

# All The Process That is Due: An Article on Cadet Disenrollments From the United States Military Academy and the Army Reserve Officers' Training Corps

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*If you let me write the procedure, and I let you write the substance, I'll screw you every time.*<sup>1</sup>

## I. Introduction

While the substantive issues involved in administrative actions are important, it is the responsibility of judge advocates to ensure government compliance with the procedural rules. This may be familiar to anyone who has advised a commander on an enlisted administrative separation.<sup>2</sup> Cadet disenrollment actions are no different; however, the United States Military Academy (USMA) and the Army Reserve Officers' Training Corps (ROTC) disenrollment processes have their own unique procedures that many judge advocates may not be familiar with.

Consider the following examples. In 2011, the Secretary of the Army approved Cadet Alan Spadone's disenrollment from USMA for plagiarism.<sup>3</sup> This ended a long administrative process involving a convened honor board, suspended disenrollment, remedial training, vacation of suspension, and finally disenrollment from the Academy with an order to active duty.<sup>4</sup> While this order ended the administrative process, Spadone filed a complaint in federal district court "challenging the Secretary's actions as arbitrary, capricious and in violation of due process,"

beginning the judicial review.<sup>5</sup> In 2014, the court granted a government motion to dismiss on the last surviving issue in the case, which finally concluded Spadone's disenrollment process.<sup>6</sup>

The ROTC disenrollment process can be equally complicated. In 1992, the Army initiated disenrollment against ROTC Cadet Jason Bush based on breach of contract due to misconduct following his conviction for criminal mischief.<sup>7</sup> Bush appeared before a board, and the board recommended disenrollment.<sup>8</sup> In 1993, the Commanding General (CG), U.S. Army ROTC Command, disenrolled Bush from his scholarship status, but retained him in his reserve status until he repaid his debt.<sup>9</sup> After Bush failed to make payments, the Army referred the debt to the Department of Justice for collection in 1998.<sup>10</sup> The government filed a motion in federal district court for summary judgment to recover the debt.<sup>11</sup> In 2002, the court granted the government's motion and dismissed Bush's counterclaims.<sup>12</sup>

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<sup>1</sup> WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 13 (8th ed. 2011) (quoting a statement of Representative John Dingell during a Hearing on H.R. 2327, the Regulatory Reform Act, before the Subcomm. on Admin. Law & Gov't Regulations of the H. Comm. on the Judiciary, 98th Cong. 312 (1983)).

<sup>2</sup> See generally U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) (RAR 6 Sept. 2011) [hereinafter AR 635-200].

<sup>3</sup> Spadone v. McHugh, 842 F. Supp. 2d 295, 299-300 (D.D.C. 2012).

<sup>4</sup> *Id.* at 300.

<sup>5</sup> *Id.* Spadone's complaint alleged eight counts of error and sought a preliminary injunction as relief. *Id.* at 298, 303. The allegations included a violation of the Administrative Procedures Act, 5 U.S.C. §§ 701-706, violations of the Due Process Clause, a violation of the Establishment Clause, and that the government's actions unjustly enriched the Army. *Id.* at 298. The district court denied the preliminary injunction because Spadone failed to show a likelihood of irreparable injury and success on the merits. *Id.*

<sup>6</sup> Spadone v. McHugh, 10 F. Supp. 3d 41, 42 (D.D.C. 2014). The only remaining claim was that the Secretary (Sec'y) of the Army violated the Establishment Clause when his agent ordered Spadone to recite the Cadet Prayer. *Id.* at 43. The district court held the issue was moot since Spadone was no longer a cadet at the United States Military Academy (USMA) due to disenrollment. *Id.* at 44. Previously, the district court dismissed Spadone's other claims when it granted summary judgment to the government. Spadone v. McHugh, 864 F. Supp. 2d 181, 184-85 (D.D.C. 2012).

<sup>7</sup> United States v. Bush, 247 F. Supp. 2d 783, 786 (M.D.N.C. 2002). Cadet Bush was convicted of criminal mischief for vandalizing cars in Potsdam, New York. *Id.* at 785. Bush's conviction was a breach of contract because prior to receiving his Reserve Officers' Training Corps (ROTC) scholarship he signed an ROTC contract. See, e.g., *infra* Appendix B (U.S. Dep't of Army, DA Form 597-3, Army Senior Reserve Officers' Training Corps (ROTC) Scholarship Cadet Contract (July 2005) [hereinafter DA Form 597-3]). Bush's contract stated misconduct was a breach of contract that may lead to disenrollment, and misconduct included criminal conduct. *Id.*

<sup>8</sup> *Id.* at 785-86.

<sup>9</sup> *Id.* at 786.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 791.

These examples illustrate the complexities of cadet disenrollments. Failure to appreciate the specifics of the processes can limit an attorney's ability to fully support the command or effectively represent a cadet. The following sections will help practitioners understand and apply the legal and procedural frameworks unique to the cadet disenrollment processes. Part II will clarify key definitions and the scope of this article. Part III will present the legal background and framework. Part IV will review the disenrollment processes applicable to the USMA and the ROTC. Part V will offer practice pointers for attorneys working with disenrollments.

## II. Definitions and Scope

The term "cadet" when used in this article refers to both U.S. citizens appointed to the USMA and enrolled in the Army ROTC.<sup>13</sup> It does not include foreign individuals at the USMA or participating students in ROTC.<sup>14</sup> Additionally, the term "enrolled" includes both scholarship and non-scholarship ROTC cadets. The term "disenrollment" refers to administrative separation under applicable statutes and regulations terminating an individual's status as a cadet at the USMA or as an enrolled member in the ROTC.<sup>15</sup>

Although the USMA and ROTC disenrollments occasionally involve both administrative and judicial components, this article's scope is mainly limited to the administrative component. The subsequent sections offer only a limited discussion on the direct and collateral avenues for judicial review of the disenrollment processes.<sup>16</sup> Furthermore, while the Army may disenroll a cadet for a

variety of reasons, this article will concentrate on adverse separations based on some form of misconduct.<sup>17</sup>

## III. Legal Background and Framework

### A. General Overview of Procedural Due Process

The Fifth Amendment limits the federal government from depriving any person "of life, liberty, or property, without due process of law."<sup>18</sup> The concept of procedural due process, which *Black's Law Dictionary* defines as "[t]he minimal requirements of notice and a hearing," stems from the Fifth Amendment.<sup>19</sup> The notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>20</sup> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."<sup>21</sup> The specific protections required at the hearing depend on the situation's circumstances.<sup>22</sup>

To determine if procedural due process is adequate in a specific circumstance, an agency must consider three elements, which the Supreme Court set forth in *Mathews v. Eldridge*.<sup>23</sup> First, the agency identifies "the private interest that will be affected by the official action."<sup>24</sup> This includes considering the type of interest, hardship imposed, and action's finality.<sup>25</sup> Next, the agency evaluates the risk of error in the process, and the relative benefit of providing "additional or substitute procedural safeguards."<sup>26</sup> The

<sup>13</sup> 10 U.S.C.S. ch. 403 U.S. Military Academy (Lexis 2014) (providing the primary statutory authority applicable to the USMA); 10 U.S.C.S. ch. 103 Senior Reserve Officers' Training Corps (Lexis 2014) (providing the primary statutory authority applicable to Army ROTC).

<sup>14</sup> 10 U.S.C.S. § 4344 (Lexis 2014) (authorizing the Sec'y of the Army to allow foreigners to attend the USMA); U.S. DEP'T OF ARMY, REG. 145-1, SENIOR RESERVE OFFICERS' TRAINING CORPS PROGRAM: ORGANIZATION, ADMINISTRATION, AND TRAINING para. 3-26 (22 July 1996) (RAR 6 Sept. 2011) [hereinafter AR 145-1]. This regulation defines participating students as "students who participate in military science courses but are not fully enrolled in ROTC. They are divided into three categories: auditing students, conditional students, and alien students." *Id.* Even though many of the rules for the USMA foreign cadets or ROTC participating students are the same as other members, nuanced differences exist that are beyond the scope of this article.

<sup>15</sup> See *infra* Part IV for further explanation. When a specific category of cadet, USMA or ROTC, is relevant to the discussion, additional care will be taken to identify the specific type of cadet.

<sup>16</sup> See generally *Wall v. Kholi*, 131 S.Ct. 1278, 1284-85 (2011) (comparing collateral and direct review).

<sup>17</sup> U.S. DEP'T OF ARMY, REG. 210-26, U.S. MILITARY ACADEMY ch. 6 (9 Dec. 2009) (RAR 6 Sept. 2011) [hereinafter AR 210-26]. This chapter lists four categories that may lead to disenrollment from the USMA. They include misconduct, honor, disciplinary, and other grounds for separation. *Id.* AR 145-1, *supra* note 14, para. 3-43, lists sixteen grounds that may lead to disenrollment from ROTC. In addition to misconduct, other examples include personal hardship, medical reasons, or breach of contract. *Id.*

<sup>18</sup> U.S. CONST. amend. V. Additionally, "[t]he due process clause of the Fifth Amendment has generally been held to make the Fourteenth Amendment due process clause applicable to the federal government." *Parrish v. Brownlee*, 335 F. Supp. 2d 661, 669 (E.D.N.C. 2004) (citing *Rostker v. Goldberg*, 453 U.S. 57, 62 (1981)).

<sup>19</sup> BLACK'S LAW DICTIONARY 575 (9th ed. 2009).

<sup>20</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>21</sup> *Morgan v. United States*, 304 U.S. 1, 18 (1938).

<sup>22</sup> *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). See also *Wasson v. Trowbridge*, 382 F.2d 807, 811 (2d Cir. 1967) (discussing idea that different protections apply in different situations).

<sup>23</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

<sup>24</sup> *Id.* at 335.

<sup>25</sup> *Id.* at 341-43.

<sup>26</sup> *Id.* at 335.

agency should evaluate this systemically, not focusing on particular instances.<sup>27</sup> Finally, the agency considers the government interest against providing additional safeguards to include “the fiscal and administrative burdens” and “other societal costs.”<sup>28</sup> Another way to consider these elements is through notions of fundamental fairness given that disenrollment is an administrative proceeding.<sup>29</sup>

## B. Procedural Due Process Applied to Cadet Disenrollments

The Supreme Court has not created an exception for applying the Due Process Clause to the military contrary to other constitutional rights.<sup>30</sup> Therefore, the legal framework for analyzing due process during disenrollments developed similar to non-military cases. In *Wasson v. Trowbridge*, the Merchant Marine Academy disenrolled a cadet for receiving excessive demerits.<sup>31</sup> On appeal, the Second Circuit held the Due Process Clause applied to disenrollments.<sup>32</sup> The court explained, “[T]o determine in any given case what procedures due process requires, the court must carefully determine and balance the nature of the private interest affected and of the government interest involved, taking account of history and the precise circumstances surrounding the case at hand.”<sup>33</sup>

The Second Circuit recognized cadets as having a property interest in remaining at the Merchant Marine Academy, and then balanced this interest against the government interest of maintaining national security.<sup>34</sup> The court further explained that while due process is a flexible concept, at a minimum it requires notice, a fair hearing, and the “opportunity to present [a] defense both from the point of view of time and the use of witnesses and other evidence.”<sup>35</sup> However, the court held due process did not require representation by counsel at the hearing because it was not criminal in nature and the cadet involved was mature and educated.<sup>36</sup>

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<sup>27</sup> *Id.* at 344.

