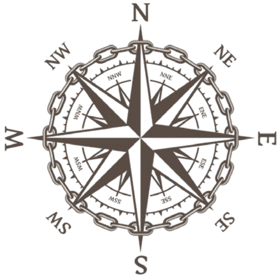

THE NAVIGATOR
AN MNB MERIDIAN PUBLICATION

WHAT THE WORLD NEEDS NOW: A REFRESHER ON "ENLISTMENT" AND HOW THE GOVERNMENT CAN (ALWAYS) BREACH THE CONTRACT TO THE DETRIMENT OF THE SERVICE MEMBER

Philadelphia, Pennsylvania, May 19, 2023 – We have been thinking a lot recently about the confusion of Service members, the public, the press, and most importantly, military law attorneys, regarding the terms of an enlistment contract. In providing this refresher, we turn again to an extraordinary publication, the Army's Administrative and Civil Law Handbook, DA Pamphlet (DA PAM) 27-21 produced until the early 1990's by the United States Army Judge Advocate General's Corps. The history it provides in today's social media-forward society is more necessary today than it has ever been. The topic is far more complex than most practitioners realize, and the broad authorities granted to and exercised by the government can have lifelong implications for Service members. What follows is essentially a down and dirty enlistment primer for the Service member and military law attorneys alike.

Most are familiar with the concept of "enlistment." In recent years, for the great majority it meant volunteering to serve up to four (4) years (with additional time in the Reserves), be trained with a skill, be stationed some place interesting, and maybe deploy to a combat zone. As a result, the Veteran is granted education benefits, disability compensation if they are injured during their service, medical care, and a guaranteed home loan, among many others. The legal truth of that enlistment is a bit more complicated.

William Winthrop, a military historian who published *Military Law and Precedents* (2ed 1920)[1], provides a great explanation of the enlistment contract that hasn't changed much since.

> *The contract of enlistment is peculiar in that it is a contract made with the State under the specific authority of the Constitution, and thus governed by the principles or considerations of expediency and economy, expressed in the terms of "public policy." Thus, while the necessities of military discipline require that the soldiers should be*

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[1] From the Library of Congress summary of Military Law and Precedents: "The second edition of Military Law and Precedents, published in 1920, is a comprehensive treatise on the science of military law. The genesis of this work traces back to an 1880 work published by the author as an annotated digest of JAG opinions. This digest was updated in 1886 to reflect significant trials and acts of military government, and material modifications to written military law, particularly Army Regulations. The treatise presented herein updates the 1886 work to reflect changes since that date in the scope and procedures of military law, as the courts and the legislature defined them. This work is divided into three parts: military law proper - the specific law governing the Army as a separate community; the law of war - law that is operative only in time of war or like emergency, and regulates the relations of enemies and authorizes military government and martial law; and the civil functions and relations of the Military."

> *strictly obliged to the compact, the State, on the other hand, is not bound by the conditions, though imposed by itself. Thus, it may be put to an end to the terms of the enlistment at any time before it has regularly expired and discharged the soldier against his consent. So, pending the engagement, it may reduce the pay, or curtail any allowance, which formed a part of the original consideration. The contract of enlistment is thus a transaction in which private right is subordinated to the public interest. In law, it is entered into with the understanding that it may be modified in any of its terms, or wholly rescinded, at the discretion of the State, but this discretion can be exercised only by the legislative body, or under any authority which that body has conferred.*

In other words, the Department of Defense (DoD) can modify your enlistment contract provided there is legislative authority to do so. As a result, a claim of breach of contract by the Government is nearly impossible to prove since the government can change the terms as it sees fit, absent some exceptions, so it is rarely "in breach." Conversely, the Service member can breach the contract when the government imposes new terms to the contract. The U.S. Supreme Court drew an analogy to a marriage contract in United States v. Grimley, 137 U.S. 147, 152 (1890).

> *Enlistment is a contract, but it is one of those contracts which changes the status, and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract, but it is one which creates a status. Its contract obligations are mutual faithfulness, but a breach of those obligations does not destroy the status or change the relation of the parties to each other. The parties remain husband and wife no matter what their conduct to each other -- no matter how great their disregard of marital obligations.*

In marriage, the Government can breach or change the contract and it would be fine, you will still be married to each other.

