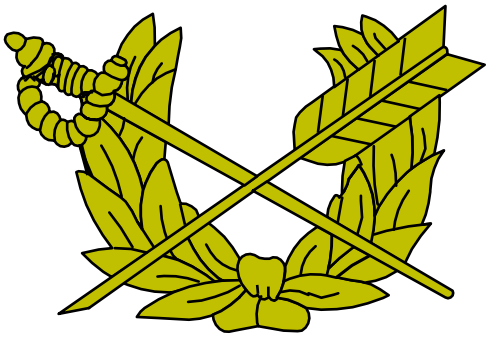
ADMINISTRATIVE AND CIVIL LAW DEPARTMENT



GENERAL ADMINISTRATIVE LAW DESKBOOK 2015

The Judge Advocate General's School

United States Army

GENERAL ADMINISTRATIVE LAW DESKBOOK

2015

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COMMAND AUTHORITY, INSTALLATION PROTECTION & THE REGULATION OF SPEECH, POLITICS & RELIGION

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COMMAND AUTHORITY, INSTALLATION PROTECTION, & THE REGULATION OF SPEECH, POLITICS, & RELIGION

I. SOURCES OF COMMAND AUTHORITY:

A. Constitution:

1. Article I, Section 8: "The Congress shall have power to ... provide for the common defense and general welfare of the United States…declare war ... raise and support Armies ... provide and maintain a Navy…make rules for the Government and regulation of the land and naval forces ...."

2. Article II, Section 2: "The President shall be Commander in Chief of the Army and Navy of the United States."

B. Statutes:

1. Some grant authority, e.g., 10 U.S.C. § 815 (commanders are authorized by statute to administer nonjudicial punishment to members of their commands), or 10 U.S.C. §§ 1071-1104 ("under regulations to be prescribed by the Secretary of Defense," active duty military entitled to medical and dental care in any facility of the uniformed services).

2. Others limit authority, e.g., 18 U.S.C. §1385, Posse Comitatus Act, "Whoever…willfully uses any part of the Army or the Air Force as a posse comitatus…shall be fined under this title or imprisoned…"

C. Regulations:

1. DoD Regulations, Directives, Instructions, Manuals and Administrative Instructions (http://www.dtic.mil/whs/directives/) lay out DoD requirements. Services provide specific service requirements in respective service regulations.

2. Service Regulations:

a. Army – Army Regulations (AR), e.g. AR 600-20, Army Command Policy (6 November 2014);

b. Navy – Navy Regulations, SECNAVINST, OPNAVINST;

c. Marine Corps – Marine Corps Orders (MCO), Marine Corps Directives;

d. Air Force – Air Force Instructions (AFI).

3. Local regulations, policies, directives.

a. Promulgated at the local installation level. Often serve as gap fillers when higher directives, orders, or regulations are inadequate or have been rescinded. Local military commanders have inherent authority to regulate the morale, safety, health and good order and discipline of their installations. See Greer v. Spock, 424 U.S. 828 (1976).

b. Local regulations are heavy lifters in the area of installation protection. DoDI 5200.08, Security of DoD Installations and Resources, 10 December 2005 (incorporating Change 2, 8 April 2014), paragraph E.1.1.1 requires military commanders to issue the necessary regulations for the protection and security or property or places under their command.

D. Inherent Authority.

1. Except in a few limited areas, there is no general statutory authority for the regulations and actions of an installation commander. The Constitution, statutes, and regulations defining the authority of a commander do not address every contingency faced by a commander in the lawful execution of their duties. To the extent authority for a commander's actions cannot be found in statute or superior regulation, a concept of "inherent authority" has been inferred from caselaw. Commanders have inherent authority to act in order to avert dangers to morale, welfare, or discipline.

2. Inherent authority recognized in Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) (power of a commander over an installation is "necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand"). See also Greer v. Spock, 424 U.S. 828 (1976) (holding that military installations are not public forums for civilian political activity. Commander has the "historically unquestioned power" summarily to exclude civilians from the area of his command; "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command."). In addition to the Commander's inherent power to provide for the safety and security of his command, the *Greer* also noted the federal government's proprietary role over installation property, "it has traditionally exercised unfettered control." Id. at 896.

3. Limitations. There must be some nexus between the authority sought and the effect on morale, welfare, or discipline. Political considerations, news media, and public relations may also serve as limiting factors. See, e.g. United States v. Roach, 26 M.J. 859 (1988).

II. DELEGATION OF COMMAND AUTHORITY:

A. It is Army policy that "Commanders delegate sufficient authority to Soldiers in the chain of command to accomplish their assigned duties . . ." AR 600-20, para 2-1b. Commanders, however, still retain the overall responsibility for the actions of their command.

B. Some duties may not be delegated, such as selection of panel members or conferring field grade Article 15 authority to a company grade officer.

III. ACCESS TO MILITARY INSTALLATIONS

A. The authority of an installation commander to exclude civilians from a military installation is a proprietorial right and does not depend upon statute or legislative jurisdiction. In Cafeteria and Restaurant Workers Union v. McElroy, supra, the Supreme Court acknowledged and reaffirmed the broad power of a military commander to exclude civilians from a military reservation.

B. Bar orders and the federal trespass statute: 18 U.S.C. § 1382. Although an installation commander may exclude individuals based on proprietorial right, 18 U.S.C. § 1382 provides statutory authority to exclude and make installation regulations criminally enforceable against trespassers:

"Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof--Shall be fined under this title or imprisoned not more than six months, or both."

1. Reentry for any purpose after having been removed or after being ordered not to reenter may be prosecuted.

2. Bar orders must be reasonable and not arbitrary or capricious. U.S. v. May, 622 F.2d 1000 (9th Cir.), cert. denied , 449 U.S. 984 (1980); U.S. v. Lowe, 654 F.2d 562 (9th Cir. 1981).

3. Notice to offender: The bar order should be in writing and should be personally served on the individual or otherwise delivered in a way that will guarantee proof of receipt later.

4. Limited bar orders: Where a bar order would have the effect of denying someone access to a post service whose governing regulation requires some type of hearing or other opportunity to be heard, issuance of a limited bar order may avoid due process litigation. Example: Permit a retired military person access to the Post Exchange, commissary or medical treatment facility, but deny access to the remainder of the installation.

IV. USE OF COMMAND AUTHORITY TO REGULATE:

A. Speech.

1. Forum analysis (Nature of forum): The Supreme Court has determined that there are three forum types for free speech purposes. The amount of regulation permissible depends upon the type of forum involved.

a. **Traditional Public Forum**: Traditionally used for free speech activities, such as public streets, parks and sidewalks. See Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939); Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995) (state owned plaza surrounding Statehouse in Columbus, Ohio). Test is whether principal purpose is free exchange of ideas, evidenced by longstanding historical practice of permitting speech. But see U.S. v. Kokinda, 497 U.S. 720 (1990) (sidewalk used solely as a passage for postal patrons not a public forum. Not every publicly accessible area is a public forum); Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (airport terminals not public forum because their traditional purpose was not to promote a free exchange of ideas but to facilitate air travel).

b. **Nonpublic Forum**: Public property which is not by tradition or designation a forum for public communication may be reserved for its intended purpose so long as "regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) (selective access to school mailboxes did not transform property into public forum). See also Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788 (1985) (the Combined Federal Campaign (CFC) is a nonpublic forum, access to which may be restricted on the basis of subject matter and speaker identity without violating the First Amendment so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral).

(1) **Military installation is NOT a public forum.** Greer v. Spock, supra. Greer v. Spock remains the principal authority on which judge advocates should rely to block demonstrative activity on military installations. The Court reaffirmed the "historical usage" test, i.e. whether or not a public place is considered a public forum for free speech purposes is determined by the "historical usage" of the property. See Hague v. Committee for Industrial Organization, supra.

(2) Prior to Greer, the Supreme Court briefly drifted away from the historical usage test, even adopting for a brief time the "public access" test in Adderly v. Florida, 385 U.S. 39 (1966), and applying it to the military in Flower v. United States, 407 U.S. 197 (1972). The court returned to the historical usage test in 1976 in Greer v. Spock, supra.

c. **Designated or "Created" Public Forum**: aka "limited" or "designated." Government property set aside for free speech activities. E.g., Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993) (school district opened school facilities for use after school hours by community groups for wide variety of social, civic, and recreational purposes); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) (once it has opened a limited forum, the government may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," nor may it discriminate against speech on the basis of its viewpoint. In this case, the university's Student Activities Fund, funded by mandatory student fees, paid for, inter alia, student group publications on student news, information, opinion, entertainment, or academic communications. The university's attempt to bar funding of printing costs for a religious student publication was held improper). Intent and extent of use granted is key.

Open House activities on military installations. Public access, such as at open house, is not sufficient to convert a military installation into a public forum in absence of abandonment of military special interest. Factors include mission-focus and political neutrality. Greer v. Spock, supra; Persons for Free Speech at SAC v. U.S., 675 F.2d 1010 (8th Cir. 1982) (open house on an Air Force base did not create a public forum. Base commander is afforded substantial discretion to control the use of the base and was not unreasonable in prohibiting nuclear weapons protesters from participating in the open house activities). See also Brown v. Palmer, 915 F.2d 1435 (10th Cir. 1990) (Air Force base did not become a public forum during an open house. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse"). Contra, U.S. v. Albertini, 710 F.2d 1410 (9th Cir. 1983) (open house created temporary public forum allowing nuclear war protesters access to protest on the installation), rev. on other grounds, 472 U.S. 675 (1985) (in dicta the Supreme Court stated that it was dubious that the military installation was ever converted into a public forum).

2. Standard applicable to each type of forum.

a. **Traditional Public Forum**: Strict scrutiny analysis. Legitimate restrictions on time, place, and manner may be imposed; however, courts will view any restrictions based upon content under a strict scrutiny standard (necessary to serve a compelling state interest and narrowly drawn to achieve that end). Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Frisby v. Schultz, 487 U.S. 474, 481 (1988).

b. **Nonpublic Forum**: Reasonable for forum. Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119 (1977) (ban on inmate solicitation to join prison inmate "labor union" and group meetings rationally related to reasonable objectives of prison administration. "A prison may be no more easily converted into a public forum than a military base." Id. at 134); Greer v. Spock, 424 U. S. 828, 838 n.10 (1976).

c. **Designated or "Created" Public Forum**: Same strict scrutiny on viewpoint discrimination; subject matter discrimination is not constitutionally prohibited. Rosenberger, supra (discrimination on subject matter which preserves limited forum purpose is permissible; discrimination because of ideology, opinion, or perspective is impermissible when directed against speech otherwise within limited forum; excluding student publication with religious editorial viewpoint from funding for publication available to other student publications held unconstitutional). Accord Lamb's Chapel v. Center Moriches Union Free School District, supra (prohibiting after hours access to school property to groups with religious viewpoints held unconstitutional).

3. Restricting Servicemember Speech: Unprotected Speech including Dangerous Speech:

a. Fighting Words, i.e., those "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen v. California, 403 U.S. 15, 20 (1971) (simply wearing jacket bearing words "F*** the Draft" may not be constitutionally made a criminal offense); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" upheld conviction for calling another "damned racketeer" and "a damned Fascist").

b. Dangerous Speech:

(1) Civilian Standard: Whether words used under circumstances are such as to create a clear and present danger, Schenck v. U.S., 249 U.S. 47 (1919); clear and present danger means directed to inciting or producing imminent lawless action and likely to do so. Brandenburg v. Ohio, 395 U.S. 444 (1969) (mere abstract teaching of propriety or necessity to resort to force and violence not the same as preparing group for and steering it to violent action).

(2) Military Standard: Speech which undermines the effectiveness of response to command is constitutionally unprotected. Parker v. Levy, 417 U.S. 733, 758 (1974) (different character of the military community and mission requires different application of 1st Amendment protections; "fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it"). Priest v. Secretary of the Navy, 570 F.2d 1013 (D.C. Cir. 1977) (affirmed Vietnam era court-martial conviction of seaman for publishing newsletter for active duty military urging desertion to Canada; 1st Amendment test in military is that words "tended to interfere with responsiveness to command or to present a clear danger to military, loyalty, discipline, or morale"). "The military has greater authority over a serviceman than over a civilian." Brown v. Glines, 444 U.S. 348, n.13 (1980).

4. Handling Dissident Activities Among Members of the Armed Forces. See DoDI 1325.06, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces (27 Nov 09 and Change 1, 22 Feb 12); AR 600-20, Army Command Policy, para. 5-9; AFI 51-903, Dissident & Protest Activities (1 Feb 98); MCO 5370.4B, Dissident & Protest Activities (26 Jun 97); OPNAVINST 1620.1B, Guidelines for Handling Dissent & Protest Activities Among Members of the Armed Forces (14 Sep 99).

a. Prior approval of the distribution of publications: Commanders may require prior approval of publications to determine whether a publication presents clear danger to loyalty, discipline, or morale of military personnel or if distribution would materially interfere with the mission. Prior approval requirement upheld in Greer v. Spock, supra (unsuccessful challenge to regulation prohibiting distribution of political literature on post); Brown v. Glines, 444 U.S. 348 (1980) (unsuccessful challenge to regulation requiring airmen to obtain prior approval from installation commander prior to distributing literature on installation).

b. Limitations: A commander cannot prohibit materials properly distributed through official outlets such as post exchanges or military libraries. These materials are governed by separate statutes or regulations. AR 25-97, The Army Library Program (8 Dec 14); AR 600-20, para. 5-9 (6 Nov 14);

5. Blogging

a. Blog: A blog (short for Web Log) is a regularly updated online journal often containing text, photos, and/or video clips. Anyone with access to the internet can publish a blog.

b. Army Policy

(1) Blogging presents a "risk of inadvertent disclosure of sensitive and/ or critical information and possibly classified information (alone or through compilation)." AR 530-1, Operations Security (OPSEC) (26 Sep 14), Paragraph 2-18a(15). In Clarification from Army Fact Sheet, "Army Operations Security: Soldier Blogging Unchanged." U.S. Army Public Affairs, 2 May 07, available at http://www.fas.org/irp/agency/army/blog050207.pdf the Army laid out a clearer delineation on the limits imposed on Soldiers in this area.

(a) "Just as in 2005 and 2006, a Soldier should inform his or her OPSEC officer and immediate supervisor when establishing a blog." Reasons: 1) To provide the command situational awareness; 2) To allow the OPSEC officer the opportunity to explain matters to be aware of when posting military-related content in a public forum.

(b) "In no way will every blog post/update a Soldier makes on his or her blog need to be monitored or first approved . . . After receiving guidance and awareness training from the appointed OPSEC officer, that Soldier blogger is entrusted to practice OPSEC when posting in a public forum."

(c) "Soldiers do not have to seek permission from a supervisor to send personal E-mails. Personal E-mails are considered private communication." However, even with personal E-mails, Soldiers must still maintain OPSEC awareness.

(2) Commander, Army Web Risk Assessment Cell (AWRAC), will conduct routine checks of information posted to Army websites and blogs, to include Soldier blogs, FRG pages, and unofficial Army websites. AR 530-1, para. 2-17.

c. Navy Policy, SECNAVINST 5720.47B (28 Dec 2005):

(1) "DON commands may not operate unmoderated news groups, bulletin boards, or any other unrestricted access posting services. This specifically prohibits a publicly accessible, interactive site that supports automatic posting of information submitted by personnel other than those authorized by the command to post information. Some Web logs (blogs) may fall into this category. This does not, however, prohibit the command from posting frequent messages from the commanding officer or messages from the command's constituents.

(2) There is also no prohibition on blogs operated by individual members as private citizens. The DON recognizes the value of this communication channel in posting current information and supporting the morale of personnel, their family and friends. As long as personnel adhere to specific restrictions on content, the DON encourages the use of blogs and recognizes this free flow of information contributes to legitimate transparency of the DON to the American public whom we serve."

d. Air Force:

(1) Air Force Instruction (AFI) 33-129 (21 Oct 09) refers to free speech in the areas of internet use. Also, AFI 51-902 (12 Nov 10) addresses restrictions of Airmen in political activities. These AFIs place lawful limits on the type of speech permitted while in the military and serve as a reminder to all military that while the Bill of Rights grants free speech to all, free speech within the military is certainly limited.

(2) AFI 51-903 (11 Feb 98) states that, "commanders must preserve the service member's right of expression, to the maximum extent possible, consistent with good order, discipline, and national security" and grants commanders authority "to ensure their mission is performed and to maintain good order and discipline."

B. Solicitation.

1. Charitable: DoD Instruction 5035.1, Combined Federal Campaign (CFC), Fund-Raising Within the Department of Defense (31 Jan 08); AR 600-29, Fund-Raising within the Department of the Army (7 Jun 10); SECNAVINST 5340.2D, Fundraising & Solicitation of Department of Navy Personnel, Military and Civilian, in the National Capitol Area (NCA) (23 Sep 99) (refers to DoDD 5035.1 as the authority for fundraising within the Navy). On-duty solicitation authorized only for Combined Federal Campaign and military relief & aid agencies. (See JER 3-210). Limited off-duty local fund raising may be authorized, e.g., for MWR activities, on-post private organizations, and other limited fund- raising to assist the unfortunate such as veteran organization flower sales and placing collection boxes for food or goods for charitable causes.

2. Commercial: DoD Instruction (DoDI) 1344.07, Personal Commercial Solicitation on DoD Installations (30 Mar 06); AR 210-7, Commercial Solicitation on Army Installations (18 Oct 07); SECNAVINST 1740.2D, Solicitation & Conduct of Personal Commercial Affairs (27 Apr 87).

   a. No right to solicit; must be authorized. Army permits in writing and valid for up to one year. (Navy and MC by local reg). Door-to-door solicitation prohibited. By appointment only; limited to family quarters or other designated areas. Highly regulated to maintain discipline, protect property, and safeguard personnel.

   b. List of forbidden practices includes: Mass/group solicitation (such as solicitation of recruits, trainees and transient personnel or others in a “captive” audience); retirees or reserve members using IDs to get on post to solicit; entering into unauthorized or restricted areas.

   c. Extensive additional requirements for life insurance and securities solicitors.

   d. Violators can lose solicitation privileges; receive due process in form of notice and opportunity to be heard. Nature varies with service, e.g., Army has “show cause” hearing; Navy and MC informal.

C. Political Activities: Ch. 6, DoDD 5500-7.R, Joint Ethics Regulation (Current Version); DoDD 1344.10, Political Activities by Members of the Armed Forces (19 Feb 2008); AR 600-20, Army Command Policy, para. 5-3 (6 Nov 14); MCO 5370.7B, Political Activities (8 Mar 93); AFI 51-902, Political Activities by Members of the USAF (12 Nov 10).

1. Active Duty Servicemembers: Traditional concept is that military members do not engage in <u>partisan political activity while on active duty</u>.

a. Examples of what an Active Duty Soldier can do (see above regulations for entire list): Vote and express <u>personal</u> opinion on candidates and issues, make contributions to a political party; attend political meetings or rallies as a spectator, when not in uniform.

b. Examples of what an Active Duty Soldier cannot do (see above regulations for entire list): Speak before a partisan political gathering; distribute partisan political literature; participate in partisan political management, campaigns, conventions, rallies (participation is more than mere attendance as a spectator).

c. Article 88, UCMJ, Contempt Toward Officials: Prohibits commissioned officers from using "contemptuous" words against the President, Vice President, Congress, the Secretary of Defense, the Secretaries of the military departments, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which the officer is on duty or is present.

d. Exception: Any enlisted member on active duty may seek, hold, and exercise the functions of a nonpartisan civil office as a notary public or member of a school board, neighborhood planning commission, or similar local agency, provided that the office is held in a non-military capacity and there is no interference with the performance of military duties.

e. Exception: Any warrant or commissioned officer on active duty may seek, hold, and exercise the functions of a nonpartisan civil office on an independent school board that is located exclusively on a military reservation, provided that the office is held in a non-military capacity and there is no interference with the performance of military duties.

2. Reserve Component (RC) servicemembers: RC servicemembers on active duty must comply with the rules regarding active duty servicemembers. However, RC servicemembers may seek and continue to hold elective office if under a call or order to active duty that specifies a period of active duty of 270 days or less, provided no interference with the performance of military duties. See DoDD 1344.10, paras. 4.2.3 and 4.4.3.

3. Civilians: Hatch Act, 5 U.S.C. §§ 7321-26. No political activity on duty, in office space, while wearing uniform or indicia of government position, or using government vehicle. Political activity means partisan, i.e., representing a party. Less restrictive than DoD is for military. Call 800-85-HATCH (854-2824) for advisory opinions.

4. Recurring issue: Visits by candidates to military installations.

a. Paragraph 3-4, AR 360-1 (The Army Public Affairs Program) (25 May 11), provides policies and procedures to be followed when considering military involvement in election year activities. Installation commanders should not permit the use of installation facilities by any candidate or representative of a candidate for political assemblies, meetings, fund-raising, events, press conferences, or any other activity that could be construed as political in nature.

b. Requests from members of Congress to visit an installation should be referred to the Office of the Chief Legislative Liaison (see AR 1-20) (2 Jul 13). Candidates who are not members of Congress may be given the same access to installations as that to which any other visitor is entitled. Before visiting an installation, all candidates must be informed that all political activity and media events are prohibited while on the installation.

5. Recurring issue: Bumper Stickers & Signs.

a. Small bumper sticker on private vehicle is authorized; large sign or poster is not. DODD 1344.10, para. 4.1.2.11.

b. Bumper stickers disrespectful to President can be banned. Ethredge v. Hail, 56 F.3d 1324 (11th Cir. 1995) (order barring civilian from displaying on his truck stickers embarrassing or disparaging to the President does not violate 1st Amendment).

c. Lawn signs in government housing areas. See DODD 1344.10, para. 4.1.2.12. No partisan political signs, posters, banners, or similar devices visible to the public at on-post residence, even if part of privatized housing.

D. Religion.

1. Constitutional test: Lemon v. Kurtzman, 403 U.S. 602 (1977) (three part test: proposed government action must have a secular legislative purpose; have a primary effect that neither advances nor inhibits religion; and not involve excessive government entanglement with religion). But see Van Orden v. Perry, 125 S. Ct. 2854 (2005) (commenting that the Supreme Court has noted that the factors identified in Lemon serve as no more than helpful signposts).

a. Applied:

(1) Religious displays: American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561 (6th Cir. 1986) (city nativity scene in front of city hall unconstitutional); Jewish War Veterans v. United States, 695 F. Supp. 3 (D.D.C. 1988) (65-foot cross in front of HQ on military installation unconstitutional). Bottom line: purely religious display in front of command headquarters is prohibited.