<sup>28</sup> *Id.* at 335, 347. In *Eldridge*, the Supreme Court opined the government interest is equivalent to the public interest (“the Government’s interest, and hence that of the public”), and the government interest must be balanced against the private interests in regard to providing additional protections. *Id.* at 348.

<sup>29</sup> *Id.*

<sup>30</sup> See *Greer v. Spock*, 424 U.S. 828 (1976) (limiting freedom of speech related to the military); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (limiting the free exercise of religion related to the military).

<sup>31</sup> *Wasson v. Trowbridge*, 382 F.2d 807, 811 (2d Cir. 1967).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 812.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Several other cases further developed the concept of procedural due process in cadet disenrollments. In *Hagopian v. Knowlton*, the USMA disenrolled a cadet for excessive demerits.<sup>37</sup> The Second Circuit found the facts in *Hagopian* were “strikingly similar” to *Wasson*.<sup>38</sup> Using *Wasson* as guidance, the court described what it meant by a fair hearing.<sup>39</sup> The hearing may be procedurally informal, but it does require the opportunity for the cadet to personally appear before the board so members can assess credibility and truthfulness.<sup>40</sup> Additionally, the court reminded the government it must substantially observe its own regulations to comply with due process.<sup>41</sup>

While both *Wasson* and *Hagopian* addressed cadet disenrollments based on excessive demerits, in *Andrews v. Knowlton*, the Second Circuit held its due process jurisprudence equally controlling when an academy disenrolled a cadet for other forms of misconduct.<sup>42</sup> In *Andrews*, two cadets appealed their disenrollment from the USMA following a determination that they each had violated the cadet honor code.<sup>43</sup> Because the proceedings met the minimum due process requirements established by previous cases, and the USMA followed its existing regulations, the court dismissed their appeals.<sup>44</sup>

Relying on the Second Circuit cases relating to due process in the USMA and other academy disenrollments, the district court in *Kolesa v. Lehman* addressed due process in a Navy ROTC (NROTC) disenrollment.<sup>45</sup> In *Kolesa*, NROTC disenrolled a cadet for illicit drug use and marginal military performance.<sup>46</sup> The district court held “the nature of [the] plaintiff’s interest in avoiding disenrollment from the NROTC scholarship program, which he had pursued with the goal of becoming an officer, is sufficiently analogous to the interest of a cadet in avoiding expulsion from a military academy so as to warrant equivalent due process protection.”<sup>47</sup> Likewise, in *Martinez v. United States*, the Court of Claims used analysis similar to the Second Circuit

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<sup>37</sup> *Hagopian v. Knowlton*, 470 F.2d 201, 203 (2d Cir. 1972).

<sup>38</sup> *Id.* at 209.

<sup>39</sup> *Id.* at 211.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 208 n.23; see, e.g., AR 210-26, *supra* note 17.

<sup>42</sup> *Andrews v. Knowlton*, 509 F.2d 898, 905 (2d Cir. 1975).

<sup>43</sup> *Id.* at 900.

<sup>44</sup> *Id.*

<sup>45</sup> *Kolesa v. Lehman*, 534 F. Supp. 590, 593 (N.D.N.Y. 1982). See generally *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Hagopian*, 470 F.2d 201; *Andrews*, 509 F.2d 898.

<sup>46</sup> *Kolesa*, 534 F. Supp. at 591.

<sup>47</sup> *Id.* at 593.

to dismiss a disenrolled Army ROTC cadet's claim, clarifying the legal framework of analysis applies beyond NROTC disenrollments.<sup>48</sup>

Shortly after *Kolesa*, in *Cody v. Scott*, the cadet disenrollment cases joined with the more general case law on procedural due process when the district court in *Cody* cited and followed the Supreme Court's analysis in *Mathews*.<sup>49</sup> *Cody* involved a cadet pending disenrollment from the USMA for using marijuana.<sup>50</sup> In addressing the due process elements in *Mathews*, the court followed the Second Circuit cases to conclude the process provided to the cadet was adequate.<sup>51</sup> Additionally, the court held that due process did not entitle the cadet to representation by counsel at the hearing.<sup>52</sup>

These cases clearly illustrate that procedural due process applies to disenrollments from both the USMA and the ROTC. At a minimum, this legal framework requires notice, a fair hearing, and the opportunity to present a defense.<sup>53</sup> A fair hearing does not include representation by counsel at the actual hearing.<sup>54</sup> However, the ability to present a defense does include a reasonable time to prepare and the ability to present evidence.<sup>55</sup> Furthermore, the services have a duty to follow their own regulations throughout the process.<sup>56</sup> Understanding this legal background should assist practitioners as they provide legal advice in specific cases.

#### IV. The Cadet Disenrollment Processes

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<sup>48</sup> *Martinez v. United States*, 26 Cl. Ct. 1471 (1992).

<sup>49</sup> *Cody v. Scott*, 565 F. Supp. 1031, 1034 (S.D.N.Y. 1983).

<sup>50</sup> *Id.* at 1032.

<sup>51</sup> *Id.* at 1035.

<sup>52</sup> *Id.* (citing to *Hagopian*, which relied on *Wasson*, to reach the conclusion that procedural due process does not entitle a cadet to representation by counsel at a hearing).

<sup>53</sup> See generally *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972); *Andrews v. Knowlton*, 509 F.2d 898 (2d Cir. 1975); *Kolesa v. Lehman*, 534 F. Supp. 590 (N.D.N.Y. 1982); *Martinez*, 26 Cl. Ct. 1471; *Cody*, 565 F. Supp. 1031.

<sup>54</sup> *Wasson*, 382 F.2d at 812.

<sup>55</sup> *Wasson*, 382 F.2d at 813; *Hagopian*, 470 F.2d at 210; *Cody*, 565 F. Supp. at 1034-35.

<sup>56</sup> *Hagopian*, 470 F.2d at 208 n.23 (citing *Friedberg v. Resor*, 453 F.2d 935, 938 (2d Cir. 1971), "[W]hen regulations prescribe specific steps to be taken to insure due process they must be substantially observed.") *Id.*; See also *Parrish v. Brownlee*, 335 F. Supp. 2d 661, 669 (E.D.N.C. 2004) (citing from *Antonuk v. United States*, 445 F.2d 592, 595 (6th Cir. 1971), which applied the rule presented in *Schatten v. United States*, "[W]here Congress or administrative agencies themselves lay down procedures and regulations, these cannot be ignored in deference to administrative discretion.") *Schatten v. United States*, 419 F.2d 187, 191 (6th Cir. 1969).

The ability to understand the legal background and framework is important; however, the capability to navigate the disenrollment process is equally vital. As suggested in the opening quote, understanding the "procedure" may trump knowing the "substance."<sup>57</sup> This section provides a brief history of disenrollments, identifies applicable statutes and regulations, and explains the specific disenrollment procedures for the USMA and the Army ROTC.

#### A. Disenrollment Procedures for the USMA

The USMA was founded in 1802 by an act of Congress signed into law by President Thomas Jefferson.<sup>58</sup> Administrative separations from the USMA did not frequently occur until after the 1950s.<sup>59</sup> Prior to the 1950s, courts-martial were the primary means to separate a cadet for misconduct.<sup>60</sup> After World War II, the paradigm switched, and now the USMA generally disenrolls cadets for significant misconduct whereas only serious criminal offenses lead to court-martial.<sup>61</sup> The current USMA disenrollment process includes key individuals and provides fundamental rights to cadets based on longstanding statutes and multiple levels of regulatory guidance.<sup>62</sup>

##### 1. Applicable Statutes and Regulations

The U.S.C. provides the fundamental legal authority applicable to the USMA disenrollments. Title 10, § 651, creates a minimum military service obligation (MSO) between six to eight years for those who attend the USMA.<sup>63</sup> Likewise, 10 U.S.C. chapter 403 controls most aspects of the USMA.<sup>64</sup> Specifically, Chapter 403, § 4348, requires cadets

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<sup>57</sup> OLESZEK, *supra* note 1.

<sup>58</sup> Military Peace Establishment, ch. IX, 2 Stat. 132 § 27 (enacted Mar. 16, 1802) (current version at 10 U.S.C.S. § 4331 (Lexis 2014)). See generally U.S. MILITARY ACADEMY: WEST POINT, A BRIEF HISTORY OF WEST POINT, <http://www.usma.edu/wphistory/SitePages/Home.aspx> (last visited May 11, 2015) (providing background on West Point).

<sup>59</sup> Robert P. Coyne & A. Robert Thorup, *West Point Honor Code Separations: Duty, Honor, Country . . . Fairness?*, 27 AM. U. L. REV. 823, 832 (1978).

<sup>60</sup> *Id.* at 831. Most commonly the USMA would charge cadets with violating "article 95 of the old Articles of War, 'Conduct Unbecoming an Officer and a Gentlemen.'" *Id.* The reason for this appears to be more historic than legal since the law permitted the President to separate a cadet without a court-martial. *Id.*

<sup>61</sup> See *id.* at 833.

<sup>62</sup> See generally 10 U.S.C.S. ch. 403 U.S. Military Academy (Lexis 2014); U.S. DEP'T OF DEF., DIR. 1332.23, SERVICE ACADEMY DISENROLLMENT (19 Feb. 1988) (C1, 20 Sept. 2011) [hereinafter DoDD 1332.23]; AR 210-26, *supra* note 17.

<sup>63</sup> 10 U.S.C.S. § 651 (Lexis 2014). The Secretary of Defense sets the specific length of the Military Service Obligation. *Id.*

<sup>64</sup> 10 U.S.C.S. ch. 403 U.S. Military Academy (Lexis 2014).

to agree to serve on active duty as an officer if offered a commission.<sup>65</sup> The Army documents this agreement in USMA Form 5-50, which all cadets sign upon arrival.<sup>66</sup> Failing to graduate from the USMA due to a breach of this agreement may result in the Army either ordering a cadet to active duty as an enlisted Soldier or to repay the cost of his education.<sup>67</sup> Chapter 403 also requires the service secretaries to implement regulations explaining what constitutes a breach of agreement.<sup>68</sup>

Department of Defense Instruction (DoDI) 1304.25 implements 10 U.S.C. § 651 by requiring each person “who enters military service by enlistment or appointment [to] incur[] an MSO of 8 years from that entry date,” subject to limited exceptions.<sup>69</sup> Likewise, Department of Defense Directive (DoDD) 1332.23 implements provisions of 10 U.S.C. chapter 403.<sup>70</sup> The DoD prefers active duty service to financial repayment for recoupment.<sup>71</sup> Also, DoDD 1332.23 directs the service secretaries to develop a written agreement for cadets to sign as well as regulations on how to process disenrollments.<sup>72</sup> Finally, DoDD 1332.23 provides specific rules related to recoupment, depending on the cadet’s tenure.<sup>73</sup>

The Department of the Army (DA) implements DoDD 1332.23 through Army Regulation (AR) 210-26.<sup>74</sup> Chapters six and seven of AR 210-26 prescribe both the disenrollment grounds and procedures.<sup>75</sup> Specifically, chapter six permits the USMA to disenroll a cadet for misconduct, honor, disciplinary, and other grounds.<sup>76</sup> Chapter seven identifies the approval authority based on the type of disenrollment and basis of separation.<sup>77</sup> However, the DA modifies the approval authorities contained in chapter seven almost annually.<sup>78</sup>

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<sup>65</sup> 10 U.S.C.S. § 4348(a) (Lexis 2014).

