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*** ARCHIVE MATERIAL ***

*** THIS SECTION IS CURRENT THROUGH THE 102ND CONGRESS, 2ND SESSION ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 59. SEPARATION

10 USCS § 1163 (1992)

§ 1163. Reserve components: members; limitations on separation

(a) An officer of a reserve component who has at least three years of service as a commissioned officer may not be separated from that component without his consent except under an approved recommendation of a board of officers convened by an authority designated by the Secretary concerned, or by the approved sentence of a court–martial. This subsection does not apply to a separation under subsection (b) of this section or under section 1003 of this title [10 USCS § 1003], to a dismissal under section 1161 (a) of this title [10 USCS § 1161(a)], or to a transfer under section 3352 or 8352 of this title [10 USCS § 3352 or 8352].

(b) The President or the Secretary concerned may drop from the rolls of the armed force concerned any Reserve (1) who has been absent without authority for at least three months, or (2) who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court–martial or other military court, and whose sentence has become final.

(c) A member of a reserve component who is separated therefrom for cause, except under subsection (b), is entitled to a discharge under honorable conditions unless—

(1) he is discharged under conditions other than honorable under an approved sentence of a court–martial or under the approved findings of a board of officers convened by an authority designated by the Secretary concerned; or

(2) he consents to a discharge under conditions other than honorable with a waiver of proceedings of a court–martial or a board.

(d) Under regulations to be prescribed by the Secretary concerned, which shall be as uniform as practicable, a member of a reserve component who is on active duty (other than for training) and is within two years of becoming eligible for retired pay or retainer pay under a purely military retirement system, may not be involuntarily released from that duty before he becomes eligible for that pay, unless his release is approved by the Secretary.

HISTORY: (Aug. 10, 1956, ch 1041, § 1, 70A Stat. 89; Sept. 7, 1962, P.L. 87–651, Title I, § 106(a), 76 Stat. 508.)
(As amended Dec. 30, 1987, P.L. 100–224, § 4, 101 Stat. 1538.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

PRIOR LAW AND REVISION:

	1956 Act	
Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1163(a)	50:992(a).	July 9, 1952, ch. 608,
1163(b)	50:992(b).	Sec. 249, 66 Stat. 495.

1163(c) ..... 50:992(c).

In subsection (a), the words "at least three years of service as a commissioned officer may not be separated from that component without his consent" are substituted for the words "completed three years of commissioned service shall not be involuntarily separated". The words "discharged or" are omitted as covered by the word "separated". The words "or to a dismissal under section 1161(a) of this title" are inserted, since the word "separated", in 50:992(a), did not cover "dismissal". The words "or to a transfer under section 3352(b) or 8352(b) of this title" are inserted to reflect the automatic transfer, under those sections, of an officer of the National Guard who loses his Federal recognition.

In subsection (b), the words "of the armed force concerned" are inserted for clarity. The words "at least" are substituted for the words "or more". The words "by a court other than a court–martial or other military court" are substituted for the words "by the civil authorities". The words "and whose sentence has become final" are substituted for the word "finally".

In subsection (c), the words "is entitled to" are substituted for the words "shall be given". The words "discharged or" are omitted as covered by the word "separated".

In subsection (c)(1), the words "he is discharged . . . under" are substituted for the words "a discharge is . . . effected pursuant to".

In subsection (c)(2), the words "proceedings of a court–martial or a board" are substituted for the words "court–martial or board proceedings".

1962 Act

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1163(d)	50:1016(d).	July 9, 1952, ch. 608, Sec. 265(d); added July 9, 1956, ch. 534 (4th par.), 70 Stat. 518.

The words "becoming eligible for" and "becomes eligible for" are substituted for the words "of qualifying for" and "qualifies for", respectively. The words "retirement pay" are omitted as obsolete. The word "release" is substituted for the word "separation" to conform to section 687 of title 10.

AMENDMENTS:

1962. Act Sept. 7, 1962 added subsec. (d).

1987. Act Dec. 30, 1987, in subsec. (d), inserted "(other than for training)".

NOTES:

CODE OF FEDERAL REGULATIONS

Enlisted administrative separations, 32 CFR Part 41.

