

STATE OF MICHIGAN
MICHIGAN NATIONAL GUARD
MILITARY HEARING

Michigan National Guard,

Agency,

Vs.

Master Sergeant Joseph Smock,

Respondent.

Hearing Examiner: Colonel Kevin Dawkins

FINAL AGENCY DECISION

Mr. Ben Banchs
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Laborers' International Union of North America
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FINAL AGENCY DECISION

I. Summary of the Decision.

Respondent, Army Master Sergeant Joseph Smock (MSG Smock) serves in the Michigan National Guard as a military service member pursuant to Title 32 of the United States Code. Additionally, he was employed at Camp Grayling as a military technician pursuant to 32 U.S.C. § 709. MSG Smock was terminated from his military technician

position on or about February 28, 2014. Pursuant to Technician Personnel Regulation 752-1, he requested that a hearing examiner be appointed to make findings and recommendations to The Adjutant General prior to the imposition of the Final Agency Decision.

A pre-conference hearing was held on October 6, 2014 and the administrative hearing was held on October 7-9, 2014. The hearing examiner provided this agency with his findings and recommendations on February 23, 2014.

After conducting a thorough review of the administrative file, I am denying MSG Smock's appeal. Accordingly, it is the Final Agency Decision that MSG Smock's appeal is denied. MSG Smock's February 28, 2014 termination will not be set aside. In accordance with 32 U.S.C. § 709(f)(4), there is no final review of this decision. It is non-appealable.

II. Standard of Review.

Dual status military technicians (DSTs) are required to be members of the United States military and must hold the rank and other special military skills required for their military service. Federal statutes and policies set out by the Secretaries of the Army and Air Force govern how military personnel are permitted to serve as DSTs.

Most notably, 32 U.S.C. § 709 clarifies that DSTs:

- Be a member of the National Guard;
- Hold the military grade specified by the Secretary concerned for the position; and
- Wear the uniform appropriate for the member's grade and component of the armed forces.

Federal and state courts have held that military technicians occupy positions that, by the nature of their positions, are irreducibly military in nature. When DSTs are punished or reprimanded in adverse actions, the agency is required to follow applicable military procedure and administrative regulations as are promulgated by agencies within the Department of Defense. Technician Personnel Regulation 752, Discipline and Adverse Action, specifies how and when DSTs may be punished and/or terminated.

Termination actions require that the agency official determine whether certain factors are involved relative to the termination. These factors are frequently referred to as the Douglas Factors, and they are enumerated in TPR 752, Appendix F. Those factors require the agency officials to look at the employee's potential for rehabilitation, mitigating circumstances for the conduct, the notoriety of the offense, and so on.

Technicians may elect to have their terminations appealed directly to The Adjutant General, or they may request an administrative hearing. See, TPR 752-1, Chapter 3. As part of the administrative hearing process, the hearing examiner must ensure that:

- The technician receives written notification;
- All parties have good contact information for all other parties in the appeal;
- A mutually acceptable date, time, and place for the hearings are scheduled;
- All parties are informed of the date, time and location of the hearings;
- The case file is provided to all parties at least 10 calendar days in advance of the pre-hearing;
- A court reporter will be available and provide a verbatim transcript;
- Both parties exchange proposed witness lists;

- Issues regarding witnesses are resolved;
- Arrangements are provided if a full time staff member is not reasonably available but their testimony is important to the case; and
- Reasonable and relevant requests by the technician or their representative, for documents or tangible evidence in control of the State, are resolved prior to the pre-hearing. See, TPR 752-1, para. 3-2.

Throughout the administrative hearing process, the hearing examiner is in charge of all aspects of the proceedings and has the authority to “direct the hearing in a manner that best facilitates the accomplishment of determining the issues.” See, TPR 752-1, para. 3-5c. Additionally, hearsay testimony is admissible. It is the examiner’s duty to make recommendations and findings concerning:

- Did the DST do what they were charged with doing?
- Will some discipline, based on the conduct, promote the efficiency of service?
- Is the penalty appropriate? See, TPR 752-1, para. 3-5b.