<sup>66</sup> See *infra* Appendix A (U.S. Military Academy, USMA Form 5-50, Cadet Agreement (1 July 2014) [hereinafter USMA Form 5-50]).

<sup>67</sup> 10 U.S.C.S. § 4348(b) (Lexis 2014); 37 U.S.C.S. § 303a(e) (Lexis 2014).

<sup>68</sup> 10 U.S.C.S. § 4348(c) (Lexis 2014).

<sup>69</sup> U.S. Dep’t of Def., Instr. 1304.25, Fulfilling the Military Service Obligation (MSO) para. 3 (31 Oct. 2013) [hereinafter DoDI 1304.25].

<sup>70</sup> DoDD 1332.23, *supra* note 62.

<sup>71</sup> *Id.* para. 4.1.

<sup>72</sup> *Id.* paras. 5.2.2-5.2.3.

<sup>73</sup> *Id.* para. 6.1.

<sup>74</sup> AR 210-26, *supra* note 17.

<sup>75</sup> *Id.* ch. 6 & 7.

<sup>76</sup> *Id.* ch. 6.

<sup>77</sup> *Id.* ch. 7.

<sup>78</sup> See, e.g., Memorandum from Assistant Sec’y of Army (Manpower & Reserve Affairs) to Superintendent, U.S. Military Academy, subject:

For example, the DA modified the approval authorities through a January 10, 2014, memorandum from the Assistant Secretary of the Army for Manpower and Reserve Affairs to the Superintendent, USMA.<sup>79</sup> While generally the Secretary of the Army (or DA level delegate) is the approval authority for cadet separations, this memorandum delegated approval authority to the Superintendent for several types of separations related to misconduct.<sup>80</sup> Delegation memoranda commonly exist in relation to administrative actions. Ideally, an organization will publish them in a consolidated location, but often this may not occur. Therefore, coordination with staff individuals who have institutional knowledge should occur to determine if any additional guidance exists. This diverse range of statutes and regulations provides the procedural framework corresponding to the substantive legal framework explained by the courts.

## 2. Key Elements of the USMA Disenrollment Process

Having identified the statutes and regulations applicable to the USMA disenrollments, the next step is to examine the specific elements in the process. This section includes a brief description of the individuals involved and a more in-depth consideration of the rights afforded to a cadet. The main participants in the disenrollment process are the cadet, the investigating officer (IO) or board, the appointing and approving authorities, and the legal advisor and the attorney conducting the legal review.<sup>81</sup> Typically, an attorney in the administrative law office of the USMA acts as a legal advisor to the IO or board. The Staff Judge Advocate (SJA) conducts a legal review after completion of the investigation or hearing but prior to comment by the Commandant and action on the disenrollment by the Superintendent.<sup>82</sup> The Academy forwards the disenrollment to the DA for final approval when required.<sup>83</sup> The involvement of multiple senior officials during the process increases the likelihood that a disenrollment will follow all applicable rules.<sup>84</sup>

When the USMA decides to initiate disenrollment, the Academy must provide notice to the cadet and access to

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Limited Delegation of Separation and Discharge Authority Regarding U.S. Military Academy (USMA) Cadets (10 Jan. 2014) [hereinafter USMA Delegation Memo].

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See generally AR 210-26, *supra* note 17, ch. 7.

<sup>82</sup> *Id.* para. 7-3.

<sup>83</sup> USMA Delegation Memo, *supra* note 78, para. 3.

<sup>84</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 339-47 (1976) (indicating that multiple levels of reviews, or process, make an administrative action more likely to comply with due process); AR 210-26, *supra* note 17, at i (explaining the “Proponent and exception authority”).

counsel.<sup>85</sup> Case law requires the notice to be effective.<sup>86</sup> Often this occurs through personal service of a document informing a cadet of the grounds for disenrollment and of their existing rights. Upon receiving notice of disenrollment, a cadet may seek advice from a legal assistance attorney.<sup>87</sup> Additionally, a cadet may hire a civilian attorney to assist with explaining the process and preparing for the hearing.<sup>88</sup> However, due process does not require legal counsel to represent a cadet at the actual hearing, and AR 210-26 does not permit it.<sup>89</sup>

Depending on the facts in question, the USMA must hold a misconduct hearing, honor investigation hearing, or conduct investigation before disenrolling a cadet.<sup>90</sup> At the hearing, the cadet has the right to appear and present a defense.<sup>91</sup> This includes the ability to submit evidence, such as documents and witness testimony.<sup>92</sup> Critical to the hearing and the overall process is the government's substantial compliance with its own rules, especially in regard to issues adversely affecting a cadet.<sup>93</sup> After the hearing or investigation is complete, the Superintendent receives the record, the SJA's legal review, and the Commandant's comments.<sup>94</sup> The Superintendent may take action on disenrollments within his authority; otherwise, the USMA forwards the record to the DA for final action.<sup>95</sup>

At each level of review, a cadet may submit rebuttal matters to accompany the record to the next higher level.<sup>96</sup> Also, a cadet can appeal the final decision to the Army

Board for Correction of Military Records (ABCMR).<sup>97</sup> After exhausting all administrative remedies, a cadet may bring a claim in federal court for violations of due process, disputes over the recoupment amount, assertions that the action was arbitrary or capricious under the Administrative Procedures Act, or allegations of other substantive grounds.<sup>98</sup> Absent an obvious error in the disenrollment process, the likelihood of success on a claim in federal court is normally low.<sup>99</sup>

## B. Disenrollment Procedures for the Army ROTC

While individuals participated in military training at civilian colleges as early as 1819, the federal ROTC formally began in 1916 when President Woodrow Wilson signed the National Defense Act.<sup>100</sup> This act reorganized the military, established a reserve corps, and modified the National Guard's role, in addition to creating the ROTC.<sup>101</sup> Seventy years later, the Army formed the U.S. Army Cadet Command (USACC), standardizing the ROTC administration and training.<sup>102</sup> At the same time, the present framework for processing disenrollments emerged.<sup>103</sup> Although current ROTC disenrollments share many similarities with the USMA, several specific rules create unique procedures only applicable to the ROTC.

<sup>85</sup> AR 210-26, *supra* note 17, paras. 6-4 (providing notice), 7-6 (describing access to legal counsel).

<sup>86</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>87</sup> AR 210-26, *supra* note 17, para. 7-6. *See generally* THE U.S. MILITARY ACADEMY, OFFICE OF THE STAFF JUDGE ADVOCATE, LEGAL ASSISTANCE OFFICE, <http://www.usma.edu/sja/SitePages/Legal%20Assistance.aspx> (last visited May 11, 2015) (discussing that Legal Assistance advises cadets on separation proceedings).

<sup>88</sup> AR 210-26, *supra* note 17, para. 7-6.

<sup>89</sup> *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *see* AR 210-26, *supra* note 17, paras. 6-4, 7-6.

<sup>90</sup> AR 210-26, *supra* note 17, ch. 6.

<sup>91</sup> *Wasson*, 382 F.2d at 812; AR 210-26, *supra* note 17, ch. 6.

<sup>92</sup> *Wasson*, 382 F.2d at 812.

<sup>93</sup> *Hagopian v. Knowlton*, 470 F.2d 201, 208 n.23 (2d Cir. 1972).

<sup>94</sup> AR 210-26, *supra* note 17, para. 7-3.

<sup>95</sup> *Id.* paras. 7-2, 7-3; USMA Delegation Memo, *supra* note 78. Normally, an attorney at the Office of The Judge Advocate General (OTJAG) provides a legal review to the Department of the Army (DA) prior to action.

<sup>96</sup> *See* AR 210-26, *supra* note 18, para. 7-3; U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-2 (19 Dec. 1986) [hereinafter AR 600-37].

<sup>97</sup> *See generally* U.S. Dep't of Def., Dir. 1332.41, Boards of Correction of Military Records (BCMRs) and Discharge Review Boards (DRBs) (8 Mar. 2004) (certified current 23 Apr. 2007) [hereinafter DoDD 1332.41]; U.S. Dep't of Army, Reg. 15-185, Army Board for Correction of Military Records (31 Mar. 2006) [hereinafter AR 15-185].

<sup>98</sup> *Phillips v. United States*, 910 F. Supp. 101, 106 (E.D.N.Y. 1996). Violations of procedural due process include defects in notice, inadequacy of hearing, or the agency failing to follow its rules. *Id.* Disputing the recoupment amount is essentially a claims action requiring a waiver of sovereign immunity by the government (*e.g.*, *The Federal Tort Claims Act*, 28 U.S.C.S. ch. 171 (Lexis 2014)). *Id.*

<sup>99</sup> *Compare, e.g.*, *Spadone v. McHugh*, 10 F. Supp. 3d 41 (D.D.C. 2014), and *United States v. Bush*, 247 F. Supp. 2d 783 (M.D.N.C. 2002) (cases resulting in favorable outcomes for the government), with *Rameaka v. Kelly*, 342 F. Supp. 303 (D.R.I. 1972), and *Hagopian v. Knowlton*, 346 F. Supp. 29 (S.D.N.Y. 1972) (obvious errors by the government resulting in favorable outcomes for cadets).

<sup>100</sup> National Defense Act, 39 Stat. 166 § 40 (enacted June 3, 1916). *See generally* U.S. ARMY CADET COMMAND: THE OFFICIAL HOME OF ARMY ROTC, HISTORY, <http://www.cadetcommand.army.mil/history.aspx> (last visited May 11, 2015) (providing additional background on the Army ROTC program).

<sup>101</sup> National Defense Act § 166.

<sup>102</sup> U.S. ARMY CADET COMMAND: THE OFFICIAL HOME OF ARMY ROTC, HISTORY, *supra* note 100.

<sup>103</sup> *Compare* U.S. DEP'T OF ARMY, REG. 145-1, SENIOR RESERVE OFFICERS' TRAINING CORPS PROGRAM: ORGANIZATION, ADMINISTRATION, AND TRAINING para. 3-43 (21 Jan. 1987) (earlier version of regulation), with AR 145-1, *supra* note 15, para. 3-43 (current version of regulation).