(2) Holiday displays: Lynch v. Donnelly, 465 U.S. 668 (1984) (secular holiday display which included nativity scene not unconstitutional). Bottom line: holiday display in front of command headquarters is okay.

(3) Invocations / Benedictions:

(1) Official prayer at nonreligious military ceremonies:

(a) Army: See AR 165-1, Chaplain Activities in the United States Army (3 Dec 09), para 3-2(b)6 (authorizes chaplain-led prayers at military and patriotic ceremonies. Such occasions are not considered religious services; however, chaplains are not required to offer a prayer "if doing so would be in variance with the tenets or practices of their faith group.")

(b) Prayer Possible Solution: For official military events/ceremonies, many commanders and chaplains have adopted a practice of prefacing official prayer with a "qualifier." "Qualifier" examples: "Please join me according to your faith," or "I invite you to join me according to your faith tradition as I pray."

(2) Public Schools: Lee v. Weisman, 505 U.S. 577 (1992) ("nonsectarian" prayer at middle and high school graduation ceremonies impermissible establishment of religion).

(4) Day care: Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995) (Army regulations prohibiting Family Child Care providers from having any religious practices during their daycare program unconstitutional; relationship between Army and provider is solely one of regulator and regulatee and does not create an unconstitutional entanglement).

b. Exceptions:

(1) Army Chaplaincy Program constitutional. Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).

(2) Opening legislative sessions with invocation constitutional. Marsh v. Chambers, 463 U.S. 783 (1983).

2. Wearing of religious apparel while in uniform: 10 U.S.C. § 774. Provides for the wearing of neat and conservative items of religious apparel while in uniform unless wear would interfere with performance of duty. The statute legislatively overruled Goldman v. Weinberger, 475 U.S. 503 (1986) (which granted great deference to professional judgment of military authorities on matters of military interest and held that 1st Amendment did not prohibit USAF regulation preventing wearing of yarmulke while on duty and in uniform). See below for more details relating to religious accommodation.

3. Accommodation of Religious Practices Within the Military: DoDD 1300.l7, Accommodation of Religious Practices Within the Military Services (10 Feb 09, Incorporating Change 1, Effective 22 Jan 14); AR 600-20, para. 5-6; SECNAVINST 1730.8B, Accommodation of Religious Practices (2 Oct 08).

a. It is DoD policy that requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline. Commanders are responsible for initial determination of appropriate accommodation, but service member can have denial reviewed. Each service establishes procedures for such review. For the Army, appeals are sent through each level of command to the Deputy Chief of Staff, G-1, Washington DC.

b. Religious accommodation requests: Four major areas.

(1) Worship: Worship services, holy days, and Sabbath observances should be accommodated, except when precluded by military necessity.

(2) Diet: Military Departments should include religious belief as one factor for consideration when granting separate rations and permit commanders to authorize individuals to provide their own supplemental food rations in a field or "at sea" environment to accommodate their religious beliefs.

(3) Wear and appearance: See AR 600-20, para. 5-6h(4). Generally, religious jewelry, apparel or articles may be worn while in uniform if they are neat, conservative and discreet. Wear of religious items that are <u>not</u> visible or apparent when in duty uniform is authorized, unless precluded by specific mission related reasons. Wear of religious items that <u>are</u> visible and apparent are governed by AR 670-1. Members may wear visible items of religious apparel while in uniform, except under circumstances in which an item is not neat and conservative or its wearing interferes with the performance of the member's military duties. Hair and grooming practices required or observed by religious groups are not included within the meaning of religious apparel. Jewelry bearing religious inscriptions or indicating religious affiliation is subject to existing Service uniform regulations just as jewelry that is not of a religious nature.

(a) Examples: Religious item worn on a chain may not be visible when worn with the utility, service, dress, or mess uniforms. When worn with the PT uniform, the item should be no more visible than ID tags would be.

(b) Example: During worship service, Soldiers may wear visible religious items that do not meet normal uniform standards. Commanders have discretion to limit this when in a field environment.

(4) Medical practices: Army – no accommodation in emergencies or life threatening situations; otherwise, medical board will consider request.

c. Processing Requests for Religious Accomodation, AR 600-20, Paragraph 5-6i.

(1) Request for religious accommodation of wear and appearance of the uniform, personal appearance, and personal grooming practices of AR 670-1 may only be approved by the Secretary of the Army of the designee. Soldiers requesting such accommodations must continue to comply with AR 670-1 until the request is approved.

(2) Unit commanders will approve/disapprove all other request for accommodation of religious practices. If a commander determines partial or complete denial is appropriate, he/she will prepare a memorandum within 10 working days specifying the basis for denial, and provide a copy of the memorandum to the Soldier. The Soldier is then afforded the opportunity to appeal the disapproval. This appeal will occur through the means of a memorandum from the Soldier, through each level of command (to specifically include ACOM, ASCC, or DRU) to the DCS, G-1, Attn: DAPE-HR-L, Washington, D.C. 20310-0300.

E. Extremist and Criminal Gang Organizations.

1. See DoDD 1325.6; AR 600-20, para. 4-12; AFI 51-903; MCO 5370.4B (26 Jun 97); OPNAVINST 1620.1B (14 Sep 99) (prohibiting active participation in organizations which espouse supremacist, extremist, or criminal gang doctrine, ideology, or causes, including those that attempt to create illegal discrimination, advocate the use of force or violence, or otherwise engage in efforts to deprive others of their civil rights).

2. Army Policy Regarding Extremist Organizations: AR 600-20, para. 4-12.

a. Command authority: Expressly recognizes commander's inherent authority to prohibit activities which will adversely affect good order, discipline, or morale within the command. See AR 600-20, para. 4-12c. Commanders should be proactive in addressing warning signs of future prohibited activity even when this activity does not rise to active advocacy or active participation. See DoDI 1325.06, encl 3, para 9.

b. Participation in extremist or criminal gang organizations or activities is incompatible with military service.

c. Extremism includes advocating racial, gender, or ethnic hatred or intolerance.

d. Punitive prohibitions include: participating in public demonstrations or rallies; fund raising; recruiting; creating or leading; distributing literature presenting a danger to discipline or mission accomplishment; attending meetings under certain circumstances, e.g., in violation of off limits sanctions or commander's order, distributing literature associated with such organizations, receiving financial assistance from such organizations, and browsing or visiting internet Websites when on duty, without official sanction, that promote or advocate violence directed against the U.S. or DoD, or that promote international terrorism or terrorist themes.

F. Appearance.

1. Each service promulgates its own uniform and appearance regulation.

a. The military uniform is an inappropriate forum for individual expression.

b. Personal appearance standards are established by the respective services. Additional standards may be imposed in unique circumstances, such as a deployed environment.

2. Service Regulations: Army - AR 670-1, Wear and Appearance of Army Uniforms and Insignia (15 September 2014); Air Force – AFI 36-2903 (15 Aug 14); Navy – Navy Uniform Regs (Jul 11); Marines – MC Order P1020.34G (31 Mar 2003).

3. Tattoos, Body Piercing, Mutilation, and Tooth Ornamentation:

a. Tattoos, Army: AR 670-1, Paragraph 3-3. No tattoos that are extremist, indecent, sexist, or racist. Soldiers are prohibited from having tattoos or brands on the head, face (except for permanent makeup), neck (anything above the t-shirt line to include on/inside the eyelids, mouth and ears), wrists, hands or fingers. Additionally, Soldiers may have no more than four visible tattoos belie to elbow (to the wrist bone) or below the knee. The tattoos in these areas must be smaller than the size of the wearer's hand with fingers extended and joined with the thumb touching the base of the index finger. The total count of all tattoos in these areas may not exceed a total of four. Soldiers who have tattoos that were compliance with previous tattoo policies, but that are no longer in compliance, are grandfathered. See Paragraph 3-3, AR 670-1 (15 Sep 14) for documentation requirements in these cases, and for procedures in dealing with prohibited tattoos.

b. Body Mutilation, Army: AR 670-1, Paragraph 3-3l. Except for females wearing earrings with dress uniforms or civilian clothes, no body piercing jewelry worn either on or off duty. Soldiers are prohibited from any unauthorized form of body mutilation. Examples include but are not limited to, tongue bifurcation, ear gauging, unnatural shaping of teeth, ear pointing (or elfing), scarification (cutting to create intentional scarring), or body modifications for he purpose of suspension (hanging by body hooks). Soldiers who entered the Army with approved body mutilation before 31 March 2014 may request an exception to policy through DCG, G-1. (Rules in other services: Navy and Marines prohibit tattoos on the face and neck; more restrictive rules for officers. Marines prohibit male earrings anywhere, whether on or off post. Air Force and Navy specifically prohibit tongue splitting (implied in Army and Marine rules).

V. AUTHORITY OFF THE INSTALLATION:

A. The Armed Forces Disciplinary Control Board (AFDCB). Joint Reg: AR 190-24/ OPNAVIST 1620.2A/ MCO 1620.2C/ AFJI 31-213 (27 July 2006).

1. The AFDCB takes action on reports of negative conditions that exist off-post; coordinates with civil authorities; makes recommendations to commander on eliminating conditions which affect health, safety, morals, welfare, morale, or discipline.

2. May recommend off-limits area, i.e., any vehicle, conveyance, place, structure, building, or area prohibited to military personnel to use, ride, visit, or enter during the off-limits period.

3. Due process provided in form of notice and opportunity to be heard for the individual or firm responsible for the alleged condition or situation.

4. Loss to business from order is not a “taking” for which damages accrue. Ainsworth v. Barn Ballroom Co., 157 F.2d 97 (4th Cir. 1946). Standard of review is whether the action was “arbitrary and capricious.”

5. Violation of off-limits order is UCMJ offense.

B. Regulation of Off-Post Behavior

1. Valid Military Purpose Required for the Order. See discussion of lawfulness of military orders at para. 14c(2)(a)(iii), Part IV, Manual for Courts-Martial, 2012: "The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs."

2. Caselaw: United States v. Roach, 26 M.J. 859 (C.G.C.M.R. 1988); United States v. Sprague, 1991 CMR LEXIS 1435; United States v. Ebanks, 29 M.J. 926 (A.F.C.M.R 1989); United States v Dumford, 30 M.J. 137 (C.M.A. 1990), *cert. den.* 498 U.S. 854 (1990).

   a. To be lawful, an order must relate to a "military duty." Military duty may include activities which are: "Reasonably necessary to safeguard or promote the morale, discipline, and usefulness of the members of any particular command and which are directly connected with the maintenance of good order." United States v. Smith, 25 M.J. 545, 548 (N.M.C.M.R. 1987)

   b. Other instances in which the courts found a nexus to military needs include an order to accused to have no contact with female enlisted member with whom he had committed a fraternization offense, United States v. Mann, 50 M.J. 689 (A.F.Ct.Crim.App. 1999)), and an order requiring unit members to remain within 400-mile radius of base (United States v. Flynn, 34 M.J. 1183 (A.F.C.M.R. 1992).

   c. In United States v. Kochan, the court found unlawful the order to accused not to drink alcoholic beverages until he reached age 21. State law prohibited minors from purchasing alcohol or possessing it in public, but it did not prohibit them from consuming alcohol in private. 27 M.J. 574 (N.M.C.M.R. 1988). The court found the order to be "so broad as to restrict appellant's private rights for the 17 months preceding his 21st birthday, wherever he might be, without a demonstrable nexus to military needs." 27 M.J. at 574.

d. In addition to having a nexus to military needs, orders must not clearly conflict with a soldier's constitutional or statutory rights. United States v. Austin, 27 M.J. 227 (C.M.A. 1988).

C. Current Issues Regarding Regulation of Off-Post Behavior

a. Motorcycle Protective Gear.

(1) DoDI 6055.04, DoD Traffic Safety Program (20 Apr 09 and Change 2, 23 Jan 13) establishes the Department of Defense's traffic safety program, and Enclosure 3, sets the personal protective equipment (PPE) requirement for motorcycle riders and passengers. It applies to "all military personnel at any time, on or off a DoD installation," Paragraph 2b. The terms of the Instruction is incorporated in AR 385-10, The Army Safety Program (27 Nov 13), Paragraph 11-9.

(2) Using DoDI 6055.4 as authority, the command may issue an order directing Soldiers to wear the above PPE (to include motorcycle helmets) whenever operating or riding on a motorcycle. While the Instruction is not, in itself, punitive, the command may issue a General Order, or specific individual orders, directing Soldiers to abide by the PPE requirements. The authority to issue a lawful order requiring the wearing of PPE is based on a commander's inherent duty to preserve the morale, discipline and usefulness of members of his command. An order that interferes with a Soldier's private rights is still lawful if it has a valid military purpose and is reasonably necessary to accomplish a military mission. See U.S. v. McDaniels, 50 M.J. 407, 408 (C.A.A.F. 1999); U.S. v. Womack, 29 M.J. 88 (C.M.A. 1989).

(3) The military purpose in a PPE requirement is the personal safety of Soldiers and ensuring their usefulness to the command. Soldiers must be fit, healthy and ready for duty at all times. PPE use arguably minimizes injuries from motorcycle accidents, thereby minimizing recovery time and time away from work and reducing the medical costs. Courts have not addressed the issue of personal safety of the Soldier and reduced medical costs as the nexus to military needs.

b. Post-Deployment Drinking / Driving Restrictions.

(1) Even in an era of heightened awareness of society's need to address alcoholism and the abuse of alcohol, most would consider an order "not to consume alcohol" as interfering with private rights or personal affairs. Nevertheless, such an order may still be lawful if it serves a valid military purpose. The issue is whether one or more of those reasons stated in the Manual for Courts-Martial (see previous discussion), or any other valid purpose, is served. United States v. Roach, 26 M.J. 859, 865 (C.M.R. 1988).

(2) The Court in Roach found an order not to drink "for a Soldier's own good" did not serve a valid military purpose.

(3) Similarly in United States v. Sprague, 1991 CMR LEXIS 1435, the Court stated, "Good motives, i.e., to stop future offenses involving alcohol, is not enough, to make an order legal. Orders given for the admirable, paternalistic reason of preventing future alcohol-related offenses or helping a serviceman battle an alcohol problem are not sufficiently related to military purposes to be valid. … The legality of an order not to drink alcoholic beverages, then, must be determined by analyzing the particular circumstances surrounding each case."

c. Regulation of Privately Owned, Off-Post Weapons.

(1) National Defense Authorization Act (NDAA) 2011, § 1062; Pub. L. 111-383, Div A, Title X, § 1062; 124 Stat. 463, effective 7 Jan 11 (record retention prohibition effective 7 Apr 11). Prohibits DoD authorities from infringing on Servicemembers' rights to lawfully acquire, possess, own, carry, and use privately owned firearms, ammunition, and other weapons off-post, when not in a duty status, and not in uniform. Prohibits commanders from imposing off-post restrictions, collecting information, and maintaining previously collected information regarding otherwise lawful, private activities. Records collection and retention exceptions for investigations and adjudications of alleged illegal activity.

(2) NDAA 2013, § 1057. Authorizes a health professional or a commanding officer to inquire if a Soldier plans to acquire, or already possesses or owns, a privately-owned firearm, ammunition, or other weapon, if such health professional or such commanding officer has reasonable grounds to believe such member is at risk for suicide or causing harm to others.

CHAPTER B

FEDERAL-STATE RELATIONS

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FEDERAL-STATE RELATIONS

I. INTRODUCTION

A. The lines of authority between states and the federal government are, to a considerable extent, defined by the Constitution and relevant case law. In recent years, however, the Supreme Court has decided a number of cases that have reevaluated this historical relationship. *See e.g.*, *U.S. v. Lopez,* 514 U.S. 549 (1995). These decisions and their progeny have had a significant impact on military operations.

B. Traditional state powers. States may generally legislate on all matters within their territorial jurisdiction. This "police power" does not arise from the Constitution, but is an inherent attribute of the states' territorial sovereignty. *See Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146 (1919).

C. The powers of the federal government have been interpreted broadly, so as to create a large potential overlap with state authority. For example, Article I, § 8, cl. 18 provides that "[t]he Congress will have power . . . to make all laws which will be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Further, Congress is given the power to regulate commerce with foreign nations and among the various states. U.S. Const., Art. I, §8, cl. 3.

II. TENTH AMENDMENT

A. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Am. 10.

1. ''The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified.'' *United States v. Sprague*, 282 U.S. 716, 733 (1931).

2. “The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.’’ *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

B. *U.S. v. Lopez,* 514 U.S. 549 (1995).

1. The Commerce Clause has been cited as the constitutional basis for a significant portion of the laws passed by Congress over the last 50 years, and it currently represents one of the broadest bases for the exercise of congressional powers. *See Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, CRS Report RL30315, 4, 2008. In *United States v. Lopez*, however, the Supreme Court brought into question the extent to which Congress can rely on the Commerce Clause as a basis for federal jurisdiction. *See Lopez*, 514 at 566.

2. Under the Gun-Free School Zones Act of 1990, Congress made it a federal offense for “any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. § 922(q)(1)(A). In *Lopez*, the Court held that, because the act neither regulated a commercial activity nor contained a requirement that the possession was connected to interstate commerce, the act exceeded the authority of Congress under the Commerce Clause. *See Lopez*, 514 at 567.

3. The *Lopez* case was significant in that it is the first time since 1937 that the Supreme Court struck down a federal statute purely based on a finding that Congress had exceeded it powers under the Commerce Clause. In doing so, the Court revisited its prior cases, sorted the commerce power into three categories, and asserted that Congress could not go beyond these three categories: (1) regulation of channels of commerce, (2) regulation of instrumentalities of commerce, and (3) regulation of economic activities that “affect” commerce. *See Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, CRS Report RL30315, 5, 2008.

C. *United States v. Morrison*, 529 U.S. 598 (2000).

1. In 1994, Congress enacted the Violence Against Women Act, 42 U.S.C. § 13981. This legislation provided a federal private right of action for victims of gender-motivated violence. In *Morrison*, the victim of an alleged rape brought suit against the alleged rapist, arguing that this portion of the act was sustainable because it addressed activities that substantially affect interstate commerce. The Supreme Court, however, noted that unlike traditional statutes based on the commerce clause, the activity in question had nothing to do with commerce or an economic enterprise. This point had been made previously in *Lopez*. The Court reaffirmed Lopez and found that in order to fall under the acceptable category of laws that "substantially affect commerce," the underlying activity itself must generally be economic or commercial. *Id*. at 609-610.

2. As gender-motivated violence does not inherently relate to an economic activity, the Court held that it was beyond the authority of Congress to regulate. *Id*. at 613.

D. Military Application: The Lautenberg Amendment, 18 U.S.C. § 922(g)(9).

1. In 1996, Congress amended the Gun Control Act of 1968 to prohibit persons convicted of a misdemeanor crime of domestic violence from owning or possessing a firearm or ammunition. *See* 18 U.S.C. § 922(g)(9).

2. The amendment was passed pursuant to the Commerce Clause. No exemption for members of the military or police was placed into the amendment. *See* 18 U.S.C. § 922(g)(9).

3. *Gillespie v. Indianapolis*, 185 F.3d 693 (1999) distinguished the Lautenberg Amendment from the Gun-Free School Zones Act in *Lopez* due to its explicit jurisdictional element requiring the domestic violence misdemeanor to have a firearm "in or affecting commerce."

4. *U.S. v. Hayes,* 555 U.S. 415 (2009).

a. Issue: whether the federal definition of "misdemeanor crime of domestic violence" requires a domestic relationship to be an element of the underlying criminal statute (typically state statute) upon which the predicate conviction is based. *See Hayes*, 555 U.S. at 415.

b. The Supreme Court held that while it had to be proven, it need not be an element of the underlying statute. Therefore, a conviction under a general battery statute may establish the predicate misdemeanor crime of domestic violence for the Lautenberg Amendment to apply. *See Hayes*, 555 U.S. at 427-428.

5. By DOD policy, a state or Federal conviction for a **felony** crime of domestic violence is a qualifying conviction. *See* AR 600-20, para 4-23(b)(2).

a. Qualifying Conviction Requires:

(1) Representation by counsel or knowingly and intelligently waived the right to counsel;

(2) If entitled to have the case tried by a jury, the case was actually tried by a jury, or knowing and intelligent waiver;

(3) The conviction has not been expunged, set aside, or a pardon issued. *See* AR 600-20, para 4-23(b)(2).

b. Soldiers given reasonable time to seek expungement or pardon for a qualifying conviction; may extend up to one year for that purpose. *See* AR 600-20, para 4-23(c)(8).

c. Conviction is defined by state law. For example, look to the state to see if deferred adjudication is considered a conviction.

III. ELEVENTH AMENDMENT

A. *The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.* U.S. Const., Am. 11.

B. The Eleventh Amendment and state sovereign immunity provide an example of the complicated interaction between the powers of the federal government, the state, and the individual. The basic issue to be addressed is the extent to which individuals can sue a state under federal law. *See Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, CRS Report RL30315, 17, 2008.

C. The Eleventh Amendment was passed as a response to the case of *Chisholm v.Georgia,* 2 U.S. (Dall.) 419 (1793). Immediately after the adoption of the Constitution, a number of citizens filed cases in federal court against states. One of these, *Chisholm*, was a diversity suit filed by two citizens of South Carolina against the State of Georgia to recover a Revolutionary War debt. In *Chisholm,* the Supreme Court noted that Article III of the Constitution specifically grants federal courts jurisdiction over such suits. In response to *Chisholm*, Congress passed and the States adopted the Eleventh Amendment to prevent suits against states in Federal courts. *See Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, CRS Report RL30315, 17-18, 2008.

D. Recognized Exceptions to the Eleventh Amendment.

1. No bar to suits against state officials for prospective, injunctive relief (order compelling state officials to comply with federal law). *See Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974); *Palmatier v. Mich. Dep't of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997) (approving *Ex parte Young* relief for USERRA claims).

2. A state may waive its sovereign immunity by statute and consent to be sued in federal court. *See Williamson v.Dep't of Human Res*., 572 S.E.2d 678, 681 (Ga. Ct. App. 2002) (holding that waiver of immunity under state statute prohibiting disability discrimination constituted waiver under the ADA).

3. Congress unequivocally expresses its intent to abrogate the immunity & and acts pursuant to a valid exercise of power. *See Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 55 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985).

E. *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).

1. The *Seminole* case involved the Indian Gaming Regulatory Act of 1988, which provided Indian tribes the opportunity to establish gambling operations. However, the statute also required the Indian tribes to enter into a compact with the state in which they were located. The states, in turn, were obligated to negotiate with the Indian tribes in good faith, with enforcement in federal court. *See Seminole Tribe*, 517 U.S. at 47.