RESEARCH GUIDE

FEDERAL PROCEDURE L ED:

Armed Forces, Civil Disturbances, and National Defense, Fed Proc, L Ed, § 5:301.

AM JUR:

54 Am Jur 2d, Military, and Civil Defense § 177.

ANNOTATIONS:

Judicial review of military action with respect to type of discharge given serviceman. 4 ALR Fed 343.

INTERPRETIVE NOTES AND DECISIONS

1. Purpose

2. Release within two years of retirement
3. Basis for and type of discharge
4. Right to hearing
5. Burden of proof

1. Purpose

Purpose of enactment of 10 USCS § 1163(d) is twofold: to provide lump–sum payments to reservists who are involuntarily released from active duty, and to provide economic security as inducement for reservists to stay in active service and thus reduce expense of personnel turnover and increase effectiveness of armed services. Fairbank v Brown (1980, DC Dist Col) 506 F Supp 336.

2. Release within two years of retirement

Protection from discharge afforded by of 10 USCS § 1163(d) did not apply to an officer who, at time of separation, could meet two year requirement of qualifying for retirement only when such active duty time as was obtained solely through improperly issued restraining order and injunction was counted towards two year period. Pauls v Seamans (1972, CA1 Puerto Rico) 468 F2d 361.

"Active duty" within meaning of statute providing that member of reserve component who is on active duty and within two years of becoming eligible for retired or retainer pay may not be involuntarily released until he becomes eligible for that pay, included time served by Army Reserve officer on active duty for training purposes. Ulmet v United States (1987, CA FC) 822 F2d 1079.

Service member's acceptance of readjustment payment did not affect his entitlement to retirement benefits, given legislative history which clearly showed that Congress considered situation of person who collected readjustment pay, and who later became qualified for retirement benefits, and given fact that current statute which governs separation pay upon involuntary release from active duty prevents double retirement benefit for persons who accept readjustment pay, and who later become qualified for regular retirement benefits by requiring deduction from each retirement payment until total amount deducted equals readjustment pay received. Ulmet v United States (1987, CA FC) 822 F2d 1079.

"Continuous active duty" language contained in Armed Forces Reserve Act of 1952 and exclusion of reservists released from active duty for training does not apply to "sanctuary" provision, but rather refers only to readjustment payments, as later enactment of readjustment pay provision clarifies point by stating that requirement of continuous active duty is for "purposes of this subsection" only, and thus fact that reservist did not serve "continuous active duty" did not bar him from entitlement to sanctuary. Ulmet v United States (1987, CA FC) 822 F2d 1079.

For purposes of determining total amount of active service time required for "sanctuary" under 10 USCS § 1163, "active duty" includes time served by reserve officer on active duty for training tours as any question as to what is included within meaning of active duty is explicitly resolved by statutory definition which specifically includes "full–time training duty." Ulmet v United States (1987, CA FC) 822 F2d 1079.

Phrase "on active duty" in 10 USCS § 1163(d) does not include active duty for training. Wilson v United States (1990, CA FC) 917 F2d 529, companion case (CA FC) 1990 US App LEXIS 18832, reh den (CA FC) 1990 US App LEXIS 21057 and mod (CA FC) 1990 US App LEXIS 21690.

Eighteen year army reservist may not be involuntarily released from duty by order of Secretary of Army alone as two step procedure set out in army regulations must be followed despite 10 USCS § 1163(d) which provides that Secretary must personally authorize release of reservists who are within 2 years of qualifying for retirement, since this is meant as additional requirement, not alternative one. Roberts v Vance (1964) 119 App DC 367, 343 F2d 236.

Amendment stating that officer on training tour of duty does not become eligible for sanctuary does not apply retroactively absent express statutory provision. Wilson v United States (1989) 16 Cl Ct 765.

Amended "sanctuary" provision barring applicability to individuals on training duty would not be applied retroactively to case pending at time of amendment in absence of statutory direction or legislative history indicating that it should be applied retroactively or that amendment represented what had always been the law. Ulmet v United States (1989) 17 Cl Ct 679.

