whenever a member of the ANG ceases to be a member of a federally recognized unit or organization of the ANG, their federal recognition shall be withdrawn.<sup>16</sup> Furthermore, SECAF has the authority to delay or remove an ANG member from a list of officers recommended for federal recognition if the member is determined not to be mentally, physically,

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<sup>8</sup> 32 U.S.C. §§ 106, 107, 108, 112, 113, & 502. *See also* DoDD 5105.83.

<sup>9</sup> 32 U.S.C. §§ 109(b) & (c), 112, 328, 502(f), & 709. *See also* 32 U.S.C. § 110 ("The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.") & § 312 (ANG appointment oath swears allegiance to the US Constitution and the Constitution of the State and requires the member to follow the orders of both the President and the Governor).

<sup>10</sup> *See* 32 U.S.C. § 314, 10 U.S.C. 12212, 10 U.S.C. § 12215(b), and OpJAGAF 1998/65, dated 10 June 1998

<sup>11</sup> *See also* ANGI 36-2501, paragraph 1.1.3.

<sup>12</sup> 32 U.S.C. § 308 grants SECAF the authority to temporarily grant federal recognition to a person who has been recommended for federal recognition by a federal recognition board and is pending appointment as a reserve officer of the Air Force.

<sup>13</sup> *See* 10 U.S.C. § 12212(a) ("Upon being federally recognized, an officer of the Air National Guard shall be appointed as a Reserve for service as a member of the Air National Guard of the United States in the grade that he holds in the Air National Guard.").

<sup>14</sup> ANGI 36-2501, paragraphs 1.1.4, 3.5.4, 3.5.4.1.

<sup>15</sup> *See* 32 U.S.C. § 323(b).

<sup>16</sup> *See* 32 U.S.C. § 323(a), Withdrawal of Federal Recognition; 10 U.S.C. § 14314, Army & AF commissioned officers: generals ceasing to occupy positions commensurate with grade; State adjutants general. *See also* 10 U.S.C. 10503(8).

morally, or professionally qualified for promotion.<sup>17</sup> The President may also vacate an ANG officer's promotion to the grade of brigadier general in the Reserve of the Air Force, to include the promotion of officers serving as TAGs or Assistant TAGs.<sup>18</sup>

DoD directives and Air Force instructions recognize the statutory authority of SECAF to regulate ANG activities in general, to inspect ANG units and personnel, and to investigate allegations of misconduct by ANG personnel.<sup>19</sup> Therefore, service in the ANG is subject to the general regulatory and investigative authority of SECAF and SAF/IG.<sup>20</sup> Regardless of an officer's duty status at the time of any violation of federal law or federal military regulation, all officers of the ANG, with rare exception, are federally recognized in some grade. Accordingly, membership in the ANGUS as a Reserve of the Air Force officer is maintained at all times, even if an ANG officer is not serving in a Title 10 or 32 duty status.<sup>21</sup>

SECAF and SAF/IG's authority to investigate allegations and take action on substantiated allegations of misconduct by ANG officer personnel also stems from a combination of statutory and regulatory sources of authority. Pursuant to 10 U.S.C. §§ 8013(b) and 8013(g)(3), SECAF is "responsible for, and has the authority necessary to conduct, all affairs of the Department of the Air Force" and may "prescribe regulations" necessary to carry out that responsibility. That broad authority necessarily includes the power to prescribe regulations governing IG investigations of allegations of misconduct by "Air Force" personnel and when appropriate, take action on substantiated allegations of misconduct.<sup>22</sup> The Army, likewise, utilizes this statutory authority to give the Secretary of the Army, and in turn, Vice Chief of Staff of the Army, the authority to take administrative actions against Army National Guard of the United States officers for substantiated misconduct.<sup>23</sup>

SECAF's authority over an ANG officer's grade also extends to a member's retirement. When ANG officers retire, SECAF determines their highest grade satisfactorily held.<sup>24</sup> The term, "satisfactorily held" is not susceptible to a precise definition because it is ultimately a subjective determination reserved for SECAF (10 U.S.C. § 1370(d)).<sup>25</sup>

SECAF's authority to take appropriate administrative action against ANG officer personnel should not be confused with the SECAF's authority to take Uniform Code of Military Justice (UCMJ) action, which is more limited. One of the distinguishing features of the ANG from the Regular Air Force and Air Force Reserve is that, while ANG officers and other ANG members

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<sup>17</sup> ANGI 36-2504, paragraph 4.5.1.

<sup>18</sup> See 10 U.S.C. § 14313, Authority to vacate promotions to grade of brigadier general or rear admiral (lower half).

<sup>19</sup> See e.g. 10 U.S.C. §§ 8013 and 10503; 32 U.S.C. § 105; DoDD 5105.77, *National Guard Bureau (NGB)*, May 21, 2008; and Air Force Mission Directive (AFMD) 10, *Organization and Functions of National Guard Bureau*, 10 December 30, 2001.