2. The Court in *Seminole* found it important to establish what constitutional authority was being exercised by the passage of the Indian Gaming Law. The Court determined that the power being exercised was the Indian Commerce Clause, which is found in Article I. The Court held that as the Eleventh Amendment was ratified after the passage of the Constitution and Article I, it was a limitation on Congress's authority to waive a state's sovereign immunity under that Article. *See Seminole Tribe*, 517 U.S. at 64-65.

F. Military Application: Uniform Servicemembers Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 2021-2027 (1994).

1. *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).

a. The original version of USERRA allowed the Attorney General to represent Soldiers in Federal Court against state government employers and private employers. *See Velasquez*, 160 F.3d at 389-390.

b. In *Velasquez*, the 7th Circuit thoroughly reviewed USERRA's abrogation of state sovereign immunity under *Seminole Tribe* and concluded that it was unconstitutional.

(1) USERRA was passed pursuant to Congress's War Powers (power to declare war, regulate the military, etc.) under the constitution. *See* U.S. Const., Art. I, §8; *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).

(2) Since 11th amendment was passed after the War Powers provisions, it cannot be used to abrogate the State's sovereign immunity. Applying the lessons of *Seminole Tribe*, it necessarily follows that Congress, acting under Article I, could not effectively abrogate the states' Eleventh Amendment immunity in USERRA Amendments to USERRA. *See Palmatier*, 981 F. Supp. at 532.

(3) The central holding in *Velasquez* was that Congress's war powers, like its powers under the Commerce Clause and the rest of Article I, predates the Eleventh Amendment's reestablishment of states' sovereign immunity against private suits. *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).

c. 144 CONG. REC. H1396, H1398-99 (daily ed. Mar. 24, 1998) (statement of Rep. Filner that because "members of the Reserve and National Guard are a critical component of our national defense," Congress should pass bill that restores USERRA protection to state employees after Seminole Tribe).

(1) In 1998, Congress amended USERRA to address the *Velasquez* problem. As amended, USERRA authorizes the Attorney General to initiate a lawsuit against a state in the name of the United States, as plaintiff. *See* 38 U.S.C. 4323(b)(1).

(2) Additionally, in the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State. 38 U.S.C. § 4323.

2. Judicial Interpretation of USERRA Amendments.

a. USERRA's jurisdiction is expressly limited in actions filed by individuals against a state as an employer "in accordance with the laws of the State." Thus, for an individual to sustain an action against a state pursuant to USERRA, the action must be permitted by state law. *Smith v. Tennessee Nat. Guard*, 387 S.W.3d 570 (Tenn. Ct. App. 2012).

b. Federal district court lacks jurisdiction over a USERRA action brought by an individual against a state as an employer. The plain language of the statute, as well as its legislative history, showed that Congress intended that actions brought by individuals against a state be commenced in state court. *See Townsend v. University of Alaska*, 543 F.3d 478, cert. denied, 129 S. Ct. 1907 (2009).

IV. DOUBLE JEOPARDY

A. No double jeopardy concern when prosecutions are carried out by different sovereigns (i.e., with proceedings in both State and Federal Courts for the same crime). *See e.g., United States v. Nixon*, 315 F. Supp. 2d 876, 879 n.1 (E.D. Mich. 2004) (noting that in some cases initiated under Project Safe Neighborhoods, federal and state prosecutors collaborated to select best forum).

B. AR 27-10, Ch. 4, a person subject to the UCMJ who has been tried in a civilian court may, but ordinarily will not, be tried by court martial or punished under UCMJ, Art. 15, for the same act over which the civilian court has exercised jurisdiction.

V. POSSE COMITATUS

A. "Whoever, *except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both."* 18 U.S.C. § 1385.

B. By policy, Posse Comitatus Act restrictions are applicable to the Department of the Navy (including the Marine Corps) with such exceptions as the Secretary of Defense may authorize in advance on a case-by-case basis. *See* DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies*, Enclosure 3, 27 FEB 13.

C. The primary restriction on DoD participation in civilian law enforcement activities is the Posse Comitatus Act. 10 U.S.C. § 375 provides that the Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law. *See* 10 U.S.C. § 375.

D. The National Guard when not in federal service is not covered by the Posse Comitatus Act. *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999); *United States v. Hutchings*, 127 F.3d 1255, 1258 (10th Cir. 1997); *United States v. Benish*, 5 F.3d 20, 25-6 (3d Cir.1993); *United States v. Kyllo*, 809 F.Supp. 787, 792-93 (D.Ore. 1992); *Wallace v. State*, 933 P.2d 1157, 1160 (Alaska App. 1997).

E. Exceptions to Posse Comitatus.

1. The Constitution explicitly permits Congress to call out the militia to execute laws, suppress insurrection, and repel invasions. *See* U.S. Const. Art. I, § 8, cl.15.

2. The President may call out the armed forces in times of insurrection and domestic violence. *See* 10 U.S.C. §§ 331-335.

3. The armed forces may share information and equipment with civilian law enforcement agencies. *See* 10 U.S.C. §§ 371-382.

F. Judicial Interpretation of PCA – passive vs. active involvement tests.

1. "Direct active use of Army or Air Force personnel" test. *See U.S. v. Red Feather*, 392 F. Supp. 916, 921 (D.S.D. 1975).

2. "Pervade[s] the activities" of the law enforcement agencies Test. *United States v.Jaramillo*, 380 F.Supp. 1375, 1380-381 (D.Neb. 1974).

3. "Subjected . . . citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature." *United States v. McArthur*, 419 F.Supp. 186, 193 n.3 (D.N.D. 1976).

G. Modern Application of Possee Comitatus.

1. 32 U.S.C. § 502(f) is utilized for long term federal missions for Defense Support to Civilian Authorities (DSCA).

a. A member of the National Guard may without his consent be ordered to perform training *or other duty* in addition to that prescribed 32 U.S.C. 502§ (a) (emphasis added).

b. This is the provision of law that was used to provide federal pay and benefits to the National Guard personnel who provided security at many of the nation's airports after September 11 and who participated in Hurricanes Katrina and Rita-related disaster relief operations. *See* CRS Report R41286, *Securing America's Borders: The Role of the Military*, 25 FEB 13.

c. Approval of the use of the National Guard in a duty status pursuant to section 502(f) for DSCA requires receipt of a reimbursable request from a federal department or agency or qualifying entity for DoD assistance; concurrence from the applicable Governor; and determination by the Secretary of Defense to approve the use of the National Guard in a duty status pursuant to section 502(f). *See* DoDI 3025.22, *The Use of the National Guard for Defense Support of Civil Authorities*, 26 JUL 13.

2. 10 U.S.C. § 12304(a) expands the use of the federal reserve for domestic disaster assistance. When a Governor requests Federal assistance in responding to a major disaster or emergency, the Secretary of Defense may, without the consent of the member affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty for a continuous period of not more than 120 days to respond to the Governor's request. *See* 10 U.S.C. § 12304(a).

VI. EXCERCISING FEDERAL AUTHORITY INCIDENT TO LEGISLATIVE JURISDICTION

A. Five Days in 1783—The Birth of Exclusive Jurisdiction.

1. The Continental Congress met in Philadelphia on 20 June 1783.

2. Soldiers from Lancaster arrived on 21 June 1783, to "obtain a settlement of accounts."

3. The eyewitness report on the "Insult to Congress."

B. Result: U.S. Constitution, Art. I, § 8, cl. 17.

> The Congress shall have power . . . to exercise **exclusive Legislation** in all cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the seat of the Government . . . and to exercise like Authority over all **Places purchased** by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dockyards, and other **needful Buildings**.

C. Concept of Legislative Jurisdiction. The concept of legislative jurisdiction has been liberally construed over time.

1. "Places" means any property occupied by the federal government.

2. "[P]urchased" means obtained.

3. "[N]eedful Buildings" has been expansively construed. In 1995, the federal government controlled about 650 million acres of land (about 30 percent of total U.S. land), mostly in western states, including about 25 million acres of land controlled by DOD.

D. Types of Jurisdiction.

1. Reference: AR 405-20, Federal Legislative Jurisdiction (21 FEB 74).

2. Exclusive legislative jurisdiction. The federal government possesses, by whatever means acquired, all of the state's authority to legislate without reservation, except that the state concerned has reserved the right to serve criminal or civil process. These areas are often referred to as "enclaves" and exclusive federal legislative jurisdiction displaces state jurisdiction.

   a. Example: "Exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes, except the service of all civil and criminal process of the courts of this state." Colorado Revised Statutes § 3-1-103.

   b. Example: "Exclusive jurisdiction in and over any land so acquired by the United States is ceded to the United States for all purposes except the service of all civil and criminal process of the courts of this state . . ." Connecticut General Statutes § 48-1.

3. Concurrent legislative jurisdiction. The state and federal governments both have full legislative jurisdiction. The state has reserved to itself the right to exercise, concurrently with the United States, all of the same authority.

4. Partial jurisdiction. The state reserves some, but not all, legislative jurisdiction. For example, a state can reserve the power to tax, but cede all other powers. Another example is when the state cedes all legislative jurisdiction but reserves criminal jurisdiction.

a. Example: Virginia has reserved the power to exclusively license and regulate, or to prohibit, the sale of intoxicating liquors on any lands the United States acquires, and to levy a tax on the sale of oil, gas and all other motor fuels and lubricants. Va. Code Ann. § 1-400.

b. Example: A Minnesota statute states, "the jurisdiction of the United States over any land or other property within this state now owned or hereafter acquired for national purposes is concurrent with and subject to the jurisdiction and right of the state . . . to punish offenses against its laws committed therein." Minn. Stat. § 1-041.

5. Proprietorial interest. The federal government only occupies the property. The federal government has only the same rights on the land as does any landowner. As with concurrent legislative jurisdiction, the state retains all jurisdiction over the area. Examples: The federal government has only a proprietary interest in TJAGLCS and leased government housing. Keep in mind, however, that the state cannot interfere with the performance of a federal function.

E. Types of Acquisition

1. Cession and Acceptance. State at some point cedes jurisdiction of land previously purchased by the U.S. *See Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525 (1885). The United States failed to reserve legislative jurisdiction over Fort Leavenworth when Kansas became a state in 1861. In 1875, Kansas finally ceded exclusive jurisdiction back to the United States.

2. Purchase and Consent. State grants consent through legislation known as "consent to purchase" statutes. State transfers pursuant to Art I, clause 17. State may relinquish all jurisdiction or less than all.

3. Federal Reservation. Common in states in the western one-third of the U.S. The United States reserved jurisdiction over some lands upon a state's entry into the union. Example: Federal government reserved 83% of land mass when Nevada admitted to union; reserved 250 million acres of Alaska; 64% of Idaho; 45% of California; 45% of Arizona, etc.

F. Army Policy. The DA's policy is to acquire only a proprietary interest in land and not to acquire any degree of legislative jurisdiction except under exceptional circumstances. *See* AR 405-20, para 5. Further, the DA's policy is to retrocede excess jurisdiction.

G. Accepting Legislative Jurisdiction by the United States

1. The federal government *must affirmatively accept* jurisdiction for all land ceded **after 1 February 1940**. 40 U.S.C. § 255 [Restated in entirety in 40 U.S.C. § 3111 and 40 U.S.C. § 3112]. 40 U.S.C. § 3112 specifically delineates the requirement for acceptance of jurisdiction, as follows:

   a. The head or "other authorized officer of the department, agency" may "accept or secure, from the State . . . consent to, or cession of, any jurisdiction over the land or interest not previously obtained. The individual shall indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated." 40 U.S.C. § 3112.

   b. It is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in the statute. 40 U.S.C. § 3112.

2. Jurisdiction is presumed, absent any dissent [by the United States] for land ceded or purchased with consent of state legislature **before 2 February 1940**. *Fort Leavenworth Rail R. Co. v. Lowe*, 114 U.S. 525 (1885); *Silas Mason Co. v. Tax Comm. of Washington*, 302 U.S. 186 (1937); *United States v. Gilbert*, 94 F. Supp. 2d 157 (D. Mass. 2000).

3. Examples:

a. Three soldiers convicted of rape under 18 U.S.C. §§ 451, 457 in the federal District Court for the Western District of Louisiana. The offenses occurred within the bounds of Camp Claiborne on 10 May 1942. The government had acquired title to the land prior to the date of offense but after 1940. The Secretary of War accepted exclusive jurisdiction over the land on which the Camp was located in a letter to the Governor of Louisiana effective 15 January 1943. Held: United States has no jurisdiction to enforce the criminal laws unless and until consent to accept jurisdiction is filed in accordance with 40 U.S.C. § 255. *See Adams v. United States*, 319 U.S. 312 (1943).

b. Defendant convicted of murder by the State of Illinois. The offense occurred on a loading platform near the Chicago River 178 feet from the Main Post Office Building. The federal government acquired the land under the Main Post Office Building in 1931. However, the federal government acquired the Post Office Annex, where the loading platform stood, in 1951. Held: the state conviction stands because the United States never filed a notice of acceptance of jurisdiction with the State of Illinois. *See Greer v. Pate*, 393 F.2d 44 (5th Cir. 1968).

c. Defendant convicted of murder under 18 U.S.C. § 1111. The offense was committed on the Old Army Base in Norfolk, Virginia. The United States acquired title to the land in 1919. Defendant contended that since the United States never accepted jurisdiction, his conviction should be set aside. Held: the requirement to affirmatively accept legislative jurisdiction required by 40 U.S.C. § 255 only applies to lands acquired after 1 February 1940. *See Markham v. United States*, 215 F.2d 56 (4th Cir. 1954).

H. Disposal of Legislative Jurisdiction.

1. Reverter clause in original consent or cession may operate. *See Palmer v. Barrett*, 162 U.S. 399 (1896) (holding that land ceded to the United States for a particular purpose reverts to the state if condition is not satisfied).

2. Government may abandon federal interest in land or may cease to use it for federal purposes.

3. Dispose of jurisdiction in the same way it was accepted – secretarial notification or compliance with state law. *See* 10 U.S.C. § 2683.

VII. SOURCES OF CIVIL LAW ON EXCLUSIVE JURISDICTION INSTALLATIONS

A. No Congressional Action.

1. The *McGlinn* Doctrine. *Chicago, Rock Island & Pacific Ry. v. McGlinn*, 114 U.S. 542 (1885).

a. State Law at time of cession remains effective. "Municipal state laws affecting the possession, use and transfer of property existing at the time of cession remain effective until, by direct action, the new government alters or repeals them." Direct action of the new government includes action of the Executive as well as of the Congress. *See Anderson v. Chicago and Northwestern R.R.*, 168 N.W. 196 (Neb. 1918).

b. Derived from international law. "Whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country . . . continue in force until abrogated or changed by the new government or sovereign."

2. Subsequently enacted state laws do not apply. *See Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929).

3. Federal Law displaces contrary state law acquired under *McGlinn*. *See Lord v. Local Union No. 20088*, 646 F.2d 1057 (5th Cir. 1981).

4. Surviving state law becomes federal law. *See Stokes v. Adair*, 265 F.2d 662 (4th Cir. 1959).

5. Difficulties applying the *McGlinn* Doctrine.

a. Finding old law can be difficult.

b. New developments in the law may be preferable to older obsolete laws. *See, e.g.*, *Murray v. Joe Gerrick Co.*, 291 U.S. 315 (1934).

c. Different rules of law may apply to different parts of the same installation where acquired at different times. *See Board of Supervisors of Fairfax County v. United States*, 408 F. Supp. 556 (E.D. Va. 1976).

B. Congressional Action to Adopt or Extend State Civil Laws.

1. Current wrongful death and personal injury state laws apply as federal law. 16 U.S.C. § 457 (LEXIS 2008). *See also* Murray v. Joe Gerrick Co., 291 U.S. 315 (1934); Vasina v. Grumman Corp., 644 F.2d 112 (2d Cir. 1981); Quadrini v. Sikorsky Aircraft Division, 425 F. Supp. 81 (D. Conn. 1977), *modified in*, 505 F. Supp. 1049 (D. Conn. 1981).

2. State fish and game laws on military installations. 10 U.S.C. § 2671; 16 U.S.C. § 670a; AR 200-3, Natural Resources - Land, Forest, and Wildlife Management (28 Feb. 95).

3. State worker's compensation laws apply directly: contractors must pay worker's compensation contributions. 40 U.S.C. § 3172.

4. State unemployment compensation laws apply directly: employers must comply and state can enforce on the installation. 26 U.S.C. § 3305(d).

5. State quarantine and health laws. 42 U.S.C. § 97.

6. State and local taxes.

a. Sales, use, and income taxes levied on persons and nonfederal entities on the installation are authorized. 4 U.S.C. §§ 105-107 (Buck Act).

(1) Servicemembers Civil Relief Act may shield members of the Armed Forces from taxes allowed by Buck Act. 50 U.S.C. App. § 571.

(2) Does not authorize taxation of the United States or its instrumentalities. Instrumentalities include post exchanges, officers' clubs and similar nonappropriated fund facilities.

(3) Label the state puts on the tax is not necessarily determinative. *See United States v. City and County of Denver*, 573 F. Supp. 686 (Colo. 1983) (discussing whether a tax by the County of Denver on federal civilian employees on an Air Force base is an income tax or an excise tax).

b. Gasoline taxes on sales of motor vehicle fuel to private persons. 4 U.S.C. § 104 (Hayden-Cartwright Act).

c. Private leasehold interests on federal property. 10 U.S.C. § 2667e.

d. Where the legal incidence of a tax falls on the United States, the Supremacy Clause preempts. *See McCulloch v. Maryland*, 17 U.S. 316 (1819) ("An act passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.")

e. Distinguish "legal" incidence from "economic" incidence. *United States v. Michigan*, 851 F.2d 803 (6th Cir. 1988)(holding that Federal credit unions are immune under the Supremacy Clause, as well as under 12 U.S.C.S. § 1768, from state taxation); *United States v. Montgomery County, Maryland*, 761 F.2d 998 (4th Cir. 1985).

VIII. USING THE SUPREMACY CLAUSE TO PREEMPT STATE LAW

A. Definition. U.S. Const., Art. VI, cl. 2.

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . shall be the **supreme Law of the Land**; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

B. Federal Statutes Preempt State Statutes.

1. Occupation of the field. Is compliance with both federal and state law impossible? Is national uniformity required, or is the federal scheme pervasive? *See Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984).

2. Conflict preemption. Does state law present an obstacle to accomplishing and executing the purposes and objectives of Congress? *See Kleppe v. New Mexico*, 426 U.S. 529 (1976) (Wild Free-Roaming Horses and Burros Act preempts the New Mexico Estray Law).

C. Federal Regulations Preempt State Statutes.

1. Express congressional authorization not needed. *See City of New York v. F.C.C.*, 486 U.S. 57 (1988) (deciding that the F.C.C. mandate and Congress's intent behind the 1984 Cable Act was sufficient authority to preempt state law regulating cable signals).

2. *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. 141 (1982) (the Federal Home Loan Bank Board's regulations, including 12 C.F.R. § 545.8-3(f), pre-empt state regulation of federal savings and loans).

3. If [an agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. *See United States v. Shimmer*, 367 U.S. 374, 383 (1961).

D. Federal Policies Preempt State and Local Statutes. *See United States v. City of Philadelphia*, 798 F.2d 81 (3rd Cir. 1986) (federal policy regarding homosexuality in the military preempted city ordinance barring employment discrimination based on sexual orientation).

E. States Cannot Interfere With the Federal Function. *See Fort Leavenworth Railroad v. Lowe*, 114 U.S. 525 (1885).

1. The United States . . . retained . . . only the rights of an ordinary proprietor; except as an instrument for the execution of the powers of the General Government, that part . . . actually used for a fort or military post was beyond such control of the State, by taxation or otherwise, as would defeat its use for those purposes. *Fort Leavenworth v. Lowe*, 114 U.S. at 527.

2. Activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides "clear and unambiguous" authorization for the regulation. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988).

3. Supremacy principle extends to local government regulation of installation and requires detailed analysis of specific federal statute. *Compare United States v. Town of Windsor*, 765 F.2d 16 (2d Cir. 1985) (invalidating local building permit ordinances applied to federal contractors) *with Parola v. Weinberger*, 848 F.2d 956 (9th Cir. 1988) (Resource Conservation and Recovery Act required federal installations to comply with local ordinance governing garbage collection).

IX. EXERCISING STATE AUTHORITY ON EXCLUSIVE JURISDICTION INSTALLATIONS

A. Keeping the State Out—Traditional View: Enclave is a Federal Island—A State Within a State.

B. In general, "In granting this consent, the Legislature and the State reserve jurisdiction on and over the land for the execution of civil process and criminal process in all cases, and the State's entire power of taxation * * * and reserve to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given." *United States v. Warne*, 190 F. Supp. 645.

1. Liquor shipped to an exclusive federal enclave is never "within" the surrounding state. *Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938).

2. Enclave residents are not residents of the surrounding state.

C. Allowing the State In – Alternate View: Where there is no Interference with the Federal Interest, the Fiction of a State within a State will be Ignored.

1. The basic rule – **where there is no friction, avoid the fiction**. *Howard v. Commissioners of Louisville*, 344 U.S. 624 (1953).

"The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed."

2. The exception – it is the potential for friction rather than the existence of friction that controls. *See United States v. McGee*, 714 F.2d 607 (6th Cir. 1983). The Court does not doubt that the City . . . would willingly agree at this time to noninterference with the function of the . . . base. But what one board of city commissioners can agree to, another board of city commissioners can reverse. It is this aspect of annexation that is most troubling.

D. Areas of Conflict.

1. Taxing and Regulating Alcohol.

a. Courts continue to adhere to the "state within a state" view. *United States v. Texas*, 695 F.2d 136 (5th Cir. 1983) (state law requiring holders of alcoholic beverage permits to pay tax on each gallon of imported beverage held invalid with regard to government instrumentalities on federal enclaves); *United States v. South Carolina*, 578 F. Supp. 549 (D.S.C. 1983) (state law requiring military bases in South Carolina to purchase their alcoholic beverages from persons who held South Carolina wholesale alcoholic beverage licenses was in violation of the Supremacy Clause of the U.S. Constitution).

b. Malt beverages and wine must be purchased from in-state distributors; liquor <u>generally</u> must be purchased from most competitive source, wherever located. 10 U.S.C. § 2495(a)(2); *see also* AR 215-1, *Military Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities*, para 10-6 (24 Sep 10).

c. U.S. Supreme Court decision upholds state's authority to impose labeling and reporting requirements on out-of-state liquor wholesalers who do business with United States. *North Dakota v. United States*, 495 U.S. 423 (1990).