## 1. Applicable Statutes and Regulations

Similar to the USMA, 10 U.S.C. § 651—a minimum MSO—also applies to contracted ROTC cadets.<sup>104</sup> However, 10 U.S.C. chapter 103 is the main statute controlling the Army ROTC.<sup>105</sup> Specifically, 10 U.S.C. § 2104 requires cadets to sign a contract with terms that include enlisting, serving for a period of time, and accepting a commission if offered.<sup>106</sup> The Army documents the ROTC contract in DA Form 597-3.<sup>107</sup> Failing to meet its terms may lead to disenrollment and recoupment through active duty enlisted service or financial repayment.<sup>108</sup>

The DoD provides guidance on how to execute the statutes applicable to the ROTC. In accordance with 10 U.S.C. § 651, DoDI 1304.25 requires ROTC cadets to serve eight years, the same as the USMA cadets.<sup>109</sup> Likewise, DoDI 1215.08 implements 10 U.S.C. § 2105 by stating DoD's preference for active duty service over financial repayment for recoupment.<sup>110</sup> Department of Defense Instruction 1215.08 specifies ROTC cadets will sign a contract, and it gives guidance for how to process disenrollments.<sup>111</sup>

The Army expands on the guidance found in DoDI 1215.08 through AR 145-1.<sup>112</sup> Specifically, chapter three addresses cadet disenrollments, and paragraph 3-43 lists sixteen different grounds for disenrollment.<sup>113</sup> This regulation requires some interpretation because portions of it are not current. For example, the organizational structure of the USACC is different from when the Army published AR 145-1.<sup>114</sup> Currently, the USACC has Professors of Military

Science (PMSs), brigade commanders, and a CG, but it no longer has region commanders.<sup>115</sup> A revision of AR 145-1 is pending, and the Army should complete the update in the near future to correct this and other issues.<sup>116</sup>

The USACC issued guidance to clarify AR 145-1. Cadet Command Pamphlet (CC PAM) 145-4 provides specifics related to disenrollments.<sup>117</sup> Unfortunately, parts of CC PAM 145-4 conflict with higher levels of guidance.<sup>118</sup> Practitioners should reference it with caution, and when it differs with higher-level regulations, the higher authority controls.<sup>119</sup> In contrast to CC PAM 145-4, a delegation of authority from the CG to the brigade commanders does clarify some of the outdated language in AR 145-1 by identifying the approval level for different types of disenrollments.<sup>120</sup> Prior to this memorandum, the issue was unclear due to AR 145-1 citing region commanders that no longer exist.<sup>121</sup> Collectively, these statutes and regulations provide the rules applicable to ROTC disenrollments.

## 2. Key Elements of the ROTC Disenrollment Process

In addition to the applicable rules, practitioners should be familiar with the elements of the ROTC disenrollment process. Similar to the USMA, the fundamental elements of the ROTC process relate to the individuals involved and the cadet's rights. The main actors in ROTC disenrollments include a cadet, IO or board, appointing and approving authorities, and legal advisor and attorney conducting the legal review.<sup>122</sup> The USACC legal office provides advice to the IO or board, and a different attorney from the legal office

<sup>104</sup> 10 U.S.C.S. § 651 (Lexis 2014).

<sup>105</sup> 10 U.S.C.S. ch. 103 Senior Reserve Officers' Training Corps (Lexis 2014).

<sup>106</sup> 10 U.S.C.S. § 2104 (Lexis 2014).

<sup>107</sup> See *infra* Appendix B (DA Form 597-3, *supra* note 7).

<sup>108</sup> 10 U.S.C.S. § 2105 (Lexis 2014); 37 U.S.C.S. § 303a(e) (Lexis 2014).

<sup>109</sup> DoDI 1304.25, *supra* note 69.

<sup>110</sup> U.S. Dep't of Def., Instr. 1215.08, Senior Reserve Officers' Training Corps (ROTC) Programs para. 6.3.5.2 (26 June 2006) [hereinafter DoDI 1215.08].

<sup>111</sup> *Id.* paras. 5.2.3 (discussing contract requirement), 6.3.5 (discussing disenrollment procedures). DoDI 1215.08 is currently under revision, and a draft version exists at the DA level. U.S. DEP'T OF DEF., INSTR. 1215.08, SENIOR RESERVE OFFICERS' TRAINING CORPS (ROTC) PROGRAMS (3 Apr. 2014) (unpublished draft; version 2) (on file with author) [hereinafter Proposed DoDI 1215.08 Revisions].

<sup>112</sup> AR 145-1, *supra* note 14.

<sup>113</sup> *Id.* ch. 3 & para. 3-43.

<sup>114</sup> Compare U.S. ARMY CADET COMMAND: THE OFFICIAL HOME OF ARMY ROTC, ORGANIZATION, <http://www.cadetcommand.army.mil/brigades.aspx> (last visited May 11, 2015) (current US Army Cadet Command (USACC)

organization), with AR 145-1, *supra* note 14, para. 1-4 (focusing on USACC's organization at time of AR 145-1's publishing).

<sup>115</sup> See U.S. ARMY CADET COMMAND: THE OFFICIAL HOME OF ARMY ROTC, ORGANIZATION, *supra* note 114.

<sup>116</sup> U.S. DEP'T OF ARMY, REG. 145-1, SENIOR RESERVE OFFICERS' TRAINING CORPS PROGRAM: ORGANIZATION, ADMINISTRATION, AND TRAINING (4 Apr. 2013) (unpublished version 2 proposed revisions to AR 145-1) (on file with author) [hereinafter Proposed Revisions to AR 145-1].

<sup>117</sup> Cadet Command, Pam. 145-4, Enrollment, Retention and Disenrollment Criteria, Policy and Procedures (30 Dec. 2009) [hereinafter CC Pam. 145-4].

<sup>118</sup> See, e.g., CC PAM. 145-4, *supra* note 117, para. 3-2d (stating that region commanders are the approval authority for offenses with fines over \$250, but this is currently withheld to the CG, USACC, in accordance with Memorandum from Commanding General, U.S. Army Cadet Command, to Brigade Commanders, U.S. Army Cadet Command, subject: Delegation of Authority – Cadet Waiver and Disenrollment Authorities (28 Oct. 2014) [hereinafter ROTC Delegation Memo]).

<sup>119</sup> *Andrews v. Knowlton*, 509 F.2d 898, 905 (2d Cir. 1975).

<sup>120</sup> ROTC Delegation Memo, *supra* note 118.

<sup>121</sup> See, e.g., AR 145-1, *supra* note 14, para. 1-4g (discussing responsibilities of region commanders).

<sup>122</sup> See generally AR 145-1, *supra* note 14, para. 3-43.

conducts a review of the record prior to it going to the CG for action.<sup>123</sup> The USACC forwards disenrollments to the DA for appeal or final decision when required.<sup>124</sup> Analogous to the USMA, the involvement of senior officials throughout the ROTC process increases the probability that a disenrollment will comply with all rules.<sup>125</sup>

When the USACC begins the disenrollment process, it must provide notice akin to that provided by the USMA since the same case law applies.<sup>126</sup> For an ROTC cadet, the USACC often serves process through certified mail.<sup>127</sup> Nevertheless, personal service may be appropriate at the senior military colleges where cadre interact more frequently with cadets.<sup>128</sup> Unlike the USMA disenrollments, AR 145-1 does not authorize ROTC cadets to receive government provided legal counsel.<sup>129</sup> However, AR 145-1 permits a cadet to receive assistance from “any reasonabl[y] available military officer” in preparing for the hearing.<sup>130</sup> Cadets may hire a civilian attorney to assist during the disenrollment process.<sup>131</sup> In either instance, AR 145-1 prohibits the individual from representing the cadet at the hearing.<sup>132</sup>

Depending on the basis for disenrollment, the Army must have a board or investigation before disenrolling a cadet.<sup>133</sup> In contrast to the USMA, the ROTC does not divide its processes between misconduct, honor, or conduct investigations.<sup>134</sup> For certain grounds of separation, AR

145-1 requires the USACC to appoint a formal board in accordance with AR 15-6.<sup>135</sup> For all other grounds, the PMS or brigade commander appoints an IO to conduct an informal investigation.<sup>136</sup> Even informal investigations entitle a cadet to a hearing.<sup>137</sup> At the hearing, the cadet has the opportunity to present a defense and the Army must comply with its regulations.<sup>138</sup> Additionally, AR 145-1 requires the ROTC to invite a representative from the school to observe the hearing.<sup>139</sup>

After the hearing is complete, the IO or board sends the record of proceedings through the chain of command to the CG, USACC.<sup>140</sup> An attorney at the USACC legal office completes a review before the CG receives the record.<sup>141</sup> The CG has the authority to retain or disenroll a cadet in most circumstances.<sup>142</sup> For disenrolled cadets, the CG may order recoupment through active duty enlisted service or financial repayment.<sup>143</sup> If the CG recommends no recoupment but approves the disenrollment, USACC forwards the action to the DA for a final decision.<sup>144</sup>

Following final action, an ROTC cadet has rights that are similar to a USMA cadet. The cadet may submit rebuttal matters if the Army includes additional comments in the record, such as when the CG forwards a recommendation to the DA.<sup>145</sup> Also, the cadet is able to appeal to the ABCMR to correct military records related to the disenrollment.<sup>146</sup> Finally, the cadet may file a claim in federal court after exhausting all administrative remedies.<sup>147</sup>

<sup>123</sup> AR 145-1 does not specifically require a legal review. However, AR 15-6, para. 2-3b, arguably requires a legal review because the proceedings “may result in adverse administrative action . . . or will be relied upon in actions by higher headquarters.” U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 2-3b (2 Oct. 2006) [hereinafter AR 15-6].

<sup>124</sup> See AR 145-1, *supra* note 14, para. 1-1 (explaining the DA is the approval authority for all waivers or exceptions to the policies contained in AR 145-1).

<sup>125</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 339-47 (1976) (indicating that multiple levels of reviews, or process, make an administrative action more likely to comply with due process); AR 145-1, *supra* note 14, at i (explaining the “Proponent and exception authority”).

<sup>126</sup> *E.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>127</sup> CC Pam. 145-4, *supra* note 117, para. 6-2d. Certified mail is a common form of service because often the ROTC cadets do not interact with cadre on a daily basis.

<sup>128</sup> *Id.*; 10 U.S.C.S. § 2111a(f) (Lexis 2014). The six senior military colleges are Tex. A&M Univ., Norwich Univ., The Va. Military Inst., The Citadel, Va. Polytechnic Inst. and State Univ., and The Univ. of N. Ga. *Id.*

<sup>129</sup> AR 145-1, *supra* note 14, para. 3-43.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Compare AR 210-26, *supra* note 17, ch. 6, with AR 145-1, *supra* note 15, para. 3-43.

<sup>135</sup> AR 145-1, *supra* note 14, para. 3-43; AR 15-6, *supra* note 123, ch. 5.

<sup>136</sup> AR 145-1, *supra* note 14, para. 3-43.

<sup>137</sup> *Id.*

<sup>138</sup> *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *Hagopian v. Knowlton*, 470 F.2d 201, 208 n.23 (2d Cir. 1972). Also, cadets may choose to waive their disenrollment board in writing. DoDI 1215.08, *supra* note 110, para. 6.3.5; AR 145-1, *supra* note 14, para. 3-43. CC PAM. 145-4, *supra* note 118, ch. 6, provides additional guidance on how to conduct the hearing.

<sup>139</sup> DoDI 1215.08, *supra* note 111, para. 6.3.5; AR 145-1, *supra* note 14, para. 3-43.

<sup>140</sup> AR 145-1, *supra* note 14, para. 3-43.

<sup>141</sup> See *supra* text accompanying note 124.