The choice of penalty will not be disturbed unless the record indicates that the choice of the penalty was arbitrary, capricious, or otherwise unreasonable in light of the proven conduct. *Id.*

Once the hearing examiner makes findings and recommendations to the agency, it is my job as Adjutant General to review the administrative process and determine those same three issues:

- Did the DST do what they were charged with doing?
- Will some discipline, based on the conduct, promote the efficiency of service?
- Is the penalty appropriate? See, TPR 752-1, para. 2-3c.

In the event that a hearing examiner's findings and recommendations are not accepted, the Adjutant General must provide rationale for the Adjutant General's decision. This opinion and final agency decision diverts from the recommendations of the hearing examiner in various aspects as described later in this opinion.

III. Hearing Examiner's Findings.

The hearing examiner made the following findings:

	Charge	Finding
1	Wrongfully removed television from MATES	Not Substantiated
2	Wrongfully removed sheets of OSB from MATES	Not Substantiated
3	Wrongfully removed wood from MATES	Substantiated
4	Wrongfully removed sheets of luan from MATES	Not Substantiated
5	Wrongfully installed government tires on son's truck	Not Substantiated
6	Wrongfully removed heaters from buildings on Grayling	Not Substantiated
7	Wrongfully removed equipment parts form air-to-ground range	Not Substantiated
8	Wrongfully removed diesel fuel from MATES building	Not Substantiated
9	Wrongfully appropriated a chainsaw from MATES	Not Substantiated

The hearing examiner made the following recommendations: that the underlying termination be upheld and that MSG Smock's appeal be denied. See, Hearing Examiner Findings, p. 7. The examiner went on to say that he found the level of dishonesty prevalent within the MATES community to be "offensive and disturbing." COL Dawkins reported that there appeared to be two "camps" within the MATES community: those who supported MSG Smock and those who believed that he committed the offenses for which he was charged.

IV. Agency Findings.

The following chart is a summary of the findings in my Final Agency Opinion.

They will be addressed in greater detail below.

	Charge	Finding
1	Wrongfully removed television from MATES	Not Substantiated
2	Wrongfully removed sheets of OSB from MATES	Not Substantiated
3	Wrongfully removed wood from MATES	Substantiated
4	Wrongfully removed sheets of luan from MATES	Not Substantiated
5	Wrongfully installed government tires on son's truck	Substantiated
6	Wrongfully removed heaters from buildings on Grayling	Not Substantiated
7	Wrongfully removed equipment parts form air-to-ground range	Not Substantiated
8	Wrongfully removed diesel fuel from MATES building	Substantiated
9	Wrongfully appropriated a chainsaw from MATES	Not Substantiated

A. Charge 1. It is my finding that Charge 1 is not substantiated.

B. Charge 2. It is my finding that Charge 2 is not substantiated.

C. Charge 3. It is my finding that Charge 3 is substantiated. MSG Smock wrongfully removed wood from the MATES facility. COL Doolittle served as the investigating officer pursuant to AR 15-6. During the investigation, he interviewed over 50 witnesses. COL Doolittle was a civilian police officer with the Battle Creek, MI police department and has had extensive training in interviewing witnesses and in working with prosecutor's offices to prepare cases for criminal prosecution.

Police officers in civilian court systems regularly testify concerning statements made by witnesses during initial interviews that are later recanted by witnesses during the civilian trials. The recanted testimony does not negate what witnesses told the investigating officer during prior interviews. The testimony in the MSG Smock hearing is replete with examples of service member after service member who indicated that they were afraid for their jobs – for their livelihoods – if they took the stand against MSG

Smock who had been a fixture at the MATES ever since he graduated high school in Grayling. *October 7, 2014 Transcripts*, pp. 269. Witnesses told COL Doolittle that "I have to worry about my family" if they testified against MSG Smock. *October 7, 2014 Transcripts*, pp. 269. MATES employees turned on each other and called each other "snitches" after they were interviewed by COL Doolittle. *October 7, 2014 Transcripts*, pp. 273.