2. Voting Rights. *Evans v. Cornman*, 398 U.S. 419 (1970) (Maryland's excluding residents on federal enclave from voting in state elections violated the Equal Protection Clause of the 14th Amendment. Enclave residents are as interested in and connected with electoral decisions as residents off the enclave and have a stake equal to that of other Maryland residents in nearly every election, whether federal, state, or local).

3. Annexation. AR 405-25, Annexation (25 Sep 73). GENERAL RULE: Do not oppose annexation unless it would not be in the federal government's best interest, or it is opposed by another local jurisdiction. United States v. McGee, 714 F.2d 607 (6th Cir. 1983) (Dayton's annexation of a portion of Wright-Patterson AFB violated state statute; also, potential for friction between the military base and the city in the event of annexation was a sufficient independent justification for court to grant the permanent injunction against the city); *United States v. City of Leavenworth*, 443 F. Supp. 274 (D. Kan. 1977).

4. Education. Impact Aid. 20 U.S.C. §§ 7701-7714.

a. Financial assistance to Local Educational Agencies.

(1) Per capita aid. 20 U.S.C. § 7703.

(2) School construction in areas affected by federal activities. 20 U.S.C. §§ 7708-09.

b. *United States v. Onslow County Board of Education*, 728 F.2d 628 (4th Cir. 1984) (invalidating a county ordinance near Camp Lejeune, North Carolina, requiring that all non-domiciliary students enrolled in the county public schools be charged tuition).

(1) Contract. Application for and receipt of payments (and construction of schools) created a contractual obligation to provide free public elementary education to federally connected children.

(2) Supremacy Clause. Tuition charge obviously takes the place of state revenues to support education; because it is a tax, the Soldiers' and Sailors' Civil Relief Act (now the Servicemembers Civil Relief Act) preempts the tuition charge as multiple taxation.

(3) Supremacy Clause. The tuition charge is unlawful because it burdens the relationship with the federal government.

5. Spouse and Child Welfare Services.

a. Current Policy. Invite state authorities onto the installation. DOD Dir. 6400.1, *Family Advocacy Program* (23 Aug 04); AR 608-18, paras 2-11 to 2-16, *The Army Family Advocacy Program* (30 Oct 07) RAR 13 Sep 11 (note: App. D also defines legislative jurisdiction).

b. State application of child welfare laws on federal enclaves. *In Re Terry Y.*, 101 Cal. App. 3d 178 (Ct. App. 1980) (military base's command invited the county child welfare authorities to exercise jurisdiction over abused children at the base and placed the base's dependents in county foster homes. The trial court's exercise of its statutory jurisdiction to protect the child promoted the federal policy toward abused children, as reflected in the applicable army regulations and federal statutes); *State ex rel. Children, Youth & Families Dep't v. Debbie F.*, 120 N.M. 665, 905 P.2d 205 (Ct. App.1995) (where the federal government had failed to exercise jurisdiction, such as children's welfare, the state could act even though the area or persons over which it asserted jurisdiction were located on a federal enclave and even though the federal government had not formally relinquished jurisdiction); *State in Interest of D.B.S.*, 349 A.2d 105 (N.J. Super. Ct. 1975).

c. Domestic Relations Restraining Orders. Applying *Howard* and *Cornman*, the Supreme Judicial Court of Massachusetts upheld a lower court's authority to issue a restraining order enforceable on Fort Devens, an exclusive federal jurisdiction. The court concluded that the order did not interfere with the federal function and was, therefore, lawfully effective. *See Cobb v. Cobb*, 545 N.E.2d 1161 (Mass. 1989).

X. FEDERAL-STATE RELATIONS OFF THE INSTALLATION – MILITARY SUPPORT TO LOCAL COMMUNITIES

A. Service of State Civil Process. AR 27-40, *Litigation*, para 2-3 (19 SEP 94).

1. Service of process on concurrent jurisdiction, proprietary interest installations, and exclusive federal jurisdictions where the state has the right to serve process.

a. Commanders will inform persons to be served who may decline to voluntarily accept process.

b. When the person to be served declines to voluntarily be served, the process server may follow state law to complete service.

(1) Service on the installation is subject to reasonable limitations.

(2) Service includes levy on personal property.

2. Service of process on exclusive jurisdiction installations where there has been no reservation of right to serve process.

a. Commanders will inform persons to be served who may decline to voluntarily accept process.

b. If the person to be served declines service, process server should be advised that federal legislative jurisdiction precludes service of process.

B. Service by Members of the Armed Forces on State and Local Juries.

1. Permitted where it does not interfere with their military duties. 10 U.S.C. § 982; DOD Dir. 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials* (15 Jan 86) with Change 1, 20 Dec 89; AR 27-40, ch. 10.

2. Exemptions: general officers, commanders, Soldiers stationed OCONUS and in certain other U.S. possessions, trainees, and Soldiers assigned to "forces engaged in operations." SPCMCA must approve.

3. Exemption for others if SPCMCA determines that jury duty:

a. Unreasonably interferes with performance of the Soldier's military duties, OR

b. Adversely affects readiness of the Soldier's unit.

C. Disaster Relief. See JA 422, Operational Law Handbook, (2012) Chapter 12.

1. Provide where directed by higher authority, or

2. When a serious emergency requires an immediate response to save life or lessen major property damage.

D. Innovative Readiness Training (IRT) - 10 U.S.C. § 2012; DoD Dir. 1100.20, *Support and Services for Eligible Organizations and Activities Outside the Department of Defense* (12 Apr 04).

1. Defines IRT as off-post military training, conducted in U.S., its territories or possessions, and Puerto Rico, which assists civilian efforts to address civic and community needs.

2. Requirements:

a. Must fulfill valid training (MOS) requirements.

b. Must avoid competition with commercial sources.

c. Examples include: constructing rural roads and runways; transporting medical supplies in underserved areas; providing medical/dental services to underserved areas.

XI. EXERCISING FEDERAL AUTHORITY THROUGH THE PROPERTY CLAUSE

A. Definition. U.S. Const., Art. IV, § 3, cl. 2.

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

B. The Property Clause is broadly construed and affects not only the land itself but also activities on the land. *See Kleppe v. New Mexico*, 426 U.S. 529 (1976).

1. The Property Clause power is independent from exercise of legislative jurisdiction.

2. The Property Clause power is "complete."

C. The Property Clause power allows regulation of activities on adjoining lands.

1. *United States v. Alford*, 274 U.S. 264 (1927). Congress may prohibit and criminalize building fires on private land near publicly-owned forests.

2. *Camfield v. United States*, 167 U.S. 518 (1897). Congress may prohibit erecting fences on private land where effect is to impede access to public lands.

3. *United States v. Arbo*, 691 F.2d 862 (9th Cir. 1982). Federal officials may properly conduct compliance inspections of private mining claims on state land adjacent to federal property.

4. *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977). Federal government may regulate hunting on non-federal waters in order to protect wildlife and visitors on adjacent federal lands.

5. *United States v. Moore*, 640 F. Supp. 164 (S.D. W. Va. 1986). Federal officials may prevent state from spraying for insects on state land adjacent to federal park.

XII. ENVIRONMENTAL FEDERALISM

A. Federal installations are subject to state regulation only when and to extent that congressional authorization is clear and unambiguous. It is a seminal principle of our law "that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them." *McCulloch v. Maryland*, 4 Wheat. 316, 426, 4 L.Ed. 579, 606 (1819).

B. The effect of this corollary, which derives from the Supremacy Clause and is exemplified in the Plenary Powers Clause giving Congress exclusive legislative authority over federal enclaves purchased with the consent of a State, is "that the activities of the Federal Government are free from regulation by any state." *Hancock v. Train*, 426 U.S. 167, 178 (1976).

C. *Hancock v. Train*, 426 U.S. 167 (1976) – Issue over implementation of Clean Air Act.

1. The Clean Air Act obligates federal installations discharging air pollutants to join with nonfederal facilities in complying with state requirements respecting control and abatement of air pollution

2. State of Kentucky sought declaratory and injunctive relief to require Federal Government. to comply with state permitting requirements for Federal enclaves in Kentucky.

3. Supreme Court found that although Congress expressly required Federal enclaves to comply with state requirements, it did not require the purchasing of permits, i.e., there was no clear and unambiguous expression of Congressional intent that an installation not be able to operate without a state permit.

XIII. TOUEY REQUESTS

A. *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

B. Individuals seeking official information from a Government agency must submit, at least l4 days before the desired date of production, a specific written request setting forth the nature and relevance of the official information sought. *See* AR 27-40, para 7-1.

C. DA personnel may only produce, disclose, release, comment upon, or testify concerning those matters specified in writing and properly approved by the SJA or legal adviser or the Litigation Division. *See* AR 27-40, para 7-2.

D. A subpoena duces tecum or other legal process signed by an Attorney for records protected by the Privacy Act does not justify the release of the protected records. An “order of the court” for purposes of the Privacy Act is an order or writ requiring the production of the records, signed by a judge or magistrate. *See* AR 27-40, para 7-5.

CHAPTER C

ADMINISTRATIVE REMEDIES

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F. AR 600-20, Army Command Policy.

II. ARTICLE 138, UCMJ (AR 27-10).

A. Article 138, UCMJ:

> *Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint, and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon (emphasis added).*

B. Army policies relating to Article 138 complaints:

1. Purpose: To provide a way for Soldiers to complain when they think they have been wronged by their commanding officers.

2. Basic Tenets:

a. Resolution of complaints at the lowest level.

b. Begin with assumption command acted properly.

c. Complainant does not participate after filing complaint.

C. Key definitions.

1. Member of the armed forces: a member of the U.S. Army, Navy, Air Force, Marine Corps, or Coast Guard. The previous definition limited the class of complainants to members of the armed forces on active duty or inactive duty for training and subject to the UCMJ. The current regulation specifies that complaints from members of the Army National Guard and U.S. Army Reserve are limited to matters concerning their Federal service (Title 10 duty status).

2. Commanding officer: Any officer in complainant's chain of command authorized to impose Article 15 punishment, up to and including the first officer exercising general court-martial jurisdiction over the complainant.

3. Wrong. Discretionary act or omission taken under color of authority which adversely affects complainant personally, that is:

a. in violation of law or regulation;

b. beyond the commander's authority;

c. arbitrary, capricious, or an abuse of discretion; or

d. materially unfair.

4. Redress.

a. Action by any commander that revokes the act complained of or restores complainant's rights, privileges, property, or status lost as a result of the wrong.

b. Redress usually in the form of a "make whole" remedy.

5. Superior commissioned officer.

a. A commissioned officer in the current chain of command.

b. Senior to the complainant in grade, rank or position.

D. Initial assessment of Article 138 complaints.

1. Is the subject matter appropriate? Not when:

a. Review provided by UCMJ (Article 15 punishment, court-martial). However, may use Article 138 to complain about the vacation of suspended nonjudicial punishment because no other appellate mechanism exists.

b. AR 15-6 formal board procedure followed (administrative separation boards for officers and enlisted Soldiers).

c. Army regulation specifically authorizes an administrative appeal. In other words, the Soldier is given a formal mechanism through which s/he can be heard and from which s/he can appeal an adverse decision.

d. Other Examples:

(1) Whistleblower reprisal allegations reported pursuant to 10 U.S.C. §1034.

(2) Withdrawals of flying status (AR 600-105, Chapter 6).

(3) Appeals from findings of pecuniary liability pursuant to financial liability investigations (AR 735-5, Chapter 13).

(4) Appeals from administrative reductions in enlisted grades (AR 600-8-19).

(5) Appeals of evaluation reports (AR 623-105/205).

(6) Filing of adverse information (generally memoranda of reprimand) in official personnel records (AR 600-37).

2. Even if subject matter is appropriate, complaint may be deficient. Examples:

a. Failure to first seek redress from Commander.

b. Untimely complaint (waivable defect).

c. Complainant not a member of the Armed Forces when the complaint was submitted (non-waivable defect).

E. Complaint procedures.

1. Request for Redress.

a. Written request for redress from the Soldier to the commander.

b. Response by commanding officer.

(1) Commander has 15 days to respond (option to provide an interim response if unable to meet deadline.) AR 27-10, para 19-7.

(2) No response may be considered a denial of the request.

2. Complaint. If redress refused, Soldier may submit written Article 138 complaint.

a. Soldier must submit complaint within 90 days of discovery of wrong excluding period when request for redress was in the hands of the commander.

b. The complaint is submitted to complainant's immediate superior commissioned officer.

3. The formal complaint goes up the chain of command to the officer exercising general court-martial jurisdiction (GCMCA) over the commanding officer concerned.

a. Any commander through whom complaint is forwarded may grant redress.

b. Complainant may orally withdraw complaint prior to receipt by GCMCA. After GCMCA receives the complaint, a written request for withdrawal is required.

c. Upon receipt, GCMCA will examine the complaint.

4. The GCMCA must act **personally** on the complaint by taking one of the following actions:

a. Return inappropriate subject matter complaints. Deficient complaints may be returned to the complainant or waived.

(1) The following deficiencies may be waived for <u>good cause</u>:

(a) Complaint not submitted within 90 days of discovery of wrong.

(b) Redress not requested and refused.

(c) Repetitive complaint.

(2) The following deficiencies may <u>not</u> be waived:

(a) Complainant not on active duty or inactive duty for training when complainant presented complaint.

(b) Wrong was not a discretionary act or omission.

(c) Complainant's commander did not commit wrong.

(d) Wrong did not affect complainant personally.

(e) Complaint does not adequately identify a respondent or the alleged wrong.

b. Grant or deny redress.

c. If redress beyond GCMCA's authority to provide, forward case to command or agency that can grant the redress.

d. GCMCA then notifies Soldier in writing of action taken on the complaint.

5. GCMCA then forwards complaint:

a. After action, GCMCA must forward complaint to Headquarters Department of the Army (HQDA) even if the requested relief is granted.

b. Soldier may voluntarily withdraw the complaint.

F. JA Involvement:

1. Soldier entitled to consultation and advice from military attorney.

2. Respondent commanders may consult their trial counsel.

III. ARMY DISCHARGE REVIEW BOARD (DRB) (10 U.S.C. § 1553; DOD DIRECTIVE 1332.28; AR 15-180).

A. 10 U.S.C. § 1553:

The Secretary concerned shall . . . establish a board of review, consisting of five members, to review the discharge or dismissal (other than by sentence of a general court-martial) of any former member of an armed force . . . .
A board established under this section may . . . change a discharge or dismissal, or issue a new discharge, to reflect its findings. . . .

B. Purpose.

1. The purpose of the review is to determine whether the discharge was granted <u>in a proper manner</u> and

2. To determine whether it was <u>fair and equitable,</u> considering the regulations in effect at the time of the discharge.

C. Review procedures.

1. Application for Review.

a. Submitted on DD Form 293.

b. Include statements, affidavits, or documents.

c. Request specific relief.

(1) Change in character of discharge.

(2) Change in reason for discharge.

2. Must be made within 15 years of date of discharge or dismissal.

D. Review standards.

1. Propriety of Discharge.

a. A discharge shall be deemed proper unless:

(1) Error in fact, law, procedure or discretion at time of issue and applicant was prejudiced; or,

(2) Retroactive change in policy requires change in the discharge.

2. Equity of Discharge.

a. A discharge shall be deemed equitable unless:

(1) Prior policies and procedures differ materially from those currently applicable; and,

(a) New policies and procedures represent a substantial enhancement of rights; and,

(b) Application of current policies and procedures would cast doubt on validity of discharge.

(2) Discharge was inconsistent with standards of discipline then in use.

(a) Boards might, for example, look simply at whether or not the discharge was consistent with other cases.

(b) Boards might also look rather hard at situations involving declined Article 15 punishment where the command opts to refer the matter to the administrative separation process instead of the more complex court-martial process.

(3) Relief is warranted on basis of applicant's service record.

E. Procedural rights of applicants.

1. Record Review.

2. Hearing before Board (O-6 Officers).

a. May be represented by attorney.

b. Rules of evidence do not apply.

c. Applicant may offer evidence, call witnesses or testify.

3. Board deliberations, conclusions and opinions.

a. Presumption of regularity in the conduct of government affairs. Burden of proof on applicant.

b. Findings based on majority vote in closed session.

c. Decisional Document prepared.

F. Judge Advocate (JA) involvement.

1. Legal advisor to DRB.

2. Advice to Soldiers pending discharge and eligible legal assistance clients. Veteran's organizations (using non-attorney representatives) and private bar provide representation.

G. Website

1. http://arba.army.pentagon.mil/adrb.htm

2. http://afls14.jag.af.mil (can link from there to site which links further to each service's reading room).

IV. ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (10 U.S.C. §1552; AR 15-185).

A. 10 U.S.C. § 1552:

The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. [S]uch corrections shall be made by the Secretary, acting through boards of civilians of the executive part of the military department. . . . Except when procured by fraud, a correction made under this section is final and conclusive on all officers of the United States.

B. Purpose:

1. To correct military records when necessary to correct an error or remove an injustice and pay claims for related lost pay and/or benefits.

2. Allows for relief outside of normal processes without private bills of relief in Congress.

3. Some of the issues considered by the ABCMR:

a. Separations.

b. Consideration for promotions.

c. Evaluation Reports.

d. Pay and Allowances.

e. Memoranda of Reprimand.

C. Composition of the Board.

1. Not less than three civilian officers or employees of the Department of Army.

2. Pay grade of GS13+.

3. Service to the board is an extra duty.

D. Procedures.

1. Application for correction submitted on DD Form 149. Signed and sworn.

2. Within three years of discovery of alleged error or injustice [waived in interest of justice/good cause]. Courts have recognized that the Servicemembers' Civil Relief Act (SCRA) tolls the statute of limitations on BCMR cases. Equitable doctrine of laches still applies. *See, e.g.,* Detweiler v. Pena, 38 F.3d 591, 595 (D.C. Cir. 1994); and Neptune v. United States, 38 Fed. Cl. 510 (1997).

E. Action by the Board.

1. Cases may be denied based on:

a. Insufficient evidence presented by applicant. [Denial on this basis nonprejudicial; applicant may refile claim.]

b. Failure to exhaust administrative remedies.

c. Failure to timely file application.

2. Burden of proof on applicant.

3. Board can, but need not, authorize a hearing.

4. Applicant may present evidence, witnesses or personal testimony.

5. Closed deliberations.

6. Written findings, conclusions and recommendations.

a. Delegated authority to take final action in certain cases.

b. Forward record to the Secretary of the Army for decision.

7. Reconsideration may be granted only for newly discovered evidence.

F. ABCMR Processing Time.

1. Active duty cases receive priority—about 120 days.

2. Average for all cases—less than 10 months.

G. Appellate Review.

1. Type of Federal Court depends on type of claim.

a. Non-monetary relief - U.S. District Courts. Kreis v. Secretary of the Air Force, 866 F. 2d 1508, 1511 (D.C. Cir. 1989); Chappell v. Wallace, 462 U.S. 296 (1983).

b. Monetary relief/Back Pay - U.S. Court of Federal Claims.

2. Standard of Review. Relief only granted when an action was "arbitrary, capricious or contrary to agency regulation or statute by weight of substantial evidence."

H. JA Involvement.

1. Legal Assistance in preparing application for relief.

2. Office of the Judge Advocate General, Administrative Law, advises ABCMR.

I. Website

1. http://arba.army.pentagon.mil/abcmr.htm

2. http://afls14.jag.af.mil (can link from there to site which links further to each service's reading room).

V. INSPECTOR GENERAL ACTIVITIES (AR 20-1)

A. Inspection function.

1. Army leaders continually assess their organizations to determine the organization's capability to accomplish its wartime and peacetime missions. They accomplish this by analyzing and correlating evaluations of various functional systems such as training, logistics, personnel, resource management, force integration, and intelligence oversight.

2. The IG inspection function is the process of conducting IG inspections, developing and implementing IG inspection programs, overseeing intelligence activities, and participating in the Organizational Inspection Program (OIP).

B. Investigation function. An IG investigation is a fact-finding examination by a detailed IG into allegations, issues, or adverse conditions to provide the directing authority a sound basis for decisions and actions. Inspector general investigations normally address allegations of wrongdoing by an individual and are authorized by written directives.

C. Assistance function.

1. The IG assistance function begins with the receipt of an IG Assistance Request (IGAR). In many cases, IGs exercise both the assistance and investigation functions concurrently, especially when IGARs contain multiple issues.

2. When IGs determine that a request for assistance is appropriate for IG action, they will use the assistance inquiry as the fact-finding process to gather the information needed to resolve the IGAR issue.

3. The assistance inquiry is an informal fact-finding process used to address or respond to a complaint involving a request for help, information or issues and not allegations of impropriety or wrongdoing.

4. An assistance inquiry must be timely and thorough. It must provide the basis for responding to the issues raised in the IGAR and for correcting underlying deficiencies in Army procedures and systems. The assistance inquiry may simply provide the facts to answer a question from the complainant.

VI. CONSTITUENT LETTERS TO MEMBERS OF CONGRESS (AR 1-20, Chapter 6)

A. In General.

1. As with military whistleblower protection (discussed infra), no one may take action against any member of the Armed Forces for making or preparing a communication to a member of Congress. (10 U.S.C. §1034).

2. Congressional inquiries may be received by the command through two routes:

a. Correspondence forwarded by the Service Congressional Legislative Liaison (CLL).

b. Directly from the Member of Congress.

B. Process.

1. Command's response and any necessary inquiry into the matter must be timely (normally no more than 5 working days with an interim reply if that deadline is not feasible).

2. Responses will normally be prepared by the appropriate office, but reviewed by the OSJA prior to return to CLL.

3. Multiple inquiries are best answered with consistent responses.

4. However, responses should not refer to inquiries from other members.

5. Responses should be factual, responsive, non-technical, and courteous.

6. If inquiry comes directly from a Member of Congress to the command, CLL must, nonetheless, be provided with a copy of the response.

7. Normally, the Member of Congress receives the response detailing the outcome of the inquiry even before the constituent.

8. Release of information and documents is regulated by AR 1-20, Chapter 7, and coordinated through the Congressional Response Team (CRT).

VII. MILITARY WHISTLEBLOWER PROTECTIONS

A. References.

1. Military Whistleblower Protection Act, 10 U.S.C. § 1034

2. Department of Defense Directive 7050.06, Military Whistleblower Protection (23 July 2007)

3. Department of Defense Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces (1 October 1997)

4. AR 20-1, Inspector General Activities and Procedures

5. AR 1-20, Chapter 6, Communications with Congress

6. AR 600-20, Army Command Policy

7. National Defense Authorization Act for Fiscal Year 2014, Public Law 113-66, section 1709

8. Army Directive 2014-20 (Prohibition of Retaliation Against Soldiers for Reporting a Criminal Offense)

B. Prohibitions.

1. No person may restrict a member of the Armed Forces in [lawfully] communicating with a Member of Congress or an Inspector General.