<sup>142</sup> See, e.g., AR 145-1, *supra* note 14, para. 3-43 (explaining the CG may disenroll scholarship cadets, but the Professors of Military Science may disenroll a nonscholarship cadet).

<sup>143</sup> DoDI 1215.08, *supra* note 110, para. 6.3.5.2; AR 145-1, *supra* note 15, para. 3-43.

<sup>144</sup> DoDI 1215.08, *supra* note 110, para. 6.3.5.2. The Sec’y of the Army has not delegated the authority to waive reimbursement to the CG, USACC.

<sup>145</sup> AR 600-37, *supra* note 96, para. 3-2.

<sup>146</sup> See generally DoDD 1332.41, *supra* note 97; AR 15-185, *supra* note 97.

<sup>147</sup> *Phillips v. United States*, 910 F. Supp. 101, 106 (E.D.N.Y. 1996).



## V. Practice Pointers

The previous sections explained the legal framework and provided an overview of the disenrollment processes that apply to the USMA and the ROTC. This section highlights positive and negative examples of disenrollments as they relate to government action. The positive examples for the government show what “right” looks like while the negative ones illustrate common issues that may occur during disenrollments.

### A. When Things Go Right for the Government

#### 1. Adequate Procedural Due Process Given

In *Tully v. Orr*, the Air Force Academy disenrolled a cadet based on his disciplinary history, which included issues of disrespect and plagiarism.<sup>148</sup> Procedurally, the disenrollment had several deficiencies, including the government’s failure to provide all of the witnesses’ names in accordance with regulations.<sup>149</sup> Despite the defects, the court found the cadet “was afforded the opportunity to present evidence and cross-examine, and to consult with counsel outside the hearing. The Academy [was] required to do no more.”<sup>150</sup>

This case supports the idea that procedural due process considers the totality of the process and minor deficiencies will not undermine the overall process. As long as the agency provides notice, a hearing, and an opportunity to present a defense, a court will likely favor the agency and find sufficient due process existed. Practitioners should consider whether or not the error is serious enough to cause prejudice that would affect the outcome of the process when advising their client, regardless if it is a commander or a cadet. Short of this level of error, government corrective action is likely not necessary, nor are subsequent appeals by a cadet likely to be successful.

#### 2. Minor Procedural Violations

In *White v. Knowlton*, the USMA disenrolled a cadet for violating the honor code by cheating on a physics exam.<sup>151</sup> The court opined “[w]hile separation is admittedly a drastic and tragic consequence of a cadet’s transgression, it is not an unconstitutionally arbitrary one, but rather a reasonable albeit severe method of preventing men who have suffered ethical lapses from becoming career officers.”<sup>152</sup>

<sup>148</sup> *Tully v. Orr*, 608 F. Supp. 1222, 1224 (E.D.N.Y. 1985).

<sup>149</sup> *Id.* at 1224-26.

<sup>150</sup> *Id.* at 1226.

<sup>151</sup> *White v. Knowlton*, 361 F. Supp. 445, 446-47 (S.D.N.Y. 1973).

<sup>152</sup> *Id.* at 449.

*White* supports the premise that the services determine what qualifies as sufficient misconduct to warrant disenrollment. The courts will not look into the reasonableness of this determination as long as the agency followed its rules. Therefore, government attorneys should proactively provide counsel to both commanders considering initiation of a disenrollment action and the IOs or boards conducting the hearing. On the other hand, cadets’ attorneys should consider seeking relief through administrative or judicial appeal whenever it appears the agency has not substantially complied with its rules.

### B. When Things Go Wrong for the Government

While the previous two examples illustrate situations resolving in the government’s favor, the following two examples demonstrate what happens when the government makes a critical mistake. The issue in the first case centers on the adequacy of the notice the government provided to the cadet. The second case addresses whether the government provided sufficient opportunity for the cadet to participate in a fair hearing. Together the concepts of adequate notice and a fair hearing form the foundational requirements of what the government must provide a cadet during the disenrollment process.

#### 1. Inadequate Notice

In *Rameaka v. Kelly*, the Army disenrolled a cadet for willful evasion of his ROTC contract in 1962, and he filed a writ in federal district court to be released from his order to active duty.<sup>153</sup> In reviewing the claim, the court held that the notice given by the government “lacked specificity” and the writ “can hardly be denied when viewed in the totality of the circumstances in the order of their development.”<sup>154</sup> Although the government provided notice to the cadet stating a board would consider his dismissal from the ROTC, it did not identify any specific grounds for the board to consider.<sup>155</sup> As a result, the court granted relief and ordered the Army to hold another hearing after first providing the cadet with the grounds it was considering as a basis for disenrollment.<sup>156</sup>

The learning point from *Rameaka* is the Army must provide notice to the cadet, stating specific grounds for disenrollment. This ties into the principle that the government must afford a cadet the opportunity to present a defense. Without knowing the specific grounds of the

<sup>153</sup> *Rameaka v. Kelly*, 342 F. Supp. 303, 304-06 (D.R.I. 1972).

<sup>154</sup> *Id.* at 309.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 310.

disenrollment, a cadet cannot properly prepare a defense. Legal advisors should develop a positive working relationship with the command so the commander and staff feel comfortable seeking clarification on the most appropriate basis for separation.

## 2. Failure to Provide a Fair Hearing

Finally, in *Hagopian v. Knowlton*, the USMA disenrolled a cadet for receiving excessive demerits.<sup>157</sup> The court held the proceedings failed to provide adequate due process based on the cadet not having a fair hearing.<sup>158</sup> Specifically, the court held “[t]he plaintiff never received the opportunity to be personally present before the Academic Board or an impartial hearing officer, the opportunity to testify, or present evidence, or confront adverse testimony, or to examine and explain the adverse materials considered by the Board.”<sup>159</sup> Consequently, the court granted an injunction allowing the cadet to stay at the USMA.<sup>160</sup>

The above list provided by the court highlights many elements required for a fair hearing. This list may seem like an excessive number of items, but the government can address all of them by having a hearing where the cadet appears and presents a defense. Therefore, the actual burden on the government is not excessively high. Again, proactive involvement by the legal advisor with the command and IO or board can eliminate or correct many potential issues before they undermine the disenrollment process.

## VI. Conclusion

The ultimate purpose of this article is to facilitate a better understanding of the USMA and the Army ROTC disenrollments for legal practitioners. Adequate notice and a fair hearing are critical to meeting the requirements of due process in disenrollment proceedings. While similar, the disenrollment processes for the USMA and the ROTC have different steps the government must follow to comply with applicable rules. Attorneys practicing in the area of cadet disenrollments should remember some of the implementing guidance and many of the controlling regulations are under revision. Also, practitioners should recall that the DA, the USMA, and the USACC frequently modify the approval authorities through memorandums. The capability to understand and effectively apply the rules related to cadet disenrollments makes attorneys stronger assets to their client, whether it is their command or a cadet they represent.

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<sup>157</sup> *Hagopian v. Knowlton*, 346 F. Supp. 29, 30 (S.D.N.Y. 1972).

<sup>158</sup> *Id.* at 32.

<sup>159</sup> *Id.* at 33.

<sup>160</sup> *Id.* at 34.

**Appendix A. USMA Form 5-50, Cadet Agreement**

**UNITED STATES MILITARY ACADEMY  
WEST POINT, NEW YORK**

***I. Oath of Allegiance***

I, \_\_\_\_\_ do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States, paramount to any and all allegiance, sovereignty, or fealty I may owe to any State or Country whatsoever; and that I will at all times obey the legal orders of my superior officers, and the Uniform Code of Military Justice.

***II. Agreement to Serve***

I, having been appointed a cadet of the United States Military Academy, do hereby agree, with the consent of my parents or guardian if I am a minor:

a. To complete the course of instruction at the United States Military Academy;  
b. If tendered an appointment as a commissioned officer in one of the armed services upon graduation from the United States Military Academy, to accept such appointment and to serve under such appointment on active duty for at least five consecutive years immediately after such appointment; if my initial appointment hereunder is in a Reserve Component, to accept a commission in a Regular Component if subsequently tendered during the five consecutive years immediately after my initial appointment, and to serve on active duty for the remainder of such period under such appointment.

c. If I am permitted to resign my commission in a Regular Component of one of the Armed Services prior to the eighth anniversary of my graduation, to accept an appointment as a commissioned officer in a Reserve Component of one of the Armed Services and remain therein until such eighth anniversary.

d. To serve a total of eight (8) years from graduation from the United States Military Academy. Any part of that service not completed on active duty must be served in a Reserve Component (not on active duty), unless I am discharged from the Reserve Component by proper military authority.

e. That if I fail to complete the course of instruction of the United States Military Academy, breach my service agreement as defined in paragraph 1.g.(4), Statement of Policies, on the next page, or decline to accept an appointment as a commissioned officer, I will serve on active duty as specified in paragraphs 1.b. through 1.f., which are contained in the Statement of Policies on the next page;

f. That if I voluntarily fail, or because of misconduct fail, to complete the period of active duty specified in paragraphs II.b., c., d. or e. above, I will reimburse the United

States in an amount that bears the same ratio to the total cost of advanced education provided me as the unserved portion of active duty bears to the total period of active duty I have agreed to serve;

g. If I am obligated to reimburse the United States for the cost of my advanced education, any subsequent enlistment in an Armed Service will not relieve me of this debt.

h. Further, that if I am separated from the United States Military Academy for breach of this service agreement, as defined in paragraph 1.g.(4), Statement of Policies on the next page, and the Army decides that I should not be ordered to active duty because such service would not be in the best interests of the Army, I shall be considered to have either voluntarily or because of misconduct failed to complete the period of active duty and may be required to reimburse the United States as described above;

i. For the purpose of this paragraph:

(1) The term "voluntarily fail" includes, but is not limited to, failure to complete the period of active duty because of conscientious objection, because of resignation from the United States Military Academy or United States Army, and marriage while a cadet.

(2) The term "because of misconduct" includes, but is not limited to, termination by the United States Army of my service because of criminal conduct, conduct violating the Cadet Honor Code, conduct deficiency under the Cadet Disciplinary System, and conduct violating regulations for the discipline of the Corps of Cadets.

(3) The term "course of instruction" is synonymous with the term "educational requirements" as the term is used in 10 USC 2005.

***III. Marital Status***

I am unmarried, do not presently have custody of a child, do not have a legal obligation of support from a prior marriage, and have no legal obligation to support a child or a former spouse. Furthermore, I understand that a cadet, who marries, has custody of a child, incurs a legal obligation of support from a prior marriage, or incurs a legal obligation to support a child or former spouse while a United States Military Academy cadet will be separated from the United States Military Academy. Divorce, annulment, or other dissolution of a cadet's marriage does not affect or preclude separation under this provision.

My signature constitutes the taking of the Oath of Allegiance, execution of the agreement to serve, my affirmation as to my marital status, the absence of child custody or a court-ordered child support obligation and my acknowledgment that I have read, understand, and agree to abide by the statement of policies on the next page. For all male cadets, signing this form also constitutes registration with the Selective Service System in accordance with the Military Selective Service Act. Incident thereto the Department of Defense may transmit my name, permanent address, Social Security Number, and birth date to the Selective Service System for recording as evidence of the registration.