Given the ability of the Government to be able to change the enlistment contract, however, the areas that affect Service members the most are: (1) promotion in rank, (2) reduction in rank, and (3) separation.

1. Promotion. Enlisted promotions, unlike those of commissioned officers, are prescribed solely in regulation but for statutory limitations on time in service and grade at the senior enlisted ranks. Service-wide promotions rates, the numbers permitted in each rank, qualifications for promotion, and defining how, when, and why Service members can be demoted are at the sole discretion of the Service Secretary. By way of example, we note Army Directive 2021-27 where the Secretary has reserved to her (or her designee) the authority to demote (to any enlisted rank) any retirement-eligible Soldier facing administrative separation.

In promoting Service members, the Government is permitted to make mistakes for which the Service member will pay, quite literally, the price. Promotions granted by mistake are "void"

promotions. "Void" promotions occur when the commander promotes someone improperly or promotes someone when they were in a non-promotable status such as: unauthorized absence (AWOL or UA); pending administrative proceedings that may result in an other than honorable discharge (OTH); ineligible for or denied reenlistment; has a suspended or revoked security clearance; failed drug rehabilitation; or, declined reassignment, among many others. If a local commander promoted a Service member to E-5, but later realized – days, weeks, months, or even years later, that promotion was "void," the Military Service can revoke the promotion, creating a Service member obligation to repay all the overpayment of pay, allowances and entitlements. Waiver of the repayment can be approved only if the Service member: accepted the promotion through no fault of their own; served in a *de facto* status, *e.g.*, promotion orders were published; the Service member held the rank promoted; actually performed at the higher rank; received pay at the higher rank; and, accepted the promotion in good faith. These waivers are rare.

2. Reduction. Reductions can occur for misconduct (including inefficiency) and for other reasons. Perhaps the most abused and discretionary rank reduction is due to inefficiency. Each of the Military Services defines "inefficiency" a little differently. The Army defines it as a "demonstration of characteristics that shows that the person cannot perform duties and responsibilities commensurate of the Soldier's current rank and MOS [which] must be predicated on a pattern of acts, conduct or negligence that clearly shows the Soldier lacks the abilities and qualities normally required and expected of the Soldier's rank and experience,"[2] and may reduce Soldiers only one rank. The Navy uses the term "incompetency" to define when a Sailor has "proven themselves not qualified to perform properly the duties of their rate"[3] also only reducing one rank. However, the Air Force allows the demotion of Airman more than one rank "when appropriate, to a grade that corresponds to their skill level, [or] failing to fulfill Airman, Noncommissioned officer, or Senior Noncommissioned officer responsibilities, [or] failure to maintain or demonstrate the ability or willingness to attain physical fitness standards…"[4] The Air Force will "[D]emote Airmen to the highest possible grade allowed for the skills they have if their AF specialty skill level is downgraded for substandard performance."[5]

Obviously, reduction in rank can be affected through non-judicial punishment and court-martial for misconduct. Secretarial authority also requires reduction to the lowest enlisted rank (E-1) when a Service member is: convicted by a civilian court to death, has an unsuspended sentence of one (1) year or more, for certain crimes, and for sentences delayed more than 30 days. Reductions are also normally effectuated during any appeal. Therefore, successful appeals require the restoration of rank, pay, and seniority.

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[2] U.S. DEP'T OF ARMY, REG. 600-8-9, Enlisted Promotions and Reductions para. 10-5 (16 May 2019) [hereinafter AR 600-8-9].
[3] U.S. DEP'T OF NAVY, NAVY MILITARY PERSONNEL MANUAL 1450-010, Reduction in Rank, Rate or Rating (14 Jan 2016) [hereinafter MILPERSMAN 1450-010].
[4] U.S. DEP'T OF AIR FORCE, INSTR. 36-2502, Airman Promotion Program para. 6.3.3.2 (6 Aug 2002) [hereinafter AFI 36-2502].
[5] *id.*

There are a few other situations when a Service member can be reduced. One is by operation of law. If a Service member has an approved court-marital conviction that includes a punitive discharge (bad conduct or dishonorable), confinement, or hard-labor without confinement, they will be reduced. The second is if a Service member appointed to a higher grade to attend a school, and fails to complete the training, they will be reduced to the grade held prior to starting the training. Lastly, Service members with an approved OTH discharge through administrative separation or *in lieu* of court-martial, are automatically reduced to the lowest enlisted rank (E-1).