2. No person may retaliate against a victim, an alleged victim or another member of the Armed Forces based on that individual's report of a criminal offense.

3. No person may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, as a reprisal against a member of the Armed Forces for making or preparing:

   a. Any lawful communication to a Member of Congress or an Inspector General; or

   b. A communication that the member reasonably believes evidences a violation of law/regulation or of fraud, waste or abuse, and the communication is made to:

      (1) A Member of Congress;

      (2) An Inspector General;

      (3) A member of a DoD audit, inspection, investigation, or law enforcement organization;

      (4) *Any person or organization in the chain of command*; or

      (5) Any other person or organization designated pursuant to regulations or other established administrative procedures for such communications.

   c. The "communications" protected in paragraph 2b, above, are those in which a member of the Armed Forces complains of, or discloses information that the member reasonably believes constitutes evidence of the following:

(1) A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination; or

(2) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

C. Definitions (See Enclosure 2 of DODD 7050.06 and Army Directive 2014-20).

1. Member of the Armed Forces. Includes all Regular and Reserve component officers and enlisted members on active duty and Reserve component officers and enlisted members in any duty or training status (includes officers and enlisted members of the National Guard). DODD 7050.06, para. E2.7.

2. Audit, Inspection, Investigation, and Law Enforcement Organizations. The law enforcement organizations at any command level in any of the DoD components, the Defense Criminal Investigative Service, the U.S. Army Criminal Investigation Command, the U.S. Army Audit Agency, and the Defense Contract Audit Agency. [For full definition (which includes investigative agencies of other Department of Defense (DoD) agencies), see DODD 7050.06, para. E2.1].

1. Retaliation. Army Directive 2014-20 defines retaliation as

a. Taking or threatening to take an adverse or unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, with respect to a victim or other member of the Armed Forces because the individual reported a criminal offense or was believed to have reported a criminal offense; or

b. ostracism, which is defined as excluding from social acceptance, privilege or friendship a victim or other member of the Armed Forces because: (a) the individual reported a criminal offense; (b) the individual was believed to have reported a criminal offense; or (c) the ostracism was motivated by the intent to discourage reporting of a criminal offense or otherwise to discourage the due administration of justice; or

a. acts of cruelty, oppression or maltreatment …committed against a victim, an alleged victim or another member of the Armed Forces by peers or other persons, because the individual reported a criminal offense or was believed to have reported a criminal offense.

2. Personnel Action. Any action taken on a member of the Armed Forces that affects or has the potential to affect that military member's current position or career. Such actions include a promotion; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; *referral for mental health evaluations* under DODD 6490.1; and any other significant change in duties or responsibilities inconsistent with the military member's rank. DODD 7050.06, para. E2.8.

D. Reporting.

1. Complaints of reprisal should be submitted to the DoD IG or to an IG within a Military Department (e.g. local IG or DAIG). Reprisal allegations may also be reported to the chain of command; however, complaints must be filed with an IG to get whistleblower protection. (AR 20-1). IGs and Staff Judge Advocates are to so inform complainants.

2. Time Limit. No investigation is required when a complaint is submitted to an IG more than *60 days* after the date the member became aware of the personnel action that is the subject of the allegation. DODD 7050.06, para. E3.1.1., AR 20-1, para. 7-4.

E. Investigating.

1. Military whistleblower reprisal allegations are investigated by the DoD IG or the military service IGs. The Army's Inspector General (TIG) has limited the authority to investigate whistleblower reprisal allegations to one level above that of the IG servicing the complainant. AR 20-1, para. 7-4. Investigations must be conducted outside the immediate chain of command of the complainant and the alleged retaliating official.

2. The investigation must be completed *within 180 days* of the original reprisal allegation being received by the IG, or the IG will so inform the Deputy Under Secretary of Defense for Program Integration (DUSD(PI)) and the complainant, in writing, of the estimated date of Report of Investigation (ROI) completion and the reasons for delay. A copy of the ROI will be forwarded to the complainant [without interview summaries or documents, unless requested by the complainant] and the DUSD(PI) not later than *30 days* after ROI completion. The ROI given to the complainant will include all factual findings and recommendations (maximum disclosure of information possible), subject to security classification and FOIA limitations. DODD 7050.06, paras. 5.1.6; 5.1.7.

3. DoD IG is the final approval authority for cases involving allegations of whistleblower reprisal and improper referral for mental health evaluation. AR 20-1, para. 7-4.

F. Reprisal Test: Would the personnel action in question have been taken, withheld, or threatened if the protected disclosure had not been made?

G. Military violators of the Military Whistleblower Protection Act (MWPA) or Army Directive 2014-20 are subject to prosecution under Article 92, UCMJ. Civilian DoD employees who violate the MWPA shall be subject to disciplinary or adverse action for misconduct pursuant to Chapter 75 of the Civil Service Reform Act. DODD 7050.06, para. 4.

H. Board for Correction of Military Records (BCMR).

1. Military whistleblower reprisal complaint resolutions may be reviewed, at the complainant's request, by a BCMR and the Secretary of Defense. The BCMR may conduct a hearing, if appropriate. DODD 7050.06, para. 5.3.4.2.3.

2. The Military Service Secretary must issue a final decision on an application for correction of military records within *180 days* after the application is filed. DODD 7050.06, para. 5.3.5.

3. The complainant may request review of the matter by the Secretary of Defense. The request for review by the Secretary of Defense must be submitted within *90 days* of receipt of the final decision by or for the Military Service Secretary. DODD 7050.06, Enclosure 3.

4. The DUSD(PI) will review the final decision of the Military Service Secretary and decide whether to uphold or reverse the decision of the Military Service Secretary. This decision is final. DODD 7050.06, para. 5.2.2.

I. No Private Cause of Action. MWPA provides strictly administrative remedies and is not a money-mandating statute for purposes of Tucker Act (28 USC § 1491) jurisdiction in Court of Federal Claims. Thus, individual does not have private cause of action on which to file claim. Soeken v. U.S., 47 Fed. Cl. 430 (2000); Hernandez v. United States, 38 Fed. Cl. 532 (1997); Acquisto v U.S., 70 F.3d 1010, 1011 (8th Cir. 1995); Alasevich v. U. S. Air Force Reserve, 1997 U.S. Dist. LEXIS 3861 (E.D. Pa. 1997).

VIII. MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES.

A. References:

1. DoD Directive 6490.04, Mental Health Evaluations of Members of Military Service, 4 March 2013. ***NOTE: This directive reissues the procedures originally contained in DoD Instruction 6490.4, and cancels DoDD 6490.1. The new guidance no longer includes the requirement to provide written notice of the right to speak with IG or a Judge Advocate. Army Regulation 20-1, and MEDCOM Regulation 40-38 do not reflect this change and still include the references to DoD Instruction 6490.4.***

B. Generally. It is the policy of the DoD to remove the stigma associated with seeking and receiving mental health services. The directive is also designed to protect Soldiers from referral for mental health evaluation (MHE) as an act of reprisal against a “whistleblower”, and to provide guidelines and procedures for commanders to follow.

C. The Directive does NOT apply to the following:

1. Patient self-referrals.

2. Required pre and post-deployment mental health assessments.

3. Responsibility and Competency inquires IAW RCM 706, MCM.

4. Interviews conducted IAW guidelines for the Family Advocacy Program.

5. Interviews conducted IAW guidelines for drug and alcohol abuse rehabilitation programs.

6. Clinical referrals (requested by another healthcare provider).

7. Evaluations under authorized law enforcement or corrections system procedures.

8. Evaluations for special duties or occupational classifications and other evaluations expressly required by applicable DoD issuance or service regulation that are not subject to a commander's discretion (*e.g.*, AR 635-200, for administrative separation actions).

D. Referral Procedures. (Enclosure 3, DODD 6490.04)

1. Non-Emergency. The commander or supervisor will: 1) advise the Soldier there is no stigma associated with obtaining services; 2) refer the Soldier to the mental health provider, providing both name and contact information; and 3) tell the Soldier the date, time, and place of the evaluation.

2. Emergency. When a commander or supervisor refers a Soldier for a MHE owing to concern about potential or imminent danger to self or others, they should ensure the safety of the Soldier and others when making arrangements for transportation to the location of the emergency evaluation. Additionally, the commander/supervisor will report to the MHP the circumstances and observations regarding the Soldier that led to the emergency referral either prior to or while the Soldier is en route to the emergency evaluation.

CHAPTER D

ENLISTED ADMINISTRATIVE SEPARATIONS

TABLE OF CONTENTS

I. REFERENCES.

A. Department of Defense Directive (DoDD) 1332.14, Enlisted Administrative Separations

B. Department of Defense Instruction (DoDI) 1332.29, Eligibility of Regular and Reserve Personnel for Separation Pay

C. Army Regulation (AR) 15-6, Procedures for Investigating Officers and Boards of Officers

D. AR 135-178, Enlisted Administrative Separations

E. AR 600-8-2, Suspension of Favorable Personnel Actions (FLAGS)

F. AR 600-9, The Army Body Composition Program

G. AR 600-20, Army Command Policy

H. AR 600-85, Army Substance Abuse Program (ASAP)

I. AR 601-280, Army Retention Program

J. AR 635-200, Active Duty Enlisted Administrative Separations

K. National Guard Regulation (NGR) 600-200, Enlisted Personnel Management

II. INTRODUCTION.

A. The topic of enlisted administrative separations covers both *favorable* and *unfavorable* separations. Examples of favorable separations include retirement and honorable discharge separations at the expiration of a Soldier's service obligation. Examples of unfavorable separations include separation based on misconduct and unsatisfactory performance. Additionally, enlisted administrative separations are either *involuntary* (initiated by the chain-of-command) or *voluntary* (initiated by the Soldier). This outline does not contain all bases for administrative separation, but attempts to identify the most common separation actions encountered by judge advocates (JA).

B. The various bases for enlisted administrative separations are generally found in AR 635-200 (AR 135-178 for Reserve Component (RC) personnel and NGR 600-200 for Army National Guard (ARNG) personnel) under different chapter headings (e.g., Ch. 14 covers misconduct). Hence separation actions are often called "chapters."

C. When analyzing enlisted administrative separations, consider:

1. *What is the reason* for the separation action (e.g., overweight, misconduct)?

2. Is the separation *voluntary or involuntary*?

3. *Who has the authority* to order (i.e., direct or approve) the separation? Only certain commanders can direct or approve separations.

4. *What kind of discharge* can the Soldier receive? There are different types of administrative discharges, and often the type of discharge a Soldier can receive is contingent upon the reason for separation and the authority approving the separation. Characterizations may affect benefits eligibility and can carry a social judgment.

5. *What procedural steps* are required to separate the Soldier? Various factors (e.g., the reason for the separation, the number of years the Soldier has in the Army, and the type of discharge) determine the procedural requirements for the separation action.

III. THE AUTHORITY TO ORDER SEPARATIONS.

AR 635-200, para. 1-19 [hereinafter, citations without reference to a regulation will be to AR 635-200].

A. Secretary of the Army (SA). Virtually unlimited authority to separate a Soldier.

B. General Court-Martial Convening Authority (GCMCA). May approve all separations, except: SA plenary authority cases (para. 5-3); reduction in force (RIF), strength limitations, and budgetary constraints (para. 16-7); Qualitative Management Program (QMP) (Ch. 19); voluntary separations of Soldiers serving indefinite enlistments (para. 4-4); conviction by a foreign court (paras. 1-41a and d, and 14-9a), and early release from active duty (AD) of RC personnel serving Active Guard Reserve (AGR) tours under Title 10 (para. 5-15).

C. General officer (GO) in command with a legal advisor. Same separation authority as a GCMCA *except* lack of jurisdiction (para. 5-9) and discharge in lieu of court-martial (Ch. 10).

D. Special Court-Martial Convening Authority (SPCMCA). A SPCMCA may not convene an administrative separation board contemplating an under other than honorable conditions (OTH) discharge or approve such a discharge, but may take action under the following chapters:

1. Ch. 5, Convenience of the Government (except para. 5-9, Lack of Jurisdiction);

2. Ch. 6, Dependency or Hardship;

3. Ch. 7, Defective Enlistments, Reenlistments, and Extensions;

4. Ch. 8, Pregnancy;

5. Ch. 9, Alcohol or Other Drug Abuse Rehabilitation Failure;

6. Ch. 10, Discharge in Lieu of Court-Martial (ONLY IF delegated for Absent Without Leave (AWOL) reasons at an installation with a personnel confinement facility (PCF), and may only approve before trial, but may never disapprove);

7. Ch. 11, Entry Level Performance and Conduct;

8. Ch. 12, Retirement (if delegated by GCMCA and only can approve, not disapprove);

9. Ch. 13, Unsatisfactory Performance;

10. Ch. 14, Misconduct;

11. Ch. 16, Selected Changes in Service Obligations; and

12. Ch. 18, Failure to Meet Body Fat Standards.

E. Lieutenant Colonel (LTC)-level commander with a legal advisor (includes MAJ(P) assigned to LTC position, but does not include MAJ or MAJ(P) acting commander). A LTC-level commander may not take action on an OTH discharge. A LTC-level commander may take action with regard to the following chapters:

1. Separation of Personnel Who Did Not Meet Procurement Medical Fitness Standards (para. 5-11);

2. Separation of Enlisted Women-Pregnancy (Ch. 8);

3. Alcohol or Other Drug Abuse Rehabilitation Failure (Ch. 9);

4. Entry Level Performance and Conduct (Ch. 11);

5. Separation for Unsatisfactory Performance (Ch. 13);

6. Selected Changes in Service Obligations (paras. 16-4 through 16-10), and

7. Failure to Meet Body Fat Standards (Ch. 18).

F. Headquarters, Department of the Army (HQDA). Only HQDA may involuntarily discharge a Soldier with 18 or more years of active federal service.

G. Separation Authority's Determinations.

1. Is there sufficient evidence?

a. Government's burden, not the Soldier (or "respondent").

b. Preponderance (a greater weight of evidence than that which supports a contrary conclusion) of evidence standard.

2. Retain or separate?

3. If separation, what characterization of service?

4. Commanders will review all administrative separations involving known victims of sexual assault (see AR 600–20, chap 8) and any Soldier who answered "Yes" to either of the questions cited under either paragraph 2–2*i* or 2–4*h*. IAW paragraph 1-16*d*, this review must consider the following:

a. Whether the separation appears to be in retaliation for the Soldier filing an unrestricted report of sexual assault.

b. Whether the separation involves a medical condition that is related to the sexual assault, to include PostTraumatic Stress Disorder (PTSD).

c. Whether the separation is in the best interest of the Army, the Soldier, or both.

d. The status of the case against the alleged offender, and the effect of the Soldier's (victim's) separation on the disposition or prosecution of the case.

e. Each commander in the chain of command must include a statement on his/her endorsement certifying this review. Commanders will ensure compliance with AR 340–21, The Army Privacy Program, and AR 25–55, The Department of the Army Freedom of Information Act Program.

H. Waivers.

1. Under a circumstance where a Soldier is notified of an OTH discharge and offers to waive his or her right to a board hearing in exchange for a more favorable discharge (often referred to as a "conditional waiver"), the separation authority remains the GCMCA or GO in command with a legal advisor (despite a SPCMCA or LTC-level commander's authority to approve a discharge under that chapter when utilizing the notification procedures from paragraph 2-1, 2-2, and 2-3).

2. A SPCMCA or lower authority may not approve a waiver or discharge in a case where the chain of command initiated or recommended an OTH, or in a case where a board is appointed to consider a separation with a possible OTH discharge.

IV. CHARACTERIZATION OF SERVICE OR TYPE OF DISCHARGE.

Characterization at separation will be based on the quality of the [S]oldier's service, including the reason for separation . . . subject to the limitation under the various reasons for separation. The quality of service will be determined according to standards of acceptable personal conduct and performance of duty for military personnel. These standards are found in the UCMJ, directives and regulations issued by the Army, and the time-honored customs and traditions of military service.

AR 635-200, para. 3-5a.

A. Honorable Discharge.

1. "[A]ppropriate when the quality of the Soldier's service *generally* has met the standards of *acceptable conduct and performance of duty* for Army personnel . . . ." AR 635-200, para. 3-7a.

2. Look at the pattern of behavior, not isolated incidents.

3. Soldier receives DD Form 256A, Honorable Discharge Certificate.

4. Usually required if the Government introduces limited use information from the Army Substance Abuse Program (ASAP) during discharge proceedings.

B. General Discharge (Under Honorable Conditions).

1. "[I]ssued to a Soldier whose military record is *satisfactory but not sufficiently meritorious* to warrant an honorable discharge." AR 635-200, para. 3-7b(1).

2. Only permitted if the reasons for separation (chapter) specifically authorize, and not permitted for expiration of term of service (ETS).

3. Soldier receives DD Form 257A, General Discharge Certificate.

4. Impact on benefits.

   a. No civil service retirement credit for time spent on active duty.

   b. No education benefits (subject to vesting of the benefit due to previous honorable discharge).

   c. Many states will not pay unemployment compensation.

   d. "I understand that I may expect to encounter substantial prejudice in civilian life." This statement is generally included in separation counseling to inform the Soldier that there may be negative impacts resulting from a general discharge.

5. No automatic upgrading of discharges. Upgrading requires application to the Army Discharge Review Board (ADRB) or the Army Board for Correction of Military Records (ABCMR). The ADRB focuses on uniform policies, procedures, and standards. The ABCMR acts to correct legal or factual errors, or to correct an injustice upon application of the Soldier.

C. Under Other Than Honorable (OTH) Conditions Discharge.

1. Authorized under certain chapters for a pattern of behavior, or one or more acts or omissions, "that constitutes a *significant departure* from the conduct expected of [S]oldiers of the Army." AR 635-200, para. 3-7c(1).

2. Board hearing required, unless waived by the Soldier or the separation is voluntary (i.e., Ch. 10).

3. No discharge certificate issued (but Soldier still receives DD Form 214 with characterization of service annotated).

4. "I . . . understand . . . I may be ineligible for many or all benefits as a veteran under both Federal and State laws and . . . I may expect to encounter substantial prejudice in civilian life."

5. When approved by a separation authority, automatically reduces an enlisted Soldier to Private, E-1, by operation of law.

6. No automatic upgrading of discharges; upgrading requires application to the ABCMR or the ADRB.

D. Entry Level Status (ELS) (Uncharacterized) Separation.

1. For "unsatisfactory performance and/or conduct while in entry-level status" (first 180 days of creditable service, or first 180 days of creditable service after a break in service of over 92 days for active duty (AD) Soldiers). *See* AR 635-200, Glossary, Section II.

2. Counseling and rehabilitation essential before separation.

3. No characterization of service.

4. Not a *per se* bar to veteran's benefits, but has the effect of disqualifying the Soldier for most federal benefits, since most require service of over 180 days to qualify.

E. Order of Release from Custody and Control of the Army.

1. Usually no characterization of service, because the person never acquired military status. There is an exception for constructive enlistment.

2. Very rare, used only for void enlistments.

3. Since no "service," no veteran's benefits.

F. Punitive Discharges. Dishonorable and Bad Conduct discharges may only result from an approved court-martial sentence, not an administrative separation.

V. PROCEDURAL CATEGORIES AND ADMINISTRATIVE CONSIDERATIONS.

A. Notification Cases (paras. 2-2 and 2-3).

1. Counseling and rehabilitative transfer requirements apply to many separations.

a. Counseling is required for (para. 1-16):

(1) Involuntary separation due to parenthood, para. 5-8;

(2) Personality disorder, para. 5-13;

(3) Physical or mental condition, para. 5-17;

(4) Entry level performance and conduct, Ch. 11;

(5) Unsatisfactory performance, Ch. 13;

(6) Minor disciplinary infractions or a pattern of misconduct, paras. 14-12a or 14-12b, and

(7) Failure to meet body fat standards, Ch. 18.

b. Rehabilitative transfer is generally required for separations under Chaps. 11, 13, 14-12a, and 14-12b.

(1) Recycle trainees between companies or platoons at least once.

(2) Recycle Soldiers between battalion-sized units or larger at least once, with at least 3 months at each unit.

(3) Permanent Change of Station (PCS) is only for "meritorious cases" where the Soldier is a "distinct asset" to the Army.

(4) Separation Authority may waive this requirement if transfer would serve no useful purpose, would not produce a quality Soldier, or is not in the best interest of the Army. Examples:

(a) Two consecutive Army Physical Fitness Test (APFT) failures.

(b) Pregnancy while in entry-level status.

(c) Highly disruptive or suicidal.

(d) Resistant to rehabilitative efforts.

(e) Small installation or remote location.

(f) Transfer would be detrimental to Soldier or Army. (i.e., indebtedness, ASAP, or mental health counseling).

2. Commander notifies Soldier in writing that separation is recommended. Soldier must sign acknowledgment of receipt. Notice will include:

a. Specific allegations and provisions of regulation that authorize separation;

b. Least favorable characterization of service Soldier could receive;

c. Right to consult with counsel;

d. Right to submit statements;

e. Right to obtain copies of all matters going to separation authority, and

f. Right to a hearing if Soldier has 6 years or more of combined active and reserve service on date separation is initiated.

3. Soldier may consult with counsel, and submit matters within 7 duty days (or request extension).

4. Action forwarded through command channels to separation authority for final action.

5. Legal review.

a. No requirement for legal review unless ASAP limited use evidence (typically, Ch. 9, and possibly some Chaps. 13 and 14) involved.

b. As a practical matter, most Staff Judge Advocate (SJA) offices try to do a legal review twice: before the packet is presented to the Soldier, and before final action goes to the separation authority.

6. Notification procedure alone may be used when:

a. Soldier has less than 6 years of combined active and reserve service on date separation is initiated.

b. Command does not seek to impose an OTH discharge.

c. Regulation permits for Chaps. 5, 7, 9, 11, 13, 14, and 18.

B. Board Hearing Cases (paras. 2-4 through 2-12).

1. Soldier entitled to all rights listed under Notification Procedure, *supra*, plus:

a. Counsel for representation (no right to counsel of choice).

b. Board hearing.

c. Submit a conditional waiver.

d. Fifteen-day notice before the hearing.

e. Challenge board members for cause.

f. Request witnesses.

g. Submit matters to the board.

h. Question witnesses.

i. Choose whether or not to submit to examination by the board.

j. Argue to the board.

2. Composition (para. 2-7). Three or more voting members, sergeant first class (SFC) or above, all senior to the respondent. Majority must be commissioned or warrant officers. One must be a MAJ or above. If Soldier is female or member of a minority group and so requests, a board member must be female or a member of a minority group subject to reasonable availability.