(Sign your full name as it appears in Paragraph I above.)

Sworn to and subscribed before me at West Point, New York, this \_\_\_\_\_ Day of \_\_\_\_\_, two thousand and fourteen

USMA Form 5-50 (Previous editions are obsolete) 1 July 2014

### Information on Oath of Allegiance

An important consideration for you is the academy form you must swear to or affirm on your first day at West Point. A copy of this USMA Form 5-50 follows.

USMA Form 5-50 consists of the Oath of Allegiance, the Agreement to Serve and an Affirmation as to your marital status and child support and custody obligations. The reverse side of the form (on page 14) contains a Statement of Department of Defense Policies regarding separation of cadets prior to graduation and subsequent to graduation on refusal to accept an appointment as a commissioned officer.

Please read USMA Form 5-50, consider it carefully, and discuss it with your parents so you fully understand your military service obligation to the nation (Do not sign now).

You will sign 5-50 (Oath of Allegiance) on R-Day as part of your in processing.

#### Statement of Policies

1. Department of Defense Directive 1332.23, dated 19 February 1988, as implemented by Army regulations, provides the following direction concerning separation of cadets prior to the completion of the course of instruction or subsequent to graduation on refusal to accept an appointment as a commissioned officer.

a. A cadet who enters the United States Military Academy (USMA) directly from civilian status assumes a military service obligation of eight years (10 USC 651).

b. A cadet who is separated from the USMA because of demonstrated unsuitability, unfitness, or physical disqualification for military service will be discharged in accordance with the applicable Army regulations. Where such a discharge is caused by voluntary action or misconduct on the part of a cadet subject to an active duty obligation, the reimbursement provision of paragraph II.f. of the Agreement to Serve will apply.

c. A cadet who enters the USMA directly from a civilian status and resigns or is separated from the USMA prior to the commencement of the Second Class academic year will be discharged from the U.S. Army. A resignation tendered by a Fourth or Third Class cadet will be accepted when found to be in the best interest of the service. A cadet who tenders a resignation will be required to state a specific reason for the action.

d. A cadet who enters the Military Academy from the Regular or Reserve Component of any military service and who resigns or is separated from the USMA prior to the commencement of the Second Class academic year will revert to his or her former status for the completion of any prior service obligation. As an exception, Invitational Reservists (cadets who entered the United States Military Academy Preparatory School from a civilian status) who resign or are separated from the USMA prior to commencement of his or her second class academic year will be discharged from the Army. A cadet who entered the USMA from the Regular Army or any Reserve Component of the Army and who has at the time of separation a remaining prior service obligation of less than one year, may, upon the approval of the Secretary of the Army or his designee, be discharged with waiver of any prior service obligation. All service as a cadet is counted in computing the unexpired portion of the enlistment or period of obligated service.

e. A cadet who has commenced his or her Second Class academic year and who resigns or is separated prior to completing the course of instruction, except for physical disqualification, unfitness, or unsuitability, will normally be transferred to a Reserve Component in an enlisted status and, if deemed to have breached his or her service agreement, may be ordered to active duty for not less than two years (10 USC 4348(b)) but no more than four years. The Secretary of the Army or his/her designee will retain final authority to order the individuals to active duty. Completion or partial completion of service obligation acquired by prior enlistment in no way exempts a separated cadet from being transferred to a Reserve Component and ordered to active duty under these provisions.

f. Any First Class cadet who completes the course of instruction and declines to accept an appointment as a commissioned officer will be transferred to a Reserve Component in an enlisted status and ordered to active duty for four (4) years (10 USC 4348(b)).

g. The foregoing provisions will be applied in accordance with the following guidance:

(1) The Second Class academic year shall be deemed to have commenced at noon on the first day of regularly scheduled academic classes following the summer training period.

As an exception, the Second Class year for a cadet who is designated a potential mid-year graduate will commence at noon on the first day of regularly scheduled classes in the term following the advancement of that cadet into the second class.

(2) In cases where it is necessary to determine whether a cadet resigned prior to or

following the commencement of the Second Class year, the critical date is the date the resignation action is initiated by the cadet.

(3) In cases in which the Academy discovers an incident giving rise to separation in one academic year, but separation is not initiated (or a resignation in lieu of the same is not forwarded by the chain of command) until the following year, the separation action will be deemed to have "started" on the date of discovery for purposes of computing the service obligation and pay grade under AR 612-205, table 3.

(4) "Breach of service agreement" includes separation resulting from resignation, for any of the bases for separation listed in AR 210-26, Table 7-1, including all additions to Table 7-1 subsequent to the date of this agreement, or from other willful acts or omissions (AR 210-26, paragraph 7-9).

2. Normally, all graduates of the USMA will be appointed by the President as commissioned second lieutenants on active duty in the United States Army. However, cadets may state a preference for appointment, upon graduation, as a commissioned officer in either the U.S. Navy, U.S. Air Force, or U.S. Marine Corps (10 U.S.C. 541 (a)). Such appointment will be contingent upon the approval of both the Secretary of the Army and the Service Secretary of the gaining military department.

3. Any First Class cadet, including potential mid-year graduates, in either of the two terms prior to their anticipated graduation, who resigns or is separated, if fully qualified, may be recommended by the Superintendent and approved by the Secretary of the Army to be commissioned in a Reserve component. Such action may be appropriate in cases of separation for marriage or child support or similar circumstances. The effective date of rank in the Reserve component will be no earlier than the graduation date of the individual's class at the time of resignation or separation. These cadets may:

(a) Be commissioned in the USAR for service with a Reserve Component unit. There will be an eight-year military service obligation associated with this appointment; or

(b) After receipt of a baccalaureate degree, be commissioned in the USAR and compete with Reserve Officer Training Corps graduates for active duty or active duty for training. The military service obligation for those selected for active duty under this provision will be eight years, three of which will be on active duty.

Appendix B. DA Form 597-3, Army Senior ROTC Scholarship Cadet Contract

<b>ARMY SENIOR RESERVE OFFICERS' TRAINING CORPS (ROTC) SCHOLARSHIP CADET CONTRACT</b> <small>For use of this form see AR 145-1; the proponent agency is DCS G-1</small>			
<b>DATA REQUIRED BY THE PRIVACY ACT OF 1974</b>			
<b>AUTHORITY:</b>	Title 10, USC, Sections 2005, 2101 through 2111, and 3013. Title 5, USC, Section 301.		
<b>PRINCIPAL PURPOSE:</b>	To specify the contractual agreements and obligations and to document contracting in the Army Senior Reserve Officers' Training Corps Scholarship Program.		
<b>ROUTINE USES:</b>	This form will be maintained in the cadet's Military Personnel Records Jacket and becomes a permanent part of the official personnel records as confirmation of enrollment, contracting, obligation and agreements.		
<b>DISCLOSURE:</b>	Disclosure of the information requested in this contract is voluntary. However, applicable portions must be completed if you desire to be enrolled in the Army ROTC Scholarship Program.		
<b>PREAMBLE</b>			
This contract represents an agreement entered into between the United States Army and the Reserve Officers' Training Corps (ROTC) scholarship recipient ( <i>cadet</i> ) named herein, with the consent of the parent or guardian if the cadet is under the age of 18, to effect the cadet's participation in the Army Reserve Officers' Training Corps Program. It is hereby agreed by both parties, the United States Army and the Cadet, that the sole purpose of the ROTC scholarship program is to produce officers for the United States Army. Entry into this program is a serious commitment. This commitment must be made with the resolve to attain a commission. If there are any doubts about the prospective cadet's ability or determination to fulfill the terms of this contract, then this contract should not be executed. In consideration of the mutual benefits, which will accrue to the parties hereto by reason of the cadet's participation in the Army ROTC and later service in the United States Army, the parties agree to the terms below.			
<b>CONTRACT</b>			
A. STUDENT'S NAME ( <i>Last, First, MI</i> )		D. NAME OF EDUCATIONAL INSTITUTION	
B. SSN		E. ADDRESS OF EDUCATIONAL INSTITUTION	
C. DATE OF BIRTH ( <i>YYYYMMDD</i> )			
F. DATE EDUCATION COMMENCES ( <i>YYYYMMDD</i> )	G. COMPLETION DATE ( <i>YYYYMMDD</i> )	H. ADDRESS OF RECORD ( <i>Include ZIP Code</i> )	
I. ACADEMIC MAJOR IN WHICH DEGREE IS TO BE ATTAINED			
J. EXTENDED BENEFITS RECEIVED	K. PERIOD COVERED	L. DATE APPROVED ( <i>YYYYMMDD</i> )	M. AUTHORIZED
<b>PART I - AGREEMENT OF THE DEPARTMENT OF ARMY</b>			
1. DEPARTMENT OF THE ARMY AGREEMENTS. In consideration of the agreement in Part II below, the Department of the Army agrees to--			
a. PAY SCHOLARSHIP BENEFITS. Pay for a period of _____ academic years ( <i>provided funds are appropriated by Congress</i> ) the following:			
(1) TUITION AND FEES. Tuition and educational fees up to an annual amount of \$ _____.			
(2) BOOKS AND LABORATORY EXPENSES. A flat rate of \$ _____, which may increase during the period of this contract, will be reimbursed as established on an annual basis by the U.S. Army Cadet Command, for textbooks, and laboratory expenses. This will be payable on the first day of enrollment for all returning or previously enrolled cadets. The flat rate for new award winners will be paid promptly upon completion of the 45-day requirement or upon validation of the scholarship contract whichever is later. ( <i>Any items the cadet believes are needed that would exceed this rate must be purchased with other than Army funds.</i> )			

DA FORM 597-3, JUL 2005

DA FORM 597-3, AUG 2004, IS OBSOLETE.

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**(3) PAYMENT TERMS.**

(a) Scholarship payment for tuitions and fees will be made if the cadet remains actively enrolled as a scholarship student on the 45th day after the start of each academic year. The 45-day waiting period applies only to the first term of each academic year (*usually the Fall semester/quarter*). The waiting period will not apply to the second semester or to second/third quarters. If the cadet enters into a scholarship contract after the 45th day of the first term of the academic year, he or she is immediately eligible for scholarship benefits payments.

(b) After the 45-day waiting period, payment for tuition and fees will be made to the beginning of the term, or the date the cadet began the term, whichever is later, provided that this contract is consummated before the end of that term.

(c) If the educational institution will not defer the payment of tuition and other fees until the 45th day after the start of classes, the cadet is responsible for payment of the tuition and fees. The Army is not obligated to pay any late fee incurred as a result of the cadet's failure to pay the costs of tuition and fees prior to the 45th day.

b. **PAY MONTHLY SUBSISTENCE.** Pay a subsistence allowance for participation in the scholarship program for 10 months of any academic year (*for the actual duration of the academic year, whichever is shorter*) at the rate of \$\_\_\_\_\_ per month for MS I cadets; \$\_\_\_\_\_ per month for MS II cadets; \$\_\_\_\_\_ per month for MS III cadets; \$\_\_\_\_\_ per month for MS IV cadets; and \_\_\_\_\_ for MS V cadets. These rates are generally prescribed by law and implemented by the Secretary of Defense and may change during the period of this contract. Entitlement is not to exceed--

- (1) 50 months for a 5-year scholarship (*or extended benefits under 4-year scholarship*).
- (2) 40 months for a 4-year scholarship.
- (3) 30 months for a 3-year scholarship.
- (4) 20 months for a 2-year scholarship.

c. **PAY FOR ATTENDANCE AT LEADER DEVELOPMENT AND ASSESSMENT COURSE (LDAC).** Provide a daily rate of pay, which is prescribed by law for cadets of the United States Military Academy and implemented by the Department of Defense Military Pay and Allowance Entitlements Manual (*DODPM*), for the period that the cadet attends LDAC.