3. Separation from the Service. Given the purely administrative nature of the status of enlisted Service members, Service Secretaries have broad discretion in the discharge, release from active duty, and retirement of Service members, to include being dropped from the rolls. Separations fall into two broad categories: voluntary and involuntary.

Voluntary separations are requested by the Service member for their own benefit before the expiration of their term of service. There are several reasons for which a Service member may request separation. They may request early separation due to a dependency[6] or hardship[7] that: arose or was aggravated to an excessive degree after the Service member entered active duty; the hardship is not temporary; the Service member made every reasonable effort to alleviate the hardship without success; and, separation is the only available means of eliminating or materially alleviating the hardship.

A Service member can request separation when they hold a firm, fixed, and sincere objection to participation in war or the bearing of arms because of religious training or belief. Conscientious objection must be established through clear and convincing evidence that their objection is sincere and based on beliefs that either did not exist or became fixed after entry into the service. Conscientious objectors are categorized as sincerely objecting to participation as a combatant in any kind of war, but whose convictions permit participation in a non-combatant role, *e.g.*, as a Corpsman (Class 1-A-0). Those Conscientious Objectors who sincerely object to participation as a combatant in any kind of war (Class 1-0) are normally discharged for the convenience of the government.

Service members who become pregnant may request separation and when approved are authorized to receive medical care from government medical treatment facilities. However, if the Service member elects to remain in the Service, they are required to perform their duties until they start authorized medical leave, and will be advised on their return from maternity leave they will be considered available for unrestricted, world-wide assignment, and must make appropriate

[6] A situation caused by the death or disability of the Service members' (or spouse's) family that causes other family members to rely on the Service member for principal care or support.
[7] Circumstances not involving death or disability, the Service member's immediate separation will materially affect the care or support of the family by alleviating the dependency or hardship conditions.

arrangements for the care of their newborn. They must have a family care plan in place and its absence may become grounds for an involuntary separation.

Service members facing a punitive discharge due to misconduct and preferral of charges under the Uniform Code of Military Justice (UCMJ), may request to be discharged *in lieu* of court-martial, a discharge for the good of the service. Given this is a voluntary request, the Service member must be afforded an opportunity to consult with an attorney.

Service members may request to be separated when enlistment or reenlistment commitments made by the Service have not fulfilled. Service members must show within 30 days of the defect or unfulfilled committed being discovered or reasonably could have been discovered: (1) the commitment was in writing; (2) remains unfulfilled and cannot be fulfilled; and, (3) the Service member did not knowingly take part in the creation of the unfulfilled commitment.

Involuntary separations are initiated by the Services when a Service members conduct or performance is unsatisfactory or it does not meet the Service's standards and there is no potential for further military service. Involuntary separations are processed through notification or administrative separation boards.

The notification process is normally initiated when an Honorable or General (under honorable conditions) discharge is being recommended. It requires written notification of involuntary separation and advisement of the ability to consult with counsel. Service members must be provided copies of the documents supporting the involuntary separation and must be given an opportunity to submit written statements on the Service member's behalf. If a Service member has more than six (6) years of service, they may request an administrative separation board. Failure to respond to the notification within usually 7 to 10 calendar days (30 for the Reserves) constitutes a waiver.

The administrative separation board process has the same notification procedures and rights but the Service member's matter is heard before a board of officers. The decision of the board of officers is a recommendation to the separation authority whose final decision is limited by the recommendation of the board of officers as to the lowest separation recommendation. If a board of officers recommends the Service member remain in the service, the separation authority is normally required to adhere to that recommendation. However, the Services have restricted that limitation in some instances. For example, in cases involving a positive urinalysis, the recommendation of the administrative separation board is not binding and the Bureau of Naval Personnel ("BUPERS") can discharge a Sailor with an other than honorable characterization despite a Board recommendation to retain the Sailor. Administrative due process only requires the Sailor be notified in writing of the involuntary separation, the ability to consult with counsel, be provided copies of the documents supporting the involuntary separation, and to be heard by a board of officers. In this instance the Secretary of the Navy's broad administrative discretion can be exercised to the detriment of Sailors.