3. Formal rules of evidence (i.e., Military Rules of Evidence (MRE), contained in the Manual for Courts-Martial (MCM)) do not apply. *See* para. 2-11 and AR 15-6.

a. Standard for admission of evidence: relevant and competent.

b. Limited privileges preserved.

c. Coerced statements excluded.

d. Bad faith unlawful searches by military members excluded.

e. Polygraph evidence admitted only by agreement of the parties.

4. Government represented by a recorder.

5. Legal advisor not required by para. 2-7a. If appointed, rules finally on all matters of evidence and challenges except to himself or herself.

6. President rules on all matters of procedure and all matters of evidence if no legal advisor appointed. May be overruled by a majority of the board.

7. Voting members meet in closed session and return findings and recommendations. The board must answer the required questions, and should use a findings worksheet similar to a court-martial.

8. Final action (para. 2-6).

    a. Legal review required "by a qualified officer fully cognizant of applicable regulations and policies to determine whether the action meets the requirements of [AR 635-200]." Para. 2-6a.

        (1) No requirement for reviewing officer to be a judge advocate (JA) unless:

            (a) OTH recommended;

            (b) Soldier identified specific legal issues for consideration by separation authority, or

            (c) Limited use evidence was introduced.

        (2) In practice, most SJA offices try to do a legal review before final action goes to the separation authority.

    b. Separation authority's action may be no less favorable than the board's recommendations unless separation authority submits a request for separation under para. 5-3 to HQDA for action by the SecArmy.

    c. Separation authority may suspend execution of an approved separation (except for fraudulent entry) for up to 12 months. Upon satisfactory completion of the probation period (or earlier) separation authority will cancel execution of the approved separation. If there is further misconduct, may be basis for new separation action, disciplinary action, or vacation of the suspension.

9. Board required (unless waived).

    a. Any case where command seeks to impose an OTH.

    b. Any case when Soldier has 6 years or more of combined active and reserve service on date separation action is initiated.

C. Administrative Double Jeopardy (para. 1-17). Soldiers will not be processed for administrative discharge under Chaps. 11, 13, 14, or AR 604-10 (Military Personnel Security Program) for conduct that has been the subject of:

1. A prior judicial proceeding resulting in acquittal, or a finding of not guilty only by reason of lack of mental responsibility;

2. A prior board action resulting in an approved finding that the evidence did not sustain the factual allegation concerning the conduct, or

3. A prior separation action if the separation authority ordered retention.

4. Exceptions.

a. Conduct or performance after the prior proceeding.

b. Fraud or collusion not known at time of prior proceeding.

c. New evidence not known at time of prior proceeding despite due diligence.

D. Separation Pay (DoDI 1332.29).

1. General prerequisites.

a. More than 6 but less than 20 years service immediately before discharge.

b. Agrees to enter Ready Reserve for 3 years.

c. Involuntary discharge or denial of reenlistment.

2. Full separation pay.

a. Honorable discharge required.

b. Fully qualified for retention, but denied reenlistment because of reduction in force (RIF), retention control point, or denial of promotion.

c. (Monthly base pay at discharge) x 12 x (yrs. active duty) x 10%.

3. Half separation pay.

a. Honorable or general discharge.

b. Not fully qualified for retention and being involuntarily separated because of ETS, selected changes in service obligation (i.e., QMP), convenience of the government, alcohol or drug abuse rehabilitation failure, or security.

c. One half of the formula of full separation pay.

4. No separation pay.

a. Any Soldier who requests discharge (i.e., Chaps. 6, 8, and 10).

b. Any separation during first term of enlistment.

c. Any separation under Chaps. 13 and 14, dropped from the rolls (DFR), or court-martial sentence.

d. Any OTH discharge.

E. Separations Involving Sexual Assault (AR 600-20, para. 8-5).

1. Commanders may consider separating the victim of a sexual assault when it is in the best interest of the victim or the Army. (Note however, that the separation must be in accordance with AR 635-200, and therefore, fit within the criteria of one of the “chapters”.)

2. Commanders must include documentation in all separation actions that positively identifies the Soldier as having been, or not having been, a victim of sexual assault. The documentation should be a memorandum stating whether or not the Soldier was a victim of sexual assault for which an unrestricted report was filed within the last 24 months, or whether the Soldier believes that the separation is a direct or indirect result of the sexual assault or unrestricted reporting thereof.

3. Separations must include a specific review by either the SPCMCA or GCMCA when involving a victim of sexual assault for possible retaliation, medical conditions, best interest of the Army determination, and status of the potential case against the alleged offender. AR 600-20, para 8-5(o)(27). Separation authority is withheld to GCMCA for all cases involving a Soldier who filed an

unrestricted report within 24 months of initiation of the separation action. AR 635-200, para 1-19(n).

4. Commanders are required to initiate separation proceedings for Soldiers convicted of a sexually violent offense. (*See* para 14-12(c)(3) and Army Directive 2013-21 (Initiating Separation Proceedings and Prohibiting Overseas Assignment for Soldiers Convicted of Sex Offenses)). If a Soldier convicted of a sex offense is retained, as a result of either the decision of a separation board, or by direction of the separation authority, then the separation authority *must* initiate a new separation action under para. 5-3 and forward to HQDA for action by the SecArmy.

VI. SOLDIER-INITIATED (VOLUNTARY) SEPARATIONS.

A. Procedure.

1. Soldier initiates action by memorandum or DA Form 4187 with supporting documentation.

2. Forwarded through command channels to approval authority.

3. Limited procedural rights for the Soldier.

B. Expiration of Service Obligation (Ch. 4).

1. Rarely any JA involvement.

2. Honorable or ELS discharge.

3. Beware of ETS discharge of Soldier for whom the command is contemplating adverse action. *See* AR 635-200, paras. 1-21 through 1-28.

C. Dependency or Hardship (Ch. 6).

1. Dependency. Death or disability of a member of a Soldier's (or spouse's) immediate family causes an immediate family member to rely upon the Soldier for principal care of support.

2. Hardship. Separation from the Army will materially affect the care or support of the family by alleviating undue and genuine hardship.

3. Voluntary request by Soldier. Soldier bears the burden of submitting substantiating evidence. The conditions must have arisen or have been aggravated to an excessive degree since entry on AD and not of a temporary nature. The Soldier must have made

every reasonable effort to alleviate the condition and separation is the only means that will be successful.

4. Separation authority: SPCMCA.

5. Honorable, general, or ELS discharge possible; general discharge requires notification procedure.

D. Pregnancy (Ch. 8).

5. Normal Pregnancy. An enlisted woman is pregnant and has been counseled IAW para. 8-9, AR 635-200.

2. Abnormal Pregnancy. An enlisted Soldier carries a pregnancy for 16 weeks or more, but then has an abortion, miscarriage, or an immature or premature delivery before separation.

3. Soldier must request separation. Soldier may request a specific separation date, but the separation authority, in consultation with treating physician, sets the date. Date may be no later than 30 days before expected delivery date or latest date her military physician will authorize travel.

4. Request must be approved, unless Soldier is under investigation, subject to court-martial charges, or serving court-martial sentence; request may be approved with consent of GCMCA.

5. Soldier will not be separated overseas except at her home of record (Soldiers assigned overseas are processed through U.S. separation facility).

6. Prohibited when separation has been initiated under a different chapter of AR 635-200.

8. Separation authority: LTC-level commander.

9. Honorable or ELS (uncharacterized) discharges authorized; general, if notification procedures listing specific factors warranting characterization used.

10. Soldiers separated for pregnancy with an Honorable discharge are entitled to medical care after separation at a MTF (prenatal care, delivery, post-partum, etc.). AR 40-400, para 3-39.

E. Discharge in Lieu of Trial by Court-Martial (Ch. 10).

1. Conditions.

a. Preferral of charges, the punishment for which, under the UCMJ, includes a punitive discharge, or

b. Referral of charges to a court-martial authorized to adjudge a punitive discharge where the enhanced punishment provisions of Rule for Courts-Martial (RCM) 1003(d) are relied upon.

c. Soldier is under a suspended sentence of a punitive discharge.

2. Voluntary request by Soldier. Consulting counsel advises Soldier concerning elements of offense, burden of proof, possible defenses, possible punishments, requirement of voluntariness, type of discharge, withdrawal rights, loss of Veteran's Administration (VA) benefits, and prejudice in civilian life because of discharge.

3. Disciplinary proceedings are neither suspended nor abated by submission.

4. Statements submitted by the accused in connection with the request for discharge are not admissible against the accused at courts-martial, except as provided for in Military Rules of Evidence (MRE) 410.

5. Withdrawal permitted only with consent of the GCMCA unless trial results in acquittal or sentence does not include a punitive discharge.

6. Separation authority: GCMCA or SPCMCA where authority has been delegated to act in certain cases (para. 10-7) (rare: generally delegated to a commander of Personnel Confinement Facility (PCF) where only charge is AWOL, and it's prior to trial with a specific delegation of authority, and cannot disapprove).

7. Most requests approved with OTH discharge, although honorable, general, or ELS (uncharacterized) separations are authorized.

F. Retirement for Length of Service (Ch. 12). Rarely JA involvement and generally not considered an administrative "separation".

G. Selected Changes in Service Obligation (Ch. 16). Ch. 16 contains 10 bases for separation, most requiring minimal, if any, JA involvement (order to active duty as a commissioned or warrant officer; discharge for acceptance into a program leading to a commission or warrant officer appointment; discharge for the purpose of immediate enlistment or re-enlistment; non-retention on active duty (only AGR Soldiers who have a local bar to reenlistment may request voluntary separation, not regular Army Soldiers); overseas returnees; early separation due to disqualification for duty in military occupational specialty (MOS); early separation due to reduction in force, strength limitations, or budgetary constraints; separation of Soldiers of medical holding detachments/companies; separation of personnel assigned to installations or units scheduled for inactivation or PCS, and holiday early transition program).

VII. COMMAND-INITIATED (INVOLUNTARY) SEPARATIONS.

A. Convenience of the Government (Ch. 5).

1. Secretarial Plenary Authority (para. 5-3).

a. Requires HQDA approval.

b. Honorable, general, or ELS (uncharacterized) discharges.

c. Ordinarily used when no other provision applies (e.g., HIV infection, refusal to submit to medical care, religious practices cannot be accommodated, or separation authority wants to take action more adverse to Soldier than that recommended by an administrative separation board).

d. Standard: early separation in the best interest of the Army or Soldier.

e. No requirement for administrative board hearing, regardless of Soldier's time in service.

f. Separation under this authority may be voluntary or involuntary.

2. Involuntary Separation Due to Parenthood (para. 5-8).

a. Parental obligations interfere with fulfillment of military responsibilities, which may include: repeated absenteeism, late for work, inability to participate in field training exercises or perform special duties (Charge of Quarters (CQ) and Staff Duty), and nonavailability for worldwide assignment or

deployment according to the needs of the Army. *See* AR 600-20, Army Command Policy, para. 5-5, for requirements for single Soldiers and Soldiers married to service members to prepare Family Care Plans (FCPs).

b. Counseling with a view towards separation required.

c. Honorable, general, or ELS (uncharacterized) discharges.

d. Separation authority: SPCMCA.

3. Personality Disorder (para. 5-13).

a. Deeply-ingrained maladaptive pattern of behavior of long duration that interferes with assignment or duty performance.

b. Psychiatrist or doctoral-level clinical psychologist must make diagnosis. Personality disorder separation actions will undergo a clinical review and corroboration by the Chief of Behavioral Health of the local medical treatment facility, and be reviewed and endorsed by the Surgeon General of the Army.

c. Counseling and opportunity to overcome deficiency required.

d. Honorable or ELS discharge required under most circumstances. General discharge available only for Soldier who has general court-martial (GCM) conviction, or more than one special court-martial (SPCM) conviction, in current enlistment.

e. A Soldier who has served in an imminent danger pay area may only be separated under para. 5-13 if the Soldier has less than 24 months of AD service (length of AD service is calculated as of the date of initiation of separation action). A Soldier who has 24 months or more of AD service and has served in an imminent danger pay area may be separated under para. 5-17.

f. All personality disorder diagnoses must address post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), or other mental illness comorbidity (the presence of one or more disorders in addition to the primary personality disorder), which may significantly contribute to the diagnosis. If PTSD, TBI, or other comorbid mental illness is a significant factor in the diagnosis, the Soldier will be evaluated under

the physical disability system under AR 635-40, and will not be separated under paras. 5-13 or 5-17.

g. The GCMCA is the separation authority for any Soldier who has been in an imminent danger pay area under paras. 5-13 and 5-17, otherwise SPCMCA.

4. Other Designated Physical or Mental Conditions (para. 5-17).

a. Conditions that potentially interfere with assignment to or performance of duty, but not amounting to disability (e.g. sleepwalking, dyslexia, or claustrophobia) and excluding conditions appropriate for separation under paras. 5-11 or 5-13.

b. Physical and/or mental examinations by appropriate physician or psychologist are required.

c. Counseling and opportunity to overcome deficiency required.

d. Honorable discharge or ELS appropriate under most circumstances. Notification procedure or administrative board procedure must be used for involuntary separation.

e. A Soldier may also be separated under this paragraph upon diagnosis of a personality disorder when the Soldier has more than 24 months of AD service and there is no presence of PTSD, TBI, or other comorbid mental illness.

f. Separation authority: GCMCA if diagnosed with a personality disorder, otherwise SPCMCA.

5. Other bases under Ch. 5: surviving sons and daughters (voluntary), aliens not lawfully admitted to the U.S., lack of jurisdiction, Soldiers who did not meet procurement medical standards, failure to qualify for flight training, concealment of arrest record, early release of RC personnel serving AGR tours, and early separation to further education (voluntary).

B. Defective Enlistments, Reenlistments, and Extensions (Ch. 7).

1. Fraudulent entry.

a. Enlistment, reenlistment, or period of active service through deliberate misrepresentation, omission, or concealment of information which, if known and considered by the Army at

the time of enlistment or reenlistment, might have resulted in rejection.

b. Separation authority must apply 3 tests.

(1) Is information disqualifying?

(2) Is the disqualifying information true?

(3) Did the Soldier deliberately misrepresent or withhold it?

c. Examples of fraudulent entry include concealment of prior service, true citizenship status, conviction by civil court, record as a juvenile offender, medical defects, absence without leave or desertion from a prior service, or other disqualification, or misrepresentation of intent with regard to legal custody of children.

d. Honorable, general, OTH, or ELS discharges are authorized.

2. Minor.

a. Release from custody and control of the Army if Soldier enlisted under 17 years old and has not yet attained that age.

b. Discharge for minority may occur upon application of parents within 90 days of enlistment if the Soldier is under 18 years old and enlisted without written consent of parents.

3. Erroneous enlistments or reenlistments.

a. Enlistment is erroneous if:

(1) it would not have occurred had the relevant facts been known by the Government or had appropriate directives been followed;

(2) it was not the result of fraudulent conduct on the part of the Soldier, and

(3) the defect is unchanged in material respects.

b. Soldier may be retained in service if retention is in the best interests of the Army and the disqualification may be waived.

c. Honorable, ELS, or release from custody and control are authorized.

4. Defective or unfulfilled enlistment or reenlistment.

a. Defective enlistment agreement: Soldier was eligible for enlistment but did not meet prerequisites for option for which enlisted. This situation exists in the following circumstances:

(1) A material misrepresentation by recruiting personnel, upon which the Soldier reasonably relied and thereby was induced to enlist for the option, or

(2) An administrative oversight or error on part of recruiting personnel in failing to detect that the Soldier did not meet all requirements for enlistment commitment, and

(3) Soldier did not knowingly take part in creation of the defective enlistment.

b. Unfulfilled enlistment commitment: Soldier received a written enlistment commitment for which the Soldier was qualified, but cannot be fulfilled by the Army, and Soldier did not knowingly take part in creation of the unfulfilled commitment.

c. Honorable or ELS discharge.

5. Separation authority: SPCMCA.

C. Alcohol or Other Drug Abuse Rehabilitation Failure (Ch. 9).

1. Soldier is enrolled in ASAP and the commander, after consultation with the rehabilitation team, determines:

a. Soldier lacks potential for future service and further rehabilitation efforts are not practicable, or

b. Long term rehabilitation is necessary and the Soldier is transferred to a civilian medical facility for rehabilitation.

2. Mandatory initiation when a Soldier is declared an alcohol or other drug abuse rehabilitation failure.

3. Notification procedure or board hearing procedure required.

4. Separation authority. LTC-level commander.

5. Honorable, general, or ELS discharges authorized, but an honorable discharge is required in any case in which the government initially introduces limited use evidence as defined by AR 600-85.

    a. The Army's Limited Use Policy is designed to encourage self-referral for alcohol and drug use support, and facilitate treatment for Soldiers who have rehabilitative and retention potential.

    b. The policy prohibits use of protected information in UCMJ proceedings or for consideration of characterization of administrative discharge. Protected evidence includes:

        (1) Results of command-directed biochemical testing that are inadmissible under the MRE.

        (2) Results of a biochemical test completed as part of a safety mishap investigation.

        (3) Information incidental to personal use or possession, including test results, resulting from emergency medical care.

        (4) Referral to ASAP.

        (5) Admissions made during ASAP referral or counseling, or during a DoD rehabilitation program.

        (6) Voluntary submission to biochemical testing without receiving an order.

    c. ASAP personnel may reveal Soldier use to a commander.

    d. The policy does not prevent use of information for rebuttal or impeachment purposes, and introduction of evidence if independently derived.

    e. Commanders will initiate separation proceedings for Soldiers with a subsequent drug or alcohol incident within 12 months of completing the ASAP program, or within 12 months of being removed from the program. AR 600-85, para 1-7(c).

D. Entry-level Performance and Conduct (Ch. 11).

1. Unsatisfactory performance or minor disciplinary infractions evidenced by inability, lack of reasonable effort, failure to adapt to military environment, or pregnancy that precludes full participation in training required to earn MOS.

2. Soldier must be in an entry-level status:

a. First 180 days of creditable continuous active duty, or

b. First 180 days of creditable continuous active duty following break in active service of more than 92 days.

c. Separation action must be initiated prior to the end of the 180th day.

3. Prior counseling and rehabilitative efforts are required.

4. Notification procedure.

5. Description of separation.

a. Soldiers who have completed Initial Entry Training (IET) or have been awarded a MOS will be transferred to the Individual Ready Reserve (IRR) unless the Soldier has no potential for useful service under full mobilization.

b. All other Soldiers separated under Ch. 11 will receive an ELS with no characterization of service.

6. Separation authority. LTC-level commander.

E. Unsatisfactory Performance (Ch. 13).

1. Soldiers beyond entry-level status who:

a. Will not develop sufficiently to a satisfactory Soldier;

b. Retention will have an adverse impact on military morale, good order, or discipline;

c. Will be a disruptive influence on military assignments;

d. Circumstances are likely to continue or recur, and

e. Ability to perform effectively and advance is unlikely.

2. Prior counseling with a view toward separation and rehabilitation required.

3. Unless the commander chooses to impose a bar to reenlistment, separation must be initiated for Soldiers who:

   a. Fail two successive Army Physical Fitness Tests (APFTs) (without medical reason), or

   b. Are eliminated for cause from a non-commissioned officer education system (NCOES) course.

4. Characterization: honorable or general.

5. Soldiers who have completed IET or have been awarded a MOS will not necessarily be separated as transfer to the IRR is possible. If the characterization is honorable, the Soldier is transferred to the IRR. If the characterization is general, the Soldier will be transferred to the IRR unless the Soldier clearly has no potential for useful service under conditions of full mobilization (separation authority's decision).

6. Separation authority: LTC-level commander.

F. Misconduct (Ch. 14).

1. Bases:

   a. Conviction by a civil court;

   b. Pattern of minor military disciplinary infractions;

   c. Pattern of misconduct (military or civilian), and

   d. Commission of a serious offense.

2. Separation authority.

   a. GCMCA or GO in command with a JA or legal advisor for cases initiated under administrative board procedures (OTH possible).

   b. SPCMCA.

      (1) Discharge under OTH not warranted and notification procedures used. This exception is used frequently.

An honorable discharge may be ordered only when the GCMCA has so authorized in the case.

(2) Board recommends an ELS or general discharge.

(3) Board recommends an honorable discharge and GCMCA has authorized the exercise of separation authority in the case.

3. Conviction by a civil court, para. 14-5.

a. May be considered for discharge when civil authorities take action tantamount to a finding of guilty, if:

(1) A punitive discharge would be authorized for the same or closely related offense under the UCMJ, or

(2) The sentence by the civil authorities includes confinement for 6 months or more, without regard to suspension or probation.

b. Execution of discharge is withheld until Soldier indicates in writing that he will not appeal the civilian conviction, until time for appeal expires, appeal is completed, or until Soldier's term of service expires, whichever is earlier.

c. Retention should be considered only in exceptionally meritorious cases when clearly in the best interests of the Army.

4. Minor (military) disciplinary infractions, para. 14-12a.

a. A pattern of misconduct consisting solely of minor military disciplinary infractions.

b. Prior counseling with a view toward separation and rehabilitation required. Rehabilitation requirement may be waived by separation authority.

5. Pattern of Misconduct, para. 14-12b.

a. Discreditable involvement with civil or military authorities, or discreditable conduct prejudicial to good order and discipline.

b. Conduct prejudicial to good order and discipline.

c. Prior counseling with a view toward separation and rehabilitation required. Rehabilitation requirement may be waived by separation authority.

6. Commission of a serious offense, para. 14-12c.

a. Specific circumstances of the offense (military or civilian) warrant separation, and a punitive discharge would be authorized for the same or closely related offense under the UCMJ.

b. Abuse of illegal drugs.

(1) Handled under the above provisions if not handled by either a court-martial authorized to impose a punitive discharge or by separation under Ch. 9.

(2) All Soldiers identified as illegal drug abusers, with the exception of self-referrals to ASAP, will be processed for separation. AR 600-85 requires initiation of separation proceedings, but does not mandate discharge. The separation action will be initiated and processed through the chain of command to the separation authority, who will exercise discretion, on a case-by-case basis, in directing retention or discharge of the Soldier. All medically-diagnosed drug dependent Soldiers will be processed for separation after detoxification. Any Soldier involved with illicit trafficking, distributing, or selling will be processed for separation unless the case is referred to a court-martial empowered to adjudge a punitive discharge.

(3) The Army Substance Abuse Program, AR 600-85, was updated in 2012 to include additional mandatory initiation of separation bases (two serious incidents of alcohol related misconduct within 12 months; involvement in illegal trafficking, distribution, possession, use or sale of illegal drugs; testing positive for illegal drugs a second time during career; convicted of DWI or DUI a second time during career) and elevate retention authority in certain cases (first GO in chain of command for NCO's identified as illegal drug abuser; first GO for all Soldiers resulting from the other drug/alcohol bases described).