NOTE: Payment for travel from the cadet's home of record to the school listed above is not authorized under this scholarship contract. (*EXCEPTION: The only exception is for four-year, Military Junior Colleges (MJC), and Green-to-Gold scholarship recipients who are paid for one time travel from home of record to school to accept an appointment as a scholarship cadet and to enlist in the USAR Control Group (ROTCI).*)

d. **PROVIDE TRAINING.** Provide the cadet with U.S. Army-sponsored and -funded Reserve Officer Training.

e. **DELAY ACTIVE DUTY FOR GRADUATE/PROFESSIONAL STUDY.** The obligated period of active duty this contract requires may be delayed upon commissioning, if the cadet's application for resident graduate or professional study is approved, until completion of the authorized delay.

f. **COMMISSION AS AN OFFICER.** Upon satisfactory completion of the academic, military, and all other requirements of the Army ROTC program, a cadet may be appointed as a reserve officer in the Army in the grade of second lieutenant.

PART II - AGREEMENT OF SCHOLARSHIP CADET CONTRACTING IN THE SENIOR ROTC PROGRAM

2. GENERAL CADET AGREEMENT. As the ROTC scholarship cadet named above, I hereby agree to do the following:

a. ENLISTMENT AGREEMENT. As a condition for membership in the Army ROTC Program, I agree to enlist in the Reserve Component of the United States Army (*with an assignment to the USAR Control Group (ROTC)*) for a period prescribed by the Secretary of the Army.

b. ENROLLMENT AGREEMENT. I agree to enroll in the necessary courses and successfully complete, within the prescribed time, the requirements for the degree in the academic major stated above. I agree to remain enrolled in and successfully complete the ROTC program, including LDAC and all training as prescribed by the Secretary of the Army or his/her designee, as a prerequisite for commissioning.

c. FULL-TIME STUDENT AGREEMENT. I agree to remain a full-time student in good standing at the educational institution named above until I receive my degree. A full-time student is defined as one enrolled in sufficient academic courses to obtain sophomore, junior, and senior academic status at the end of each appropriate one-academic-year increment for the duration of the scholarship. This includes the required Army ROTC classes, which may be part of or in addition to those courses required for my degree. If I desire to transfer to another institution or take a leave of absence from the continuous performance of this contract, I agree to obtain prior written approval from the Professor of Military Science (*PMS*).

d. ACADEMIC GRADE POINT AVERAGE AGREEMENT. I agree to maintain, at a minimum, a cumulative academic grade point average of 2.0 on a 4.0 or equivalent scale. This grade point average must also be maintained for each semester or quarter. If I am required by my academic major or by the school I am attending to maintain a higher cumulative and semester or quarter grade point average, I agree to maintain that higher standard until the completion of the academic requirements for my degree. I understand and agree that failure to maintain the minimum academic grade point average may subject me to disenrollment from the ROTC program.

e. ROTC COURSES GRADE POINT AVERAGE AGREEMENT. I agree to maintain at least a 2.0 on a 4.0 or equivalent scale, cumulative and semester or quarter academic grade point average in all ROTC courses. I understand and agree that failure to maintain the minimum ROTC courses grade point average may subject me to disenrollment from the ROTC program.

f. MEDICAL AND PHYSICAL FITNESS STANDARDS.

(1) I agree to maintain eligibility for enrollment and retention in ROTC and commissioning, as defined by statute, Army regulation, and this contract, throughout the period of this contract. I agree to meet and maintain the Army Physical Fitness Test (*APFT*) standard and the screening weight or body fat percentage required by the Army Weight Control Program as required of active duty soldiers each year and prior to attendance at ROTC LDAC. These will be continuous requirements that I must continue to meet until the date that I report to Officer Basic Course (*OBC*) or a Reserve Component unit and thereafter. Commissioning eligibility standards, including the APFT and Army Weight Control Program standards, are subject to change, and I must keep myself informed of such changes through contact with the PMS. I understand and agree that failure to maintain the weight and physical fitness requirements may subject me to disenrollment from the ROTC program.

(2) I agree to undergo precommissioning drug and alcohol screening tests, normally administered during LDAC training, or as may otherwise be prescribed by U.S. Army Cadet Command. If the result of any test is positive, I will be subject to disenrollment from the ROTC program.

(3) I agree to undergo testing for HIV (*Human Immunodeficiency Virus*) antibody during my precommissioning physical examination; normally during LDAC training or as the U.S. Army Cadet Command may otherwise prescribe. If the result of the testing is confirmed positive, I will be disenrolled from the ROTC program.

PART II - AGREEMENT OF SCHOLARSHIP CADET CONTRACTING IN THE SENIOR ROTC PROGRAM (Continued)

g. **NURSE CADET AND ARMY MEDICAL SPECIALIST CORPS CADET ADDITIONAL AGREEMENT.** I agree, if I am a nurse candidate or a medical specialist corps cadet, to complete a baccalaureate program from an accredited and approved educational institution with an academic and clinical curriculum in English. I also agree to complete my ROTC training requirements by my projected commissioning date and accept, if offered, a commission in the USAR. I further understand that if selected for active duty in the Army Nurse Corps or Army Medical Specialist Corps, I must first pass the professional degree and licensing exam requirements set forth in relevant Army regulations prior to entry on active duty for my particular specialty. If a nurse cadet, I will take the exam not later than 60 days after graduation. If I fail the exam, I must retake it within 120 days after the first exam. If I fail my nurse licensing examination for the second time, I will be branched based on the needs of the Army.

3. **ADDITIONAL TERMS AND CONDITIONS.** I further understand that--

a. **DISCLOSURE OF DISQUALIFYING CONDITIONS.** By executing this contract, I represent that I meet all eligibility criteria for contracting in the ROTC Program and commissioning, as defined by statute, Army regulation, and this contract. I represent that I have disclosed or will disclose any and all pre-existing medical conditions and non-medical conditions that would make me ineligible for enrollment in the ROTC program as specified in statute, Army regulations (including but not limited to AR 145-1) and this contract. If I am ineligible for contracting in ROTC based on a particular medical or non-medical condition, but such ineligibility may be waived, I must obtain an approved waiver before executing this contract. Failure to have disclosed or to disclose any disqualifying condition, including any conditions I should have known about, will subject me to disenrollment from the ROTC program and possible recoupment of scholarship benefits. I certify that I have been notified of the Department of Defense Homosexual Conduct Policy, and I understand that my sexual orientation does not make me ineligible for contracting with the Army. Therefore, nothing in this paragraph requires a disclosure of my sexual orientation in violation of the Department of Defense Homosexual Conduct Policy as addressed in AR 600-20.

b. **NATURE OF DUTIES AND CONSCIENTIOUS OBJECTOR STATUS.** My acceptance of the terms and conditions of this agreement signifies my readiness to bear arms, to engage in and support combat operations and to operate and support operations of approved weapons systems. If I at any time apply for and receive conscientious objector status, I will be disenrolled from the program. If conscientious objector status is approved, my failure to complete the service obligation within this contract will result in my disenrollment, at which point I may be required to reimburse the United States Government for advanced educational assistance expended on my behalf.

c. **CADET OBLIGATION.**

(1) **CADETS.** I understand and agree that I will incur an active duty and/or reimbursement obligation after the first day of my MS II year (sophomore year) if I am a three-, four- or five-year scholarship recipient; after the first day of my MS III year (junior year) if I am a two-year scholarship recipient; or after the first day of my MS IV year (senior year) if I am a one-year or less scholarship recipient.

(2) **GREEN-TO-GOLD CADETS.** If I was conditionally discharged from the active Army to become a scholarship recipient, I am obligated and may not voluntarily withdraw from the ROTC program from the date of discharge without incurring an active duty or reimbursement obligation.

(a) If I am an MS I/freshman and I am disenrolled from the ROTC Program for any reason, I may be returned to active duty for the time not served on my original active duty enlistment when I was separated to accept the ROTC scholarship. If I have less than one year remaining on my original active duty enlistment and am not returned to active duty, I may be required to repay scholarship funds expended on my behalf.

(b) If I am in the ROTC program beyond the MS I/freshman year and am disenrolled, I may be returned to active duty or I may be involuntarily ordered to active duty as stipulated in paragraph 6 of this contract. In case of personal hardship, I may request return to active duty in my enlisted status to serve



**PART II - AGREEMENT OF SCHOLARSHIP CADET CONTRACTING IN THE SENIOR ROTC PROGRAM (Continued)**

out the time remaining on my original active duty enlistment contract instead of the active duty obligation stipulated in paragraph 6 of this contract.

**NOTE:** If I am a cadet with prior service, I understand that I will be required to serve any unexpired portion of my previous statutory enlistment obligation. The unexpired portion of my previous statutory enlistment obligation runs concurrently with my contractual military service obligation under this contract.

**4. CADET AGREEMENTS UPON PROGRAM COMPLETION.** Upon completion of all requirements for appointment, to include medical qualification, all prescribed military science courses, LDAC and any other training that may be prescribed by the Secretary of the Army or his or her designee, I agree to, as prescribed by the Secretary of the Army, complete the following requirements:

a. **ACCEPTANCE OF APPOINTMENT.** I agree to accept an appointment, if offered, as a commissioned officer in the USAR or ARNGUS, in accordance with governing Army regulations. I understand that upon appointment, I will incur a total military service obligation not to exceed eight (8) years and cannot resign such appointment before completion; however, this obligation may be met in a variety of ways as outlined below. I further understand that active duty service may include worldwide assignment and assignment that involves combat or exposure to nuclear, chemical, or biological weapons.

(1) **ACTIVE DUTY ASSIGNMENT.** Serve up to 4 years on active duty as a commissioned officer in the U.S. Army or for a period as prescribed by relevant Army regulations based on the needs of the Army, followed by service in the Reserve Component as set forth in relevant Army regulations, until the remainder of my eight-year contractual military service obligation has been served.

(2) **RESERVE COMPONENT DUTY ASSIGNMENT.** Serve a short period of active duty or active duty training if appointed for duty in a Reserve Component. If I am not selected for extended active duty, I will complete an officer's basic course for branch qualification. This will be followed by service in a Reserve Component Unit (ARNGUS or USAR), which has Monthly Unit Training Assemblies and an annual training period of approximately two weeks until the remainder of my contractual military service obligation has been served.