It is only reasonable that Army first obtained reserve member's request for extension and resulting knowledge of member's willingness and ability to continue on active duty before it can be assessed liability for continuing backpay on basis that expiration of training tour of duty ordered resulted in "involuntary" release. Green v United States (1989) 17 Cl Ct 716.

Plaintiff, scheduled for release from active duty due to reductions in officer strength, did not challenge such release, but rather, by use of stay, sought to preserve status quo, that is, reenlistment rights which had been denied, and thus did not

create any new rights and did not reach statutory period which precludes discharge of reservist with 18 years of service except with agreement of Army Secretary. Fairbank v Brown (1980, DC Dist Col) 506 F Supp 336.

Section 1163(d) providing that member of reserve component who is on active duty and is within 2 years of becoming eligible for retired pay or retainer pay may not be involuntarily released from that duty before he becomes eligible for that pay unless release is approved by Secretary does not afford protection to serviceman from being released from current active duty for training tour on ground that serviceman, who had completed over 16 years of active duty Army service prior to being relieved from active duty and who later performed periods of active duty for training in Army Reserve since his release, accrued more than 18 years of active federal service. Steenson v Marsh (1985, ND Ala) 609 F Supp 800.

3. Basis for and type of discharge

District Court did not err in determining that record of Board of Naval Officers proceeding at which it was recommended that reserve officer be separated with honorable discharge on ground of his admitted homosexuality displayed nothing more than permissible policy bias, notwithstanding that Board members all stated that in light of Secretary of Navy instruction there were no conceivable circumstances under which they would retain homosexual in Navy, since, inter alia, each Board member had stated that he could keep open mind toward argument as to whether or not instruction was binding on Board. Urban Jacksonville, Inc. v Chalbeck (1985, CA11 Fla) 765 F2d 1085, 38 BNA FEP Cas 750, 38 CCH EPD para. 35531.

Secretary of Navy was without authority to issue punitive discharge to inactive reservist on basis of secret information relating to his associations subsequent to separation from active duty. Bland v Connally (1961) 110 App DC 375, 293 F2d 852; Davis v Stahr (1961) 110 App DC 383, 293 F2d 860.

Department of Defense exceeded its statutory authority in characterizing administrative discharges as being issued under other than honorable conditions to members of inactive reserve having no military duties, based on civilian misconduct, where Department regulation and policy require no connection between members' civilian misconduct and their military service and there is no showing that civilian misconduct affected quality of individuals' service to military or had adverse impact on overall effectiveness of military service. Wood v Secretary of Defense (1980, DC Dist Col) 496 F Supp 192 (disapproved on other grounds Walters v Secretary of Defense, 233 App DC 148, 725 F2d 107, reh den, en banc 237 App DC 333, 737 F2d 1038).

4. Right to hearing

Regular air force officer is entitled to "fair and impartial" hearing on separation under 10 USCS § 8792, but there is no similar provision for reserve officers in 10 USCS §§ 1162, 1163; however, Air Force Regulation 36–2, applying to both regular and reserve officers, guarantees "fair and impartial" hearing and United States Court of Appeals has jurisdiction of action seeking declaration that discharge of reserve officer was illegal because hearing guaranteed by regulations was denied. Denton v Secretary of Air Force (1973, CA9 Cal) 483 F2d 21, cert den 414 US 1146, 39 L Ed 2d 102, 94 S Ct 900.

5. Burden of proof

Nowhere in 10 USCS § 1163 or its legislative history is there hint of authority to conduct proceeding in which defendant bears burden of proof; consequently, dishonorable discharge of air force reserve officer under regulation shifting burden of proof to accused was unlawful. Carter v United States (1975) 206 Ct Cl 61, 509 F2d 1150, reh den 207 Ct Cl 316, 518 F2d 1199, cert den 423 US 1076, 47 L Ed 2d 86, 96 S Ct 861, reh den 424 US 950, 47 L Ed 2d 356, 96 S Ct 1423 and later proceeding 209 Ct Cl 790.

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