7. Honorable, general, OTH, or ELS discharges are authorized.

G. Failure to Meet Weight Control Standards (Ch. 18). *See also* AR 600-9, The Army Body Composition Program.

1. Soldiers must be given a reasonable opportunity to comply with the body fat standards.

2. Soldiers must not have a medical condition that precludes them from participating in the Army Body Composition Program (ABCP).

3. Initiation of separation or bar to reenlistment is mandatory for Soldiers who do not make satisfactory progress (loss of 3-8 lbs. or 1% body fat per month) for two consecutive months, or after 6 months, still exceeds the body fat standards and had less than satisfactory progress for 3 or more months (nonconsecutive) during that period.

4. Initiation of separation required for Soldiers who fail to maintain body fat composition standards during the 12-month period following removal from the ABCP. After the 12th month, but within 36 months from the date of removal from the ABCP, initiation of separation is required for Soldiers who reenter the ABCP and fail to meet the standard within 90 days. (Soldiers reentering the program in the 12-36 month window are given a 90 day grace period).

5. Sole basis for separation is failure to meet weight control standards under the provisions of AR 600-9. Ch. 18 will not be used to separate a Soldier who meets the criteria for separation under other provisions of AR 635-200.

6. Notification procedure, however, Soldiers with more than 6 years AFS are entitled to an administrative separation board.

7. Honorable or ELS discharge authorized.

8. Separation authority: LTC-level commander (or SPCMCA if a board is required).

H. Qualitative Management Program (QMP) (Ch. 19).

1. Purpose: enhance the quality of the NCO corps, retain the highest quality Soldiers, deny further service to unproductive Soldiers, and provide encouragement to maintain eligibility for further service.

2. Basis: NCOs whose performance, conduct, and/or potential for advancement do not meet Army standards.

3. HQDA boards screen both RA and RC NCOs in the rank of staff sergeant (SSG) through sergeant major/command sergeant major (SGM/CSM) for the program.

4. Soldier notified and given opportunity to appeal.

5. Approval authority is Deputy Chief of Staff (DCS), G-1.

6. Honorable Discharge.

7. The program is currently implemented in accordance with annually published guidance through MILPER messages. See MILPER message number 13-195 for FY14 QMP procedures and standards.

VIII. CONCLUSION.

APPENDIX A - SEPARATION ACTIONS

	SECRETARIAL AUTHORITY	PARENTHOOD	PHYSICAL OR MENTAL CONDITIONS	PERSONALITY DISORDER	FAILURE TO MEET BODY FAT STANDARDS
Grounds for action.	Best interest of the Army; may apply to reason not covered by other, more specific provision.	Parental obligations interfere with military responsibilities; e.g., repeated absenteeism, late for work, unavailable for field exercises, CQ, SDO, world-wide deployment or assignment.	Conditions that potentially interfere with assignment or duty, but not disability or para. 5-11 conditions. May use for personality disorder when Soldier has < 24 months service. Diagnosed by psychiatrist or licensed clinical psychologist w/ PhD when personality dis.	Long term, deeply ingrained, maladaptive pattern of behavior that interferes with duty performance, diagnosed by psychiatrist or licensed clinical psychologist, corroborated, and reviewed by The Surgeon General's Office. No presence of PTSD/TBI.	Failure to meet body fat standards in AR 600-9. Overweight condition must be only basis for discharge.
Counseling and rehab required?	No.	Yes.	Yes.	Yes.	Comply w/ AR 600-9.
Who initiates?	Soldier or any commander, including separation authority if board recommends retention.	Immediate or any higher commander.			
Board hearing?	No. If command initiated, use notification procedure only, even if Soldier has more than 6 years service.	Use notification procedure. Entitled to board if Soldier has 6 or more years of active and reserve service.			
Regulation.	AR 635-200, para. 5-3.	AR 635-200, para. 5-8.	AR 635-200, para. 5-17	AR 635-200, para. 5-13.	AR 635-200, para. 18.
SJA Review?	Maybe. *See* AR 635-200, paras. 2-6a & e(4)(c).				
Separation Authority.	Secretary of the Army.	SPCMCA.	SPCMCA or GCMCA if Soldier has been in imminent danger pay area and personality dis.	SPCMCA or GCMCA if Soldier has been in imminent danger pay area.	LTC cdr (or MAJ(P) in LTC cmd) if no board; SPCMCA if board used.
Characterization of service.	Hon, Gen, or ELS.	Hon, Gen, or ELS.	Hon, Gen, or ELS. *See* para. 5-1.	Hon, Gen, or ELS. *See* para. 5-13h for Gen.	Hon or ELS.

	RELEASE FOR MINORITY (16 OR YOUNGER)	RELEASE FOR MINORITY (17 YEARS OLD)	ERRONEOUS ENLISTMENT	DEFECTIVE OR UNFULFILLED ENLISTMENT	FRAUDULENT ENTRY
Grounds for action.	Enlisted when under age 17 and still under age 17.	Enlisted under age 18 w/o parental consent, and still under 18, not facing court-martial (CM) charges, serving CM sentence, or in military confinement.	Enlistment would not have occurred had government known the relevant facts or had appropriate directives been followed.	Eligible for enlistment but not option for which enlisted; or received promise that Army can't fulfill. Soldier must identify w/in 30 days of discovery.	Material misrepresen-tation, omission, or concealment of information that if known by Army might have resulted in rejection.
Counseling and rehab required?	No.	No.	No.	No.	No.
Who initiates?	Immediate or higher commander.	Parents w/in 90 days of enlistment.	Immediate or higher commander.	Immediate or higher commander.	Immediate or higher commander.
Board hearing?	No.	No.	Use notification procedure. Entitled to board if Soldier has 6 or more years of active and reserve service.	No.	Yes, but may be waived. No board if OTH not warranted and Soldier has less than 6 years service.
Regulation.	AR 635-200, Ch. 7, Sec. II.	AR 635-200, Ch. 7, Sec. II.	AR 635-200, Ch. 7, Sec. III.	AR 635-200, Ch. 7, Sec. III.	AR 635-200, Ch. 7, Sec. IV.
Entitled to counsel?	Counsel for consultation.	Counsel for consultation.	Counsel for consultation. Counsel for representation if board.	Counsel for consultation (possibly legal assistance).	Counsel for consultation. Counsel for representation if board.
SJA Review?	No.	No.	Maybe. *See* AR 635-200, paras. 2-6a & e(4)(c).	No.	Maybe. *See* AR 635-200, paras. 2-6a & e(4)(c).
Separation Authority.	SPCMCA.	SPCMCA.	SPCMCA.	SPCMCA.	OTH: GCMCA If OTH not warranted and notification procedure used: SPCMCA.
Characterizatio n of service.	Release from custody & control of the Army.	ELS.	Hon, ELS, or Release from C&C of Army.	Hon or ELS.	Hon, Gen, OTH, or ELS.

	ALCOHOL OR DRUG ABUSE REHABILITATION FAILURE	IN LIEU OF TRIAL BY COURT-MARTIAL	ENTRY LEVEL PERFORMANCE AND CONDUCT	UNSATISFACTORY PERFORMANCE
Grounds for action.	Soldier enrolled in ASAP and (1) lacks potential for service and rehab is not practical or 2) long-term civilian rehab required.	Preferral of charges for which punitive discharge authorized OR referral to court-martial authorized a punitive-discharge UP RCM 1003(d).	Unsat performance or minor disciplinary infractions in first 180 days of service. Inability, lack of effort, failure to adapt, or pregnancy which prevents MOS training.	Unsatisfactory duty performance.
Counseling and rehab required?	No.	No.	Yes.	Yes.
Who initiates?	Immediate or any higher commander.	Soldier.	Immediate or any higher commander.	Immediate or any higher commander.
Board hearing?	Use notification procedure. Entitled to board if Soldier has more than 6 years active and reserve service.	No.	Use notification procedure.	Use notification procedure. Entitled to board if Soldier has more than 6 years active and reserve service.
Regulation	AR 635-200, Ch. 9.	AR 635-200, Ch. 10.	AR 635-200, Ch. 11.	AR 635-200, Ch. 13.
Entitled to counsel?	Counsel for consultation. Counsel for representation if board used.	Counsel for consultation (performed by trial defense counsel).	Counsel for consultation.	Counsel for consultation. Counsel for representation if board used.
SJA Review?	Maybe. *See* AR 635-200, paras. 2-6a & e(4)(c).	Yes.	Maybe. *See* AR 635-200, paras. 2-6a & e(4)(c).	
Separation Authority	No board: LTC Cdr or MAJ(P) in LTC cmd. Board: SPCMCA.	GCMCA in most cases	No board: LTC Cdr or MAJ(P) in LTC cmd.	No board: LTC Cdr or MAJ(P) in LTC cmd. Board: SPCMCA.
Characterization of service	Hon, Gen, or ELS. Hon required in Limited Use Evidence used.	Normally OTH. Hon, Gen possible.	ELS.	Hon, Gen.

	CONVICTION BY CIVILIAN COURT	MINOR (MILITARY) DISCIPLINARY INFRACTIONS	PATTERN OF MISCONDUCT	COMMISSION OF A SERIOUS OFFENSE
Grounds for action.	Civilian conviction for offense that authorizes punitive discharge under UCMJ, or any civilian sentence to confinement for more than 6 months.	Pattern of misconduct consisting solely of minor military disciplinary infractions.	Discreditable involvement with civil or military authorities, or conduct prejudicial to good order and discipline.	Commission of any offense (military or civilian) for which punitive discharge authorized under UCMJ.
Counseling and rehab required?	No.	Yes.	Yes.	No.
Who initiates?	Immediate or any higher commander.	Immediate or any higher commander.	Immediate or any higher commander.	Immediate or any higher commander.
Board hearing?	Yes. May be waived. No appearance if in confinement. No board if OTH not warranted and Soldier has less than 6 years service.	Yes. May be waived. No board if OTH not warranted and Soldier has less than 6 years active and reserve service.	Yes. May be waived. No board if OTH not warranted and Soldier has less than 6 years active and reserve service.	Yes. May be waived. No board if OTH not warranted and Soldier has less than 6 years active and reserve service.
Regulation.	AR 635-200, para. 14-5.	AR 635-200, para. 14-12a.	AR 635-200, para. 14-12b.	AR 635-200, para. 14-12c.
Entitled to counsel?	Counsel for consultation. Counsel for representation if board used.	Counsel for consultation. Counsel for representation if board used.	Counsel for consultation. Counsel for representation if board used.	Counsel for consultation. Counsel for representation if board used.
Separation Authority.	OTH: GCMCA If OTH not warranted and notification procedure used: SPCMCA.	OTH: GCMCA If OTH not warranted and notification procedure used: SPCMCA.	OTH: GCMCA If OTH not warranted and notification procedure used: SPCMCA.	OTH: GCMCA If OTH not warranted and notification procedure used: SPCMCA.
Characterization of service.	Hon, Gen, OTH, or ELS.	Hon, Gen, OTH, or ELS.	Hon, Gen, OTH, or ELS.	Hon, Gen, OTH, or ELS.

APPENDIX B OTHER SERVICES REFERENCES

I. Air Force Instruction (AFI) 36-3208, Administrative Separation of Airmen.

II. MILPERSMAN 1910, Enlisted Administrative Separations (ADSEP).

III. Marine Corps Order (MCO) P1900.16F, Marine Corps Separation and Retirement Manual (Short Title: MARCORSEPMAN).

IV. Commandant's Instruction (COMDTINST) M1000.6, Coast Guard Personnel Manual.

CHAPTER E

OFFICER PERSONNEL LAW

TABLE OF CONTENTS

I. REFERENCES.

A. Title 10, United States Code

B. Department of Defense Directive (DoDD) 1332.30, Separation of Regular and Reserve Commissioned Officers

C. Department of Defense Instruction (DoDI) 1332.29, Eligibility of Regular and Reserve Personnel for Separation Pay

D. DoDI 1332.40, Separation Procedures for Regular and Reserve Commissioned Officers

E. Army Regulation (AR) 15-80, Army Grade Determination Review Board

F. AR 135-175, Separation of Officers

G. AR 600-8-24, Officer Transfers and Discharges

H. AR 600-8-29, Officer Promotions

I. Air Force Instruction (AFI) 36-3206, Administrative Discharge Procedures for Commissioned Officers

J. AFI 36-3207, Separating Commissioned Officers

K. COMDTINST M1000.6A, Personnel Manual

L. Marine Corps Order (MCO) P1900.16F, Marine Corps Separation and Retirement Manual (Short Title: MARCORSEPMAN)

M. Secretary of the Navy (SECNAV) Instruction 1920.6C, Administrative Separation of Officers

N. SECNAV Instruction 1920.7B, Continuation of Active Duty of Regular Commissioned Officers and Reserve Officers on Reserve Active Status List

O. SECNAV Instruction 1900.4, Separation Pay for Involuntary Separation from Active Duty

II. COMPOSITION OF THE ARMY.

A. "The Army consists of: the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, the Army Reserve, and all persons appointed or enlisted in, or conscripted into, the Army without component." 10 U.S.C. § 3062.

B. Regular Army (RA). All Soldiers who serve continuously on active duty (AD) and all RA retirees. *See* 10 U.S.C. § 3075.

C. The Reserve Components (RC). *See* 10 U.S.C. § 10101.

1. Army National Guard of the United States consists of federally recognized units and organizations of the Army National Guard (ARNG). *See* 10 U.S.C. § 10105.

2. Army National Guard in the Service of the United States. *See* 10 U.S.C. § 10106.

3. Army Reserve (USAR) consists of all members of the Reserve of the Army who are not members of the ARNG. *See* 10 U.S.C. § 10104. The elements of the USAR include the:

a. Ready Reserve, 10 U.S.C. §§ 10142-10150;

b. Standby Reserve, 10 U.S.C. §§ 10151-10153, and

c. Retired Reserve, 10 U.S.C. § 10154.

III. OFFICER STATUS, PROMOTIONS, TRANSFERS AND DISCHARGES.

A. Appointment.

1. Privilege of Service. "An individual is permitted to serve as a commissioned officer in the Military Services because of the special trust and confidence the President and the United States have placed in his or her patriotism, valor, fidelity, and competence." DoDD 1332.30, para. 4.1.

2. Proper authority makes appointment.

a. Other Than Regular Army (OTRA) officers below the rank of lieutenant colonel (LTC): The President of the United States (President) appoints.

b. OTRA officers in the rank of LTC and above and for RA Officers: President appoints with advice and consent of the Senate.

c. Section 501 of the Fiscal Year 2005 National Defense Authorization Act (FY05 NDAA) amended 10 U.S.C. § 531 to permit the President to appoint officers in the grade of O-1 through O-3 in the RA without the advice and consent of the Senate.

d. Warrant Officers: Secretary of the Army (SA) appoints warrant officers (WO1); President appoints chief warrant officers (CW2-CW5).

3. Tender of appointment to individual.

4. Acceptance by individual. There is a statutory presumption of acceptance unless the appointment is expressly declined.

5. Key Concepts.

a. Commissioned Officer v. Warrant Officer. Status of the officer determines the amount of due process available to the officer in separation actions.

b. RA v. OTRA.

(1) RA Officer: an officer who holds a grade and office under a commission signed by the President, and who is appointed as an officer in the standing Army.

(2) OTRA Officer: an officer who holds a grade and office under a commission signed by the President, and who is appointed as an officer in an RC of the Army.

(3) The laws for RA appointments and the transfer of officers between RA and OTRA were amended in the FY05 NDAA. Specifically, Section 501 rescinded 10 U.S.C. § 532(e), which stated that no person will receive an original appointment as a commissioned officer in the RA, Regular Navy, Regular Air Force, or Regular Marine Corps until completing 1 year of active duty (AD) service as a commissioned officer of a RC.

(a) The DoD policy is to transition to an all-Regular active duty list (ADL). As of 1 May 2005, all new officers commissioned to the ADL receive regular appointments regardless of method or source of commission.

(b) RC officers on the ADL who do not meet the requirements for appointment as a regular officer UP 10 U.S.C. § 532 may continue to serve with a reserve appointment until 28 October 2009, or completion of any mandatory active duty service obligation (ADSO) existing on 1 May 2005, whichever is later. After 28 October 2009, all commissioned officers on the ADL must hold a regular appointment, be completing an ADSO incurred before 1 May 2005, or have a waiver from the Secretary of Defense (SecDef). The officer may also be transferred to the Reserve Active Status List (RASL).

d. Probationary v. Nonprobationary Status.

(1) Probationary Officer. A commissioned officer (RA or OTRA) with less than 5 years of active commissioned or commissioned service. All newly commissioned officers are probationary for 5 years.

(2) Nonprobationary Officer. An officer other than a probationary commissioned officer. Receives significant due process in transfer and discharge actions.

(3) The Fiscal Year 2008 National Defense Authorization Act and DoDI 1332.30 both authorize the probationary period to be 6 years for an officer; however, the Army has yet to update its regulation so the 5 year benchmark is still being used in Army actions.

e. Show-Cause Authority. Specifically determined by the Secretary of the military department concerned. Includes:

(1) The Secretary of the department or officers designated by the Secretary to determine, based upon a record review, that an officer should show cause for retention.

(2) Commanders exercising general court-martial authority and all general or flag officers in command who have a judge advocate (JA) or legal advisor available. Also referred to as General Officer Show-Cause Authority (GOSCA).

B. The Active Duty Promotion System for Army Officers.

1. Active Duty List (ADL).

    a. All officers on AD regardless of component.

    b. Centralized, with minor exceptions.

    c. Competitive category.

    d. Special Branches: medical professionals, chaplains, and Judge Advocates (JAs).

2. Basic Promotion Policies.

    a. When promoted while on AD, the officer is promoted within his or her component.

    b. Minimum time in grade (TIG) requirements for promotion. The Defense Officer Personnel Management Act (DOPMA) establishes minimum TIG requirements. For instance the TIG requirement for promotion to first lieutenant (1LT) is 18 months; 2 years for promotion to captain (CPT); 3 years for major (MAJ) through LTC; and 1 year for promotion to colonel (COL) and brigadier general (BG).

    c. Selection criteria.

        (1) Except for officers eligible for selective continuation, the promotion system has an “up or out” policy.

        (2) Failure to be selected for promotion to LTC, MAJ, CPT, CW5, CW4, and CW3.

            (a) Officers on the ADL who are twice nonselected for promotion will be separated not later than the first day of the seventh calendar month beginning after the month in which the SA approves the report of the board that considered them for the second time.

            (b) Alternatives include resignation, selective continuation, and retirement (if eligible).

            (c) The rules for selective continuation are found in AR 600-8-29, para 1-14.

(3) ADL officers not recommended for promotion to CW2 or 1LT will be separated NLT 90 days after the Promotion Review Authority approves their non-recommendation.

3. Zones of Consideration.

a. Promotion Zone (PZ). The opening and closing dates of the zone are adjusted each year to reflect both the Army's need for officers at the higher grade and established selection rates. Promotion boards review the files of all officers whose date of rank lies within the PZ.

b. Above the Zone (AZ). After evaluating files within the PZ, the promotion board also reviews the files of nonselected officers from previous zones. Previously nonselected AZ officers who are better qualified than those selected from within the zone will displace the less qualified officers on the Order of Merit List (OML). These officers are considered AZ selections.

c. Below the Zone (BZ). Boards also review the files of officers projected to be within the PZ during the next promotion period. Officers selected before they enter the considered PZ are BZ selections.

C. Officer Transfers and Discharges (AR 600-8-24).

1. The regulation divides officer transfers and discharges into 6 areas:

a. Voluntary Release From Active Duty (REFRAD), Ch. 2, paras. 2-5 through 2-20.

b. Involuntary REFRAD, Ch. 2, paras. 2-21 through 2-38.

c. Resignations, Ch. 3.

d. Eliminations, Ch. 4.

e. Miscellaneous Types of Separations, Ch. 5.

f. Retirements, Ch. 6.

2. Purposes of officer transfers and discharges.

a. Provide a way to terminate service prior to the terms of the original contract.

b. Provide authority to transfer officers from one component to another.

c. Provide authority to discharge officers from all military obligations.

d. Support the Army's personnel life-cycle function of transition.

IV. RELEASE FROM ACTIVE DUTY (REFRAD). Applies to OTRA officers only. A REFRAD is the transfer of an OTRA officer from AD status to an inactive status without affecting the officer's commission. REFRAD is not a discharge. It can be voluntary or involuntary. *See* AR 600-8-24, Ch. 2.

A. Voluntary REFRAD. Examples of voluntary REFRAD not discussed below include: national interest, expiration of obligated service, and separation to accept public office. *See* AR 600-8-24, paras. 2-5 to 2-20.

1. Personal Reasons. OTRA officers may submit applications NET 12 months and NLT 6 months prior to the desired release date. UP AR 600-8-24, paras. 2-5 and 2-6, the officer must:

a. Complete at least 1 year of current AD commitment;

b. Complete current prescribed tour if stationed outside the continental United States (OCONUS), and

c. Complete ADSO unless granted an exception to policy.

2. Hardship. Exists when in circumstances not involving death or disability of a member of the Soldier's (or spouse's) immediate family, separation will materially affect the care or support of the family by alleviating undue and genuine hardship. UP AR 600-8-24, paras. 2-9 and 2-10, the officer must clearly establish:

a. The hardship is permanent and did not exist prior to entry on AD, or

b. If the hardship existed prior to entry on AD, the condition has since intensified and can only be alleviated by separating from AD, and

c. Upon REFRAD, the officer will be able to eliminate or materially alleviate the condition.

3. Pregnancy. A commander with separation approval authority (SAA) may release a RC officer who requests REFRAD because of pregnancy. AR 600-8-24, paras. 2-13 and 2-14.

a. The officer's immediate commander will counsel the officer to provide information concerning the officer's rights, entitlements, and responsibilities with respect to continued AD or separation.

b. Officers commissioned through funded programs will not be released until completion of their ADSO. When extenuating circumstances exist, officers may request a hardship separation.

c. If before the REFRAD is accomplished a medical officer determines that the pregnancy has terminated for any reason, the authority for separation no longer exists.

4. School. An officer who is serving the initial tour of AD and who is not mission essential may request REFRAD to attend a recognized institution of higher learning. UP AR 600-8-24, paras. 2-15 and 2-16:

a. Officers commissioned through funded programs will not be released until completion of their service obligations.

b. Officer's school reporting date must be in the last 3 months of the officer's remaining active service.

B. Involuntary REFRAD. *See* AR 600-8-24, paras. 2-21 to 2-38. Involuntary REFRAD may be divided into two groups: actions based upon the Soldier's status, and actions based upon the Soldier's conduct.