(3) **UNAVAILABILITY OF TROOP PROGRAM UNIT ASSIGNMENT.** If I am fulfilling my obligation through Reserve Component duty and an appropriate troop program unit assignment is not available or becomes unavailable in either the U.S. Army Reserve or the Army National Guard of the United States, I agree to participate as a member of the Individual Mobilization Augmentee (IMA) program by serving at least twelve (12) days, excluding travel time, on annual training each fiscal year as directed by the Human Resources Command - St. Louis (HRC-St Louis). If it is determined that neither an appropriate unit nor an IMA assignment is available, I agree to participate as a member of the Individual Ready Reserve (IRR) by serving up to twelve (12) days of training each fiscal year until such time as an appropriate unit or IMA assignment becomes available or until the expiration of my contractual military service obligation. I may be required to travel the distance specified in Army regulations to fulfill my contractual military service obligation.

(4) **THE ARMY NATIONAL GUARD COMBAT REFORM INITIATIVE (ANGCRI).** If I am offered the opportunity to participate in the Army National Guard Combat Reform Initiative (ANGCRI), I understand and agree that in return for participation in the ANGCRI program, I will serve my remaining service obligation in an Army National Guard unit, in lieu of completing my active duty service obligation, including mandatory service requirements as prescribed by Federal statute, Army regulation, and my ROTC contract. Furthermore, if I voluntarily, or because of misconduct, fail to complete my obligated Reserve service in an Army National Guard unit, the Army may require me to return to active duty to complete the remainder of my service obligation or the Army may seek recoupment against me.

b. **APPLICATION FOR RESERVE COMPONENT DUTY ASSIGNMENT.** I understand that I may apply for a Reserve Component appointment and request service on active duty or service with a Reserve Component Unit (ARNGUS or USAR) at my discretion. However, my selection for the appointment and service shall be determined according to the needs of the Army at the time that my requested appointment is considered. Further, specific career field choices and branch assignments cannot be guaranteed but will be made according to the needs of the Army no earlier than 12 months before commissioning.

PART II - AGREEMENT OF SCHOLARSHIP CADET CONTRACTING IN THE SENIOR ROTC PROGRAM (Continued)

c. If granted scholarship benefits beyond four years, I am obligated to serve an additional period of active duty equivalent to any scholarship entitlements extended beyond four years, e.g., six months for each additional semester of financial assistance granted (or four months for each additional quarter of financial assistance granted).

5. TERMS OF DISENROLLMENT. I understand and agree that once I become obligated and I am disenrolled from the ROTC program for breach of contractual terms or any other disenrollment criteria established now or in the future by Army regulations (which include, but are not limited to, AR 145-1) incorporated herein by reference, I am subject to the terms in paragraphs 5a through 5e below--

a. I AGREE TO SERVE ON ENLISTED ACTIVE DUTY. Under the terms of this contract, the Secretary of the Army or his or her designee, may order me to active duty as an enlisted soldier, if I am qualified, for a period of not more than four (4) years if I fail to complete the ROTC program. If I am disenrolled after the point of obligation, I may be ordered to active duty for one of the periods listed in paragraph 6 below based upon the year during which my disenrollment was initiated;

b. I AGREE TO REIMBURSE THE UNITED STATES GOVERNMENT. If I am offered the opportunity to repay my advanced educational assistance in lieu of being ordered to active duty, I will be required to reimburse the United States government through repayment of an amount of money, plus interest, equal to the entire amount of financial assistance (to include tuition, educational fees, books, laboratory expenses, and supplies) paid by the United States for my advanced education from the commencement of this contractual agreement to the date of my disenrollment or refusal to accept a commission. This amount includes any financial assistance I may have received prior to my obligation point. I agree that any money I am determined to owe to the United States shall bear interest at the rate equal to the highest rate being paid by the United States on securities having maturity dates of ninety days or less and shall accrue from the day that I am first notified of the amount I owe to the United States as reimbursement under this contract. I understand that I may be deemed to have failed to comply with the terms and conditions of this contract (breach of contract) regardless of whether I knew that the failure violated the contract and regardless of whether the failure was the result of an act or omission on my part made with a specific intent to avoid responsibilities under the contract.

c. FAILURE TO COMPLETE REQUIRED SERVICE OBLIGATION. I understand and agree that if I voluntarily or because of misconduct fail to begin or fail to complete any period of active duty or duty in a reserve status not on active duty that I have incurred under this contract whether as an officer or an enlisted soldier, I will be required to reimburse the United States an amount of money, plus interest, that is equal to or bears the same ratio to the total cost of the financial assistance provided to me by the United States as the unserved portion of such duty bears to the total period of such duty I was obligated to serve.

d. I AGREE THAT PENDING DISCHARGE FROM ROTC, I MAY NOT ENLIST. I may not enlist in the active Army, another military service, or in a military service academy while I am a contracted ROTC cadet unless I am properly released from my ROTC cadet status.

e. I AGREE THAT ANY OBLIGATION TO REIMBURSE WILL NOT BE ALTERED BY SUBSEQUENT ENLISTED DUTY. If I am disenrolled from ROTC, I understand the Secretary of the Army, or his or her designee, retains the prerogative to either order me to active duty or order monetary repayment of my scholarship benefits. Therefore, if I am required to repay my advanced educational assistance under the terms of this contract, my subsequent enlistment in an Armed Service will not relieve me from my repayment obligation.

6. ENLISTED ACTIVE DUTY SERVICE OBLIGATIONS. If I am called to active duty for breach of contract under the provisions of paragraph 5, above, I will be ordered to active duty for one of the periods listed below, based upon the year during which the breach occurs -

- a. During MS II, 2 years;
- b. During MS III, 3 years;

PART II - AGREEMENT OF SCHOLARSHIP CADET CONTRACTING IN THE SENIOR ROTC PROGRAM (Continued)

- c. During MS IV, 4 years;
- d. After completion of MS IV, 4 years if I was a 2, 3, or 4-year scholarship recipient;
- e. Scholarship recipients who are granted extended scholarship benefits beyond 4 years incur an additional active duty service obligation equivalent to the length of the extended period of scholarship benefits.
- f. Any unexpired portion of my enlistment obligation remaining after such active duty must be served in a Reserve Component.
7. **LEAVE OF ABSENCE, SUSPENSION OR TERMINATION OF SCHOLARSHIP BENEFITS.** If my scholarship benefits are temporarily inactivated by a leave of absence or administrative suspension, or are terminated due to my failure to meet academic or military retention standards for scholarship cadets, as prescribed by law, Army regulation, or this contract; I will not be relieved of my obligation to the U.S. Army and my obligations under this contract remain in effect. If my ROTC scholarship contract is terminated for any reason, but I am qualified and am allowed to remain in the ROTC program as a nonscholarship cadet, I understand that I will not be required to reimburse the United States for any financial assistance I received provided that I successfully completed the ROTC program and all of the active duty and duty in a reserve status not on active duty for which I am obligated under the provisions of this scholarship contract.
8. **RELEASE FROM OBLIGATIONS.** I understand that the Secretary of the Army or his/her designee may at any time release me without notice from the obligations under this contract and disenroll me from the ROTC Program without further benefits hereunder if, in the opinion of the Secretary of the Army or his or her designee, it is in the best interest of the Army.
9. **COMPLIANCE WITH AND CHANGES IN ELIGIBILITY REQUIREMENTS.** I acknowledge that I have discussed the eligibility requirements pertaining to enrollment in ROTC, enlistment in the USAR or ARNG, and accepting a commission as an officer, with the PMS or other designated and authorized ROTC cadre member, and that I understand these requirements. I realize that these requirements may change in the future. I agree to keep myself apprised of all changes in requirements and to maintain my eligibility to participate in ROTC at all times in the future. I also agree to inform the PMS of any change in my eligibility (*medical and non-medical*) based on current or revised requirements as soon as I know or should have known of a change in my eligibility status. Failure to so advise the PMS may result in disenrollment. Nothing in this paragraph requires a disclosure in violation of the Department of Defense Homosexual Conduct Policy as addressed in AR 600-20.
10. **DECLARATION OF BANKRUPTCY.** I understand that the cost of my education under this program is, for all purposes, a debt owed to the United States and entered into voluntarily on my part which, under the provisions of Title 10, United States Code, Section 2005, Subsection (d), may not voluntarily be discharged by my declaration of bankruptcy if less than five (5) years after the last day of the specified period of active duty.
11. **ORDER TO ACTIVE DUTY IN THE EVENT OF A WAR.** I understand that either as an enlisted member or as a commissioned officer in the Reserve Component of the Army of the United States or upon my transfer or assignment thereto, I may be ordered to active duty without my consent in the event of a war, a national emergency declared by Congress or the President, an order of the Selected Reserve to active duty authorized by the President, and as otherwise authorized by law, such call to active duty could be for the duration of a war or any period of time authorized by law.
12. **COMPLETE AGREEMENT AND SEVERABILITY.** I understand the provisions in the contract contain the only binding promises by and to both parties. This agreement controls over any conflicting advice or information that I may have received orally or in writing from Cadet Command, my PMS, other cadre, cadets or others regarding my obligations and agreements to the Army. If any provision within this agreement is determined to be invalid or unenforceable by a court of law, the remaining terms and agreements remain in full force and effect.

<b>PART II - AGREEMENT OF SCHOLARSHIP CADET CONTRACTING IN THE SENIOR ROTC PROGRAM (Continued)</b>		
N. HOME ADDRESS (Include ZIP Code)	O. SIGNATURE	
	P. DATE (YYYYMMDD)	
<b>PART III - CONSENT OF PARENT OR GUARDIAN TO CONTRACT IN ROTC AND ENLIST IN THE U.S. ARMY RESERVE (To be completed if applicant is under 18 years of age at time of contracting in the ROTC program)</b>		
13. I certify that I am the applicant's parent or legal guardian, and that the applicant's date of birth as shown above is correct.		
14. I consent to applicant's enrollment in the ROTC and to enlistment in the USAR.		
15. I have read and thoroughly understand the above statements of terms under which the applicant is being enrolled, including all statutes, directives, and regulations, incorporated by reference. I relinquish all claims to applicant's service and to any wages or compensation for such service. I understand that the applicant will be subject to all of the requirements and lawful commands of the officers who may from time to time be placed over the applicant, and I certify that no promise of any kind has been made to me concerning the applicant's assignment to duty or appointment as an officer as an inducement to me to sign this contract.		
Q. SIGNATURE OF PARENT OR GUARDIAN	R. SIGNATURE OF WITNESS	S. DATE (YYYYMMDD)
<b>PART IV - CONFIRMATION OF ENROLLMENT AS AN ROTC SCHOLARSHIP CADET (And of Enrollment in the ROTC Program, if not previously enrolled)</b>		
16. On the basis of the above executed contract (Part II), the above named applicant's selection for the award of the financial assistance indicated (Part I), and the executed consent of the parent or guardian (Part III), if applicable, I have selected and enrolled this applicant as a cadet in the ROTC Program on the effective date of enrollment in item T.		T. EFFECTIVE DATE OF ENROLLMENT (YYYYMMDD)
<b>PART V - FOR THE SECRETARY OF THE ARMY</b>		
U. NAME OF ROTC CONTRACTING OFFICIAL (Print or Type)	W. DATE (YYYYMMDD)	
V. SIGNATURE OF ROTC OFFICIAL		