The factual testimony indicates that MSG Smock regularly misappropriated wood while he served as a military technician at the MATES facility. The overall body of testimony suggests that the span of theft was so great that witnesses had a hard time pinning down exactly when various wood products were stolen by MSG Smock. Nevertheless, the testimony given to COL Doolittle by MSG Cooper, Chief Mack, and Todd Witcher indicates that MSG Smock misappropriated wood to build:

- A deck at his home. *October 7, 2014 Transcripts*, pp. 286.
- A gazebo at his home. *October 7, 2014 Transcripts*, pp. 286. *October 8, 2014 Transcripts*, pp. 24-29, and 98. *October 8, 2014 Transcripts*, pp. 386-387.
- Automatic triggers for winter fishing rods, called "tip-ups," using wood and machines at MATES. *October 8, 2014 Transcripts*, pp. 27. MSG Smock charged other employees for making their own tip-ups. *October 8, 2014 Transcripts*, pp. 27 and 391.
- Shelving for his "red cabin by his house." *October 8, 2014 Transcripts*, pp. 382.

One witness, Chief Mack, testified that he personally helped MSG Smock load an entire pick-up truck full of wood from the MATES facility, drove with MSG Smock to MSG

Smock's home, and unloaded the wood. This was done in broad daylight without anyone from management intervening.

D. Charge 4. Charge 4 is not substantiated.

E. Charge 5. It is my finding that MSG Smock wrongfully misappropriated government vehicle tires and installed them on vehicles owned by his family. *October 8, 2014 Transcripts*, pp. 395-396, 400, and 457.

F. Charge 6. It is my finding that Charge 6 is not substantiated.

G. Charge 7. It is my finding that Charge 7 is not substantiated.

H. Charge 8. It is my finding that MSG Smock wrongfully removed diesel fuel from MATES. COL Doolittle testified that, during initial questioning, several witnesses (MSG Cooper and CW2 Mack) indicated that MSG Smock had removed multiple 55-gallon drums of diesel fuel in a civilian vehicle. *October 7, 2014 Transcripts*, pp. 255-257. COL Doolittle testified that apparently, on the day that MSG Smock stole the diesel fuel, LTC Golnick, the supervisor for MATES, had a discussion with MSG Herblet, and asked him "what are you going to do about" MSG Smock stealing the diesel fuel? *October 7, 2014 Transcripts*, pp. 257. *October 8, 2014 Transcripts*, pp. 405-406. While none of the parties were able to specify the date or time that MSG Smock drove off in a non-tactical vehicle with several 55-gallon drums of diesel, it appears that it happened sometime in 2011. *October 8, 2014 Transcripts*, pp. 42-43 and pp. 190-191.

The fact that MSG Cooper was unable to remember the diesel fuel incident when he was questioned during the administrative hearing does not mean that he made up the statement that he previously gave to COL Doolittle during his initial interview.

October 7, 2014 Transcripts, pp. 259. Accordingly, it is my finding that MSG Smock

misappropriated several 55-gallon cans of diesel fuel from the MATES facility. *October 7, 2014 Transcripts*, pp. 255-257.

I. Charge 9. It is my finding that Charge 9 is not substantiated.

V. Upholding the Termination as a Punishment.


TPR 752-1, para. 3-5 states that the choice of penalty, in this case termination, will not be disturbed unless the adverse action was found to be arbitrary, capricious, or otherwise unreasonable in light of the proven conduct. It is my finding that the termination action is reasonable and will not be set aside.

The original decision-making authority in this matter was Colonel Gregory Durkac. During his testimony, he stated that he thoroughly reviewed the case file and the Douglas factors before making his decision to terminate MSG Smock from his DST position. *October 7, 2014 Transcripts*, pp. 162-174. Based on the testimony presented in this administrative hearing, I see no reason to find that the adverse action was arbitrary, capricious or otherwise unreasonable. Accordingly, COL Durkac's decision stands.

VI. Final Decision.

The final agency decision is to terminate MSG Smock from his DST position. This matter is now closed. I direct the Human Resource Officer to provide the parties copies of this decision. I direct the Human Resource Officer to forward the administrative file and this decision to MSG Smock's military commander for a determination as to whether any further action may be appropriate.

Dated: 03 / 06 /2015


GREGORY VADNAIS
Major General, MIARNG
The Adjutant General