<sup>20</sup> OpJAGAF 1998/65; see generally GAO Rpt. No. 04-258, *Information on Selected National Guard Management Issues*, December 2003 (surveying inspector general cases and concluding that the "Army National Guard and the Air National Guard have established effective processes for taking action against senior National Guard officers (colonels and generals) involved in misconduct cases"); See also 32 U.S.C. § 105; DoDD 5105.77; and AFMD 10.

<sup>21</sup> In addition, membership in the Reserve of the Air Force continues even after an ANGUS officer retires. See 10 U.S.C. § 12774(a).

<sup>22</sup> Id. See also 10 U.S.C. § 10214 as evidence of SECAF's federal connection and relationship with TAGs; see generally, 32 U.S.C. § 105.

<sup>23</sup> See 10 U.S.C. § 3013, 3034; DA General Order No. 2012-01.

<sup>24</sup> See 10 U.S.C. § 12771 and OpJAGAF 1997/51.

<sup>25</sup> See AFI 36-3203, *Service Retirements*, 8 September 2006.

are performing duty in a SAD or Title 32 status, they are not subject to the UCMJ even where the ANG officer has been "federally recognized."<sup>26</sup> This limitation on SECAF's authority to exercise criminal jurisdiction over an ANG member's actions, however, in no way affects SECAF's IG investigative responsibilities and administrative authorities required to address shortcomings discovered by such investigations.<sup>27</sup> SECAF retains the authority to investigate, take adverse administrative action and withdraw federal recognition when there is a federal nexus.<sup>28</sup> For purposes of substantiated allegations resulting from a SAF/IG investigation, the federal nexus is established when a federally recognized ANG officer violates federal law or federal military standards.

Given the above, we conclude that the federal government's clear and pervasive connection to, funding of, and authority to establish training and other requirements for federally recognized ANG officers empower SECAF to administratively reprimand ANG general officers regardless of their duty status at the time of the offending conduct, up to and including withdrawal of federal recognition.<sup>29</sup> For situations involving ANG officers that are not federally recognized in any grade, each case will have to be reviewed and determined as to whether a sufficient federal nexus exists.

SECAF's authority to take administrative action over ANG officer personnel above the grade of colonel<sup>30</sup> may be, and has been, delegated to you, where there is a nexus between the officer's actions and the exercise of Federal authority by that officer.<sup>31</sup> In order to maintain a clear nexus between the misconduct and federal military standards, any administrative action taken must clearly state that, regardless of the duty status of the officer at the time of the misconduct, the nature of the offense has led you to question the qualifications of that officer as a member of the ANGUS and as a Reserve of the Air Force.

It should be noted, that SECAF's authority to address these cases to ensure consistency and accountability does not deprive the Governor/TAG of their own administrative authority and responsibility over ANG officers and their conduct. There is no "double jeopardy" prohibition to administrative dispositions from both chains of command/lines of authority as one is federal and the other is state. Consequently, an ANG officer may be issued an LOR, LOA, or LOC both by you (exercising SECAF's delegated authority) and the Governor for the same conduct; or you

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<sup>26</sup> UCMJ, Article 2 (10 U.S.C § 802). But even then, federal authorities have some jurisdiction over ANG members because the President and the installation commander may convene general, special and summary courts martial for ANG members when not in Federal service. 32 U.S.C. § 327.

<sup>27</sup> *Accord Air National Guard Commander's Legal Deskbook*, 11-5, p. 2 ("Even though the orders of active Air Force officers to ANG members who are not in federal service are not enforceable by court-martial under the UCMJ, the member may still be subject to administrative action."); *see* 32 U.S.C. § 105.

<sup>28</sup> OpJAGAF 1998/65.

<sup>29</sup> *See* AFMD 1, which states that SECAF is responsible for, and has the authority necessary to conduct all affairs of the Department of the Air Force. *See also*, AFMD 10; and AFI 36-2907 (cited as authority for Letters of Reprimand in *Air National Guard Commander's Legal Deskbook*, 24-5, p. 1. While there is currently no specific ANGI or applicable AFI governing administrative admonitions and reprimands for ANG personnel in SAD or Title 32 status, Commanders and supervisors have inherent authority to issue them. Further, while AFI 36-2907 does not apply to ANG officers in SAD or Title 32 status, it does govern ANG officers who have been federally recognized and, therefore, have a status as reserve commissioned officers).

<sup>30</sup> We have interpreted this delegation to include ANG Colonels who have been selected for promotion to Brigadier General.

<sup>31</sup> 10 U.S.C. §§ 8014 & 8034(c); SECAF Memo, *Authority to Take Administrative Disciplinary Action Against Air National Guard Officers*, 26 July 2012; and AFMD 1.

could issue an LOR and the Governor/TAG could determine that a criminal prosecution under state law was appropriate.<sup>32</sup>

**Conclusion:** Pursuant to the authority delegated to you by SECAF, it is permissible for you to impose administrative disciplinary actions against an ANG general officer, if a federal nexus exists between the officer's ANGUS membership and a violation of law or federal military standards.

OPJAGAF 2014/6 5 August 2014

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<sup>32</sup> *Accord Air National Guard Commander's Legal Deskbook*, 11-5, p. 2.