There are several reasons for which a Service member may be involuntarily separated.

Separations can relate to entry level performance evidenced in the first 180 days of service as inability, lack of reasonable effort, or failure to adapt to military life. Service members beyond the initial 180-days of service can be involuntarily separated when a commander determines the Service member cannot or will not progress or develop sufficiently to become a satisfactory Service member, and it is likely the substandard performance or service will continue. Service members normally receive an Honorable or under honorable conditions discharge.

Service members may be separated for misconduct when they have engaged in patterns of minor military disciplinary infractions, have discreditable involvement with civilian or military authorities, have committed serious misconduct, or have been convicted by a civilian court. In each of these instances, under other than honorable characterizations are authorized:

Minor Military Disciplinary Infractions. Examples include failure to repair, failure to obey an order of a superior, short periods of absence (UA/AWOL), and other uniquely military offenses that are minor in nature.

Patterns of Misconduct. Includes conduct consisting of discreditable involvement with civilian or military authorities or conduct that is prejudicial to good order and discipline. This conduct is normally violative of the standards of conduct found in the UCMJ, service regulations, civil law, or the time-honored customs of the military or naval service.

Commission of a Serious Offense. Includes the commission of serious military or civilian offenses if the circumstances warrant separation and a punitive discharge would have been warranted under the UCMJ for the same or closely related offense. Importantly, it is possible a Service member could be separated with an other than honorable characterization without having been prosecuted or convicted.

Conviction by Civilian Court. If a Service member is initially convicted by civil authorities or when action taken that is tantamount to a finding of guilty, provided, a punitive discharge would have been authorized under the UCMJ for the same or a closely related offense, or the sentence by civil authorities includes confinement for six (6) months or more, regardless of probation or suspension, the Service member can be involuntarily separated.

Alcohol or Drug Rehabilitation Failure. When Service members are unable (or refuse) to participate or cooperate in, or successfully complete the rehabilitation program and lack potential for further military service and rehabilitation is no longer practicable, they can be separated. Note participation in rehabilitation does not prohibit commanders from initiating separation for related misconduct or unsatisfactory performance.

Lastly, Service members may be separated when their enlistments are defective or erroneous, for the convenience of the government, or due to the expiration of the Service member's enlistment.

Erroneous enlistments are enlistments that would not have been accepted by the Military Service had certain information or qualifications been known to the Government at the time of enlistment. (In certain instances, Service members' erroneous enlistments can be waived if the defects no longer exists or waivable by the Service.)

Fraudulent enlistments are enlistments where the Service member deliberately and materially misrepresented, concealed, or omitted information that had the Service known and considered the information would have caused the Service to reject the enlistee.

Separations for the convenience of the government may occur when the Service member is unable to perform due to parenthood, personality disorder, or concealment of an arrest record, among others.

Separation due to expiration of time of service occurs when the Service member's enlistment period has concluded and has fulfilled the obligations of service.

The lesson to be learned is the Service Secretaries have very broad statutory-based regulatory authority and discretion to change and interpret their rules, and Service members have little true ability to challenge any changes. Period. Service members must rely more on fairness and equity at records corrects boards than law over the course of their careers. Regrettably, the standard by which these boards decide to correct the record or not is whether the Service members were given notice and a chance to be heard, and whether the Service followed its own regulations. If these criteria are met, it is generally deemed to be "fair and equitable." In other words, the Services have a very low burden to meet and Service members are severely detrimented by this low burden and this shows in the results from these records corrections boards. In far too many cases, the Service member's records are not corrected simply because the Service followed its own regulations.

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With more than 100 years of combined experience, the attorneys of MNB Meridian Law, Ltd. are the Nation's foremost experts on military administrative law and the effects of administrative punishment on current Service members, as well as the life-long 2nd and 3rd order effects these issues will have on their post service lives. There is no reason to face an investigation, reprimand, relief from duty, administrative separation, ADSEP board, or other adverse action alone. MNB Meridian Law was purpose built to stand with you as you navigate the issues and defend your career, pay, benefits, entitlements, and reputation.