1. Status based involuntary REFRAD includes: reaching maximum age, reaching maximum service, and nonselection for Active Guard Reserve (AGR) continuation.

a. Maximum Age or Service. *See* AR 600-8-24, paras. 2-21 to 2-24 and FY08 NDAA.

(1) Age. An officer will be released from AD (unless he or she requests voluntary retirement) on the last day of the month in which he or she attains the following maximum age:

(a) For major general (MG) or brigadier general promotable (BG(P)) promotable: 62.

(b) For any other commissioned officer: 60 (if the officer is within 2 years of active federal service (AFS) retirement eligibility, he or she may be retained on AD until eligible for retirement).

(c) For WO who cannot qualify for (non-regular service) retired pay UP 10 U.S.C. §§ 12731-12740: 62.

(d) For WO who qualify for (non-regular service) retired pay UP 10 U.S.C. §§ 12731-12740: 60.

(e) For certain medical officers: 67. However, the Service may not retain the officer to this age without the officer's consent.

(2) Service. Generally, RC officers will be released from AD after completing 20 years of AFS. There are several exceptions:

(a) Staff College Level School or Senior Service College members will be retained on AD until completing 2 years of AD following graduation.

(b) Officers named by command selection boards will be retained on AD up to 90 calendar days after completing assignment to the designated command position.

(c) LTCs may be retained until 28 years service.

(d) COLs may be retained until 30 years service.

(e) BGs may be retained until 5 years in grade or 30 years service, whichever is later.

(f) MGs may be retained until 5 years in grade or 35 years service, whichever is later.

(g) Lieutenant Generals (LTG) and above may serve 38 years.

b. Nonselect for AGR Continuation. *See* AR 600-8-24, paras. 2-25 and 2-26.

(1) AGR officers on initial period of duty will be separated from AD 90 days after notification of nonselection.

(2) AGR officers on AD and within 2 years of retirement eligibility will ordinarily not face involuntary REFRAD until eligible for retirement.

2. Conduct-based involuntary REFRAD includes: board directed actions for poor performance or misconduct; civil conviction, and officer basic course (OBC) failure.

a. REFRAD by the Department of the Army Active Duty Board (DAADB). *See* AR 600-8-24, paras. 2-27 and 2-28.

(1) IAW 10 U.S.C. § 14902, Service Secretaries shall prescribe, by regulation, procedures for the review at any time of the record of any RC officer to determine whether that officer should be required, because of substandard performance, misconduct, moral or professional dereliction, or national security concerns, to show cause for retention in an active status.

(2) The DAADB is the Army's tool for ensuring that only RC officers who consistently maintain high standards of efficiency, morality, performance, and professionalism are permitted to serve on AD.

(a) Referral of a case to the DAADB may be initiated locally or at Department of the Army (HQDA) level.

(b) Bases for REFRAD are similar to bases for administrative elimination: substandard performance, misconduct, moral or professional dereliction, and national security reasons.

(c) These cases involve minimal due process. The officer is notified and given an opportunity to respond/rebut. The board reviews the record and officer's response/rebuttal and then recommends either retention or release.

(d) The initiating commander can close the case and stop the REFRAD action upon considering the officer's response/rebuttal.

b. Civil Conviction. An officer convicted of a criminal offense or who enters a plea of no contest to a criminal offense in any federal or state court may be released from AD.

(1) UP AR 600-8-24, paras. 2-29 and 2-30, the SA, or designee, or the General Court-Martial Convening Authority (GCMCA) may immediately REFRAD an officer when the offense:

(a) Results in conviction and sentence for more than 1 year, or

(b) Results in conviction and sentence for a crime of moral turpitude (regardless of the sentence), including, but not limited to, child abuse, incest, indecent exposure, soliciting prostitution, embezzlement, check fraud, and any felony or other offense against the customs of society.

(2) These cases involve minimal due process. The officer's case is not referred to a board; the officer is only notified and allowed an opportunity to respond.

c. Branch Orientation/Familiarization/OBC Failure. RC officers with less than 5 years commissioned service will be released from AD and discharged from his or her RC commission when the officer fails to meet service school standards.

(1) UP AR 600-8-24, paras. 2-33 and 2-34, the failure and resulting release and discharge must be based upon:

(a) Misconduct;

(b) Moral or professional dereliction;

(c) Academic or leadership deficiencies, or

(d) Resignation from the course.

(2) Enhanced due process is warranted since action may involve more than a loss of AD status. Officers are entitled to a faculty board because they can also lose their commission. However, officers may waive the board and accept the decision of the approval authority with respect to their release/discharge.

C. Separation Approval Authority (SAA). *See* AR 600-8-24, para. 2-2.

1. Approval authority varies with type of REFRAD.

2. There is limited approval authority at the installation level. The following officers may exercise SAA and grant voluntary REFRADs:

a. Commanders of units and installations having GCMCA;

b. General officers (GO) in command of Army medical centers, and

c. Commanders of:

(1) Personnel centers;

(2) Training centers;

(3) OCONUS replacement depots, or

(4) All active Army installations authorized 4,000 or more AD military personnel.

3. There is no denial authority at the installation level. A General Officer Show Cause Authority (GOSCA) may generally approve voluntary REFRADs but has no authority to disapprove a voluntary request. Recommendations for disapproval must be forwarded to Human Resources Command (HRC) or HQDA.

4. The SAA for involuntary REFRAD actions is generally reserved to the Commander, HRC or HQDA level. In any involuntary REFRAD case, reviewing JAs must consult AR 600-8-24.

V. RESIGNATIONS.

A. Unqualified Resignations. *See* AR 600-8-24, paras. 3-5 and 3-6.

1. Any officer on AD for more than 90 calendar days may tender an unqualified resignation, unless:

a. Action is pending that could result in resignation for the good of the Service;

b. The officer is under a suspension of favorable action;

c. The officer is pending investigation;

d. The officer is under charges, or

e. Any other unfavorable or derogatory action is pending.

2. Normally, resignations will not be accepted unless, on the requested date of separation, the officer has completed his or her applicable ADSO.

3. Once forwarded to HRC, a resignation may only be withdrawn with HQDA approval. *See* AR 600-8-24, para. 3-2.

B. Failure to Meet Medical Fitness Standards When Appointed. A probationary officer who did not meet medical fitness standards when accepted for appointment may submit a resignation UP AR 600-8-24, paras. 3-9 and 3-10.

C. Pregnancy. *See* AR 600-8-24, paras. 3-11 and 3-12.

1. Counseling required. Purpose is to provide information concerning rights, entitlements, and responsibilities with respect to continued AD or separation.

2. Normally, the Army will not grant a tendered resignation for pregnancy until the officer has completed her initial ADSO or any service obligation incurred from the funded program. However, when extenuating circumstances exist, the Army may grant an exception to policy if the officer accepts an indefinite appointment in the RC in order to complete the ADSO.

D. Resignations for the Good of the Service.

1. Officers who resign for the good of the service normally receive an under other than honorable conditions (OTH) characterization of service. Regardless of the characterization of service received, an officer who resigns for the good of the service in lieu of general court-martial is barred (with minor exceptions) from receiving Veteran's Affairs (VA) benefits.

2. In Lieu of General Court-Martial. *See* AR 600-8-24, paras. 3-13 and 3-14.

a. An officer may submit a resignation for the good of the service in lieu of general court-martial when:

(1) Court-martial charges have been preferred against the officer with a view toward trial by general court-martial, or

(2) The officer is under a suspended sentence of dismissal.

b. Tender of the resignation does not preclude or automatically suspend court-martial proceedings. However, the convening authority may not take action on findings and sentence until HQDA acts on the resignation request.

VI. ELIMINATIONS.

A. Privilege of Service.

1. Commissioned officers are expected to display responsibility commensurate to that special trust and confidence and to act with the highest integrity at all times. All commanding officers (and others in authority) are required:

    a. To show in themselves a good example of virtue, honor, patriotism, and subordination;

    b. To be vigilant in inspecting the conduct of all persons who are placed under their command;

    c. To guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them, and

    d. To take all necessary and proper measures, under the laws, regulations, and customs of the Army, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

2. It is DoD policy to separate those officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence expected of them.

B. Bases for Elimination.

1. Substandard Performance. There are a variety of performance-related areas covered UP AR 600-8-24, para. 4-2a. Some examples include:

    a. Downward trend in performance resulting in inefficiency or mediocre service.

    b. Lack of response to training, in that performance of duties in officer's assigned specialty is precluded or impaired to the degree of being unsatisfactory;

    c. Poor performance of duty, inefficiency, or poor leadership;

    d. Failure to keep pace with contemporaries;

    e. Apathy, defective attitudes;

    f. Failure of a course at a Service school for academic reasons;

g. Army Physical Fitness Test (APFT) or body fat/weight failure;

h. Testing HIV Positive within 180 days of entering AD, and

i. Failure to establish an adequate Family Care Plan (FCP).

j. Best interest of the Government.

2. Misconduct, Moral or Professional Dereliction, or in the Interests of National Security. AR 600-8-24, para. 4-2b, outlines a non-exclusive list of reasons that support this basis for elimination:

a. Discreditable or intentional failure to meet personal financial obligations;

b. Mismanagement of personal affairs;

c. Intentional omission or misstatement of fact in official statements or records;

d. Acts of personal misconduct (including acts committed while in a drunken or drug intoxicated state);

e. Intentional neglect or failure to perform duties;

f. Conduct unbecoming;

g. Loss of professional qualifications or security clearance denial,;

h. Drug dependence or misconduct involving drugs (in cases involving drugs, the command must initiate elimination action);

i. Failure to respond to rehabilitation efforts for Family abuse/violence;

j. Failure at a service school course because of misconduct; and

k. Conviction by court-martial not including a punitive discharge for a sexually violent offense.

3. Derogatory Information. The Army's receipt of, or filing of, unfavorable information relating to an officer may result in the initiation of an elimination action. AR 600-8-24, para. 4-2c.

a. Required record review is triggered by:

(1) Punishment under Article 15, Uniform Code of Military Justice (UCMJ);

(2) Conviction by court-martial;

(3) Denial or revocation of security clearance;

(4) Relief for cause Officer Evaluation Report (OER);

(5) Official Military Personnel File (OMPF)–filed administrative reprimand, or

(6) Failure of a course at a Service school.

b. In considering whether to terminate his or her appointment, the Army must review the officer's overall record.

C. Procedural Issues.

1. Elimination actions may be initiated by either HQDA or a GOSCA. After reviewing the packet, HQDA or GOSCA shall either close a case in which an officer should not be required to show cause for their continued retention or forward the matter for referral to a Board of Inquiry (BOI). Officers may be considered for separation for one or more reasons; however, separate findings are required for each.

2. There is a "double jeopardy" limitation upon the initiation of show cause boards.

a. Generally, an officer will not be required to show cause for conduct that was the subject of administrative elimination proceedings that resulted in a final determination that the officer should be retained.

b. Likewise, officers will not be required to show cause for conduct that has been the subject of judicial proceedings that resulted in acquittal.

c. There are several exceptions to these limitations. Show cause actions may be based upon:

(1) New evidence;

(2) Fraud in the earlier hearing, or

(3) Subsequent conduct.

(a) If the later show cause action is based upon substandard performance, the Army must wait 1 year if the officer was originally required to show cause for retention for the same reason(s).

(b) If the action against the officer is based upon misconduct, moral or professional dereliction, or is in the interest of national security, the officer may again be required to show cause at any time.

3. In misconduct cases in which the officer is retained, the officer may again be required to show cause for retention; however, the second show cause action may not be based solely upon the conduct presented to the previous BOI unless the findings and recommendation of the BOI are determined to have been the result of fraud or collusion.

4. Notification and Rebuttal.

a. The initiating authority must provide the officer with a "show cause" notice that identifies the reason(s) for elimination.

(1) Bases for elimination may be combined.

(2) If combined, separate findings are required for each separation basis identified.

b. Notice to show cause must also outline the officer's option to:

(1) Submit a resignation in lieu of elimination.

(2) Request discharge from the RA IAW 10 U.S.C. § 1186.

(3) Submit a request for Retirement in Lieu of Elimination, if eligible, IAW 10 U.S.C. § 1186.

(4) Appear before a BOI, if eligible, IAW 10 U.S.C. §§ 1182 and 14903.

c. Without regard to the officer's probationary or nonprobationary status, he or she is entitled to submit a written response or rebuttal to the headquarters that initiated the show cause action. At any point of the process, a decision to retain the officer stops the show cause action.

5. The characterization of service for officers facing show cause actions may be honorable, general, or OTH.

a. The characterization is normally based on a pattern of behavior and duty performance rather than an isolated incident.

b. If the sole reason for elimination is substandard performance, the officer is entitled to an honorable discharge.

6. Probationary officers have limited due process in show cause actions.

a. Prior to forwarding the case to the SA for action, the officer must receive:

(1) Formal notification of the bases for the action, and

(2) An opportunity to submit a rebuttal to initiating authority.

b. Probationary officer not entitled to a board unless OTH discharge is recommended.

c. If officer loses probationary status during processing, the command must process the officer as nonprobationary.

d. A decision to retain the officer, at any point, stops the show cause action.

7. Nonprobationary officers are afforded greater due process.

a. The officer is first provided with both formal notice to show cause and an opportunity to submit rebuttal matters to the initiating authority. The decision to retain the officer, at any point, stops the show cause action.

b. The officer is referred to a BOI. If the BOI recommends the officer's retention, the action is terminated. In all other cases, the case is referred to HQDA.

c. HQDA next appoints a Board of Review (BOR) to review the BOI proceedings. If the BOR recommends the officer's retention, the action is terminated. In all other cases, the case is referred to the SA.

d. The SA takes final action in the officer's case.

8. Referral to BOI: full due process. 10 U.S.C. §§ 1182 and 14903.

a. BOI procedures are the same for probationary officers facing OTH discharge eliminations as for nonprobationary officers.

b. The BOI "shall give a fair and impartial hearing to a respondent. . . . The hearing shall provide a forum for why the officer concerned thinks the contemplated action should not be taken." DoDD 1332.40, para. E3.3.3.

c. Full due process. At the BOI, the officer:

(1) Will be provided with a military counsel and may hire civilian representation;

(2) Will have a reasonable time to prepare his case, but in no case will he or she have less than 30 days;

(3) Will be permitted to be present at all stages of the proceedings, and have full access to all of the records, except when the SA determines that national security requires the protection of classified documents;

(4) May challenge any member of the board for cause;

(5) May present documents from his service record, letters, depositions, sworn or unsworn statements, affidavits, evidence, and may require the production of witnesses deemed to be reasonably available;

(6) May cross examine any witness brought before the board, and

(7) May elect to testify or may remain silent. If the officer testifies, he or she may be required to submit to examination by the board as to any matter concerning the testimony, but not in contravention of Article 31, UCMJ. *See* AR 600-8-24, para. 4-11.

d. Composition of the BOI.

(1) Locally appointed by GOSCA.

(2) Comprised of at least 3 voting officers. The members must be:

(a) On ADL or RASL;

(b) From the same military service as respondent, and

(c) Senior in grade and rank to the officer. President shall be a COL or higher, and other members must be LTC or higher.

(d) If the officer is an OTRA officer, an RC member must serve on the BOI.

(e) When the officer is a female, minority, or member of a special branch, the BOI will, upon the officer's written request, include a female, minority, or special branch member. Such request must be made within 7 days or the notification.

(3) Other Participants. The BOI will also include a legal advisor, a recorder, and respondent's counsel, all of whom are nonvoting members.

e. Determinations.

(1) The BOI will decide the case based only on the evidence received or developed during open hearings.

(2) The BOI conducts its voting in closed session with only voting members in attendance.

(3) All findings and recommendations shall be determined by a majority vote.

(4) If the BOI determines that retention is warranted, the case is closed.

(5) If the BOI determines that retention is not warranted, the case is forwarded to the GOSCA who will "report" the case to a BOR.

9. Board of Review. *See* 10 U.S.C. § 1183.

a. Convened at HQDA level.

b. Limited due process. The BOR reviews the administrative record of the case. There is no personal appearance at the BOR.

c. Composition. Same composition requirements as a BOI. Members must be senior in rank to the respondent. The BOR shall review the entire record of the BOI.

d. Recommends either retention or elimination.

(1) If officer “shows cause” or establishes that retention is warranted, the case is closed.

(2) If the documentation establishes that retention is not warranted, the BOR recommends separation action and the appropriate characterization for the officer’s discharge certificate, then forwards the case to SA for final action.

10. Action by Service Secretary. 10 U.S.C. §1184. The SA has 2 choices: retention or separation. The SA’s decision is final.

VII. MISCELLANEOUS SEPARATIONS.

A. AR 600-8-24, Ch. 5, prescribes disposition and procedures for miscellaneous types of separations whereby an officer may be dismissed, released, separated, and discharged from AD. These include:

1. Lack of jurisdiction, or cases in which the officer obtains a court writ ordering release from AD;

2. Chaplain’s loss of professional qualifications, if the command did not initiate elimination action under Ch. 4, para. 4-2b;

3. Officers twice nonselected for promotion by an HQDA centralized board, unless selectively continued (SELCON), the officer has more than 18 years of service, or is retirement eligible;

4. Second lieutenant (2LT) and WO1 nonselected for field promotion;

5. Conviction by foreign tribunal, in cases when sentence includes confinement of greater than 6 months;

6. Dropped From the Rolls (DFR): AD or retired when confined, absent without leave (AWOL) for at least 3 months, or loses retired pay, and

7. Dismissed by general court-martial, after appellate review is complete.

B. Procedures. The steps necessary to separate officers vary with the type of separation. In all Ch. 5 cases, the command must follow the separation steps outlined in the regulation.

VIII. RETIREMENT.

A. Types of Retirement. *See* AR 600-8-24, Ch. 6.

1. Voluntary Retirements.

a. Voluntary Retirement (VR): GCMCA approval. The Army is the only service to include voluntary retirements in its officer separation regulation; however, this area is primarily governed by statute. Temporary Early Retirement Authority (TERA) is again available for 2012-2018 for members who have attained 15 years, but not yet 20 years of service. Authority contained in NDAA FY12, previously authorized in NDAA FY93.

b. Voluntary Retirement in Lieu of Mandatory, i.e., pending REFRAD, elimination, or nonselection.

c. Retirement in lieu of elimination, in cases involving misconduct or moral or professional dereliction, requires referral to Army Grade Determination Board (AGDB).

d. Retirement in lieu of permanent change of station (PCS): at least 19 years, 6 months time in service; must submit within 30 days of notice of PCS.

2. Involuntary Retirements.

a. Mandatory Retirement: maximum age or service.

b. Selective Early Retirement: based on selection by Selective Early Retirement Board (SERB). 10 U.S.C. § 638 provides authority for the SA to convene boards to select officers for retirement before their mandatory retirement date. *See* AR 600-8-24, para. 6-29.

B. Retired Grade. *See* 10 U.S.C. § 1370.

1. Minimum TIG Requirements (Voluntary Retirements).

a. 6 months for MAJ and below.

b. 3 years for LTC through MG. The President may waive this requirement in individual cases involving extreme hardship or exceptional or unusual circumstances.

c. Under previous drawdown authority, the SA could reduce the TIG requirement to 2 years for LTC and COL.

2. SA makes satisfactory grade determination (delegated to Assistant Secretary of the Army (Manpower and Reserve Affairs (ASA(M&RA)) or Deputy Assistant Secretary of the Army (Review Boards)(DASA-RB)).

C. Retired Pay. *See* 10 U.S.C. § 1401-1412.

1. Member before 8 September 1980 = "Multiplier" x number of years x high month's pay.

2. Member after 7 September 1980 = "Multiplier" x number of years x average monthly base pay for member's high 3 years.

3. Determining the retired pay "multiplier." 10 U.S.C. § 1409.

a. Member before 1 August 1986: "multiplier" equals 2.5% per year.

b. Member after 31 July 1986: "multiplier" equals 2.5% per year minus 1% for each year of service less than 30 years. For a 20-year retirement, officer will receive 40%. NOTE: As a result of the FY00 NDAA, members who entered the service after July 31, 1986 will be given a choice of retirement plans at their 15th year of service. There are two options:

(1) Take the pre-1986 retirement system (high-three year average system), or

(2) Elect the post-1986 retirement system (Military Retirement Reform Act (MRRA) of 1986, commonly referred to as REDUX) and take a $30,000 career retention bonus.

c. Retired pay readjusted at age 62 regardless of the basic active service date (BASD).

D. Other Retirement Related Actions: Selective Continuation on AD (SELCON). *See* 10 U.S.C. § 637.

1. Applies to RA and OTRA officers. The SA may (based on the needs of the service for specific skills) convene SELCON boards to retain twice nonselected officers who wish to remain on AD. CPTs may be retained until 20 years time in service (TIS); MAJs until 24 years TIS, unless thereafter promoted AZ.

2. FY02 NDAA, sec. 505(d), extended SELCON to OTRA officers.

   a. MAJs with less than 14 years TIS are not required to be SELCON until 20 years. SELCON operates in increments of 3 years.

   b. MAJs with more than 14 years TIS will normally be SELCON until 20 years. Officers who refuse to accept SELCON through retirement eligibility are not authorized to receive separation pay.

   c. Non-SELCON officers will be separated within 7 months.

E. Reserve Component Retirement Based on Active Duty Performance.

1. Pursuant to the FY08 NDAA and a 28 May 2009 Office of the Chief, Army Reserve Memorandum, an RC Soldier/officer may have his/her retirement age reduced from age 60 to a lesser age not below 50 for those who have served on AD on or after 29 January 2008. The AD period must be for the express purpose of overseas contingency operations or its derivatives.

2. Each day of service on AD counts toward a reduction in retirement age, to be aggregated in 90 day increments within any fiscal year.

IX. FINANACIAL CONSIDERATIONS RELATED TO SEPARATIONS

A. Separation Pay for Involuntarily Separated Officers. *See* DoDI 1332.29, part 3.

1. Basic eligibility requirements.

   a. 6 years AD;

   b. Honorable service;

   c. Involuntary separation, and

   d. Written agreement to serve in Ready Reserve for at least 3 years.

2. Full Separation Pay.

a. Officers who are involuntarily separated for the following reasons may receive full separation pay.

(1) Fully qualified but denied continuation on AD.

(2) Fully qualified but being separated under a reduction in force (RIF).

b. Computation.

(1) Formula: 10% of annual base pay times the number of years service.

(2) Example. CPT with 6 years service. (.10 x (12 x $4,948.80 (monthly base pay))) x 6 (years in service) = $35,631.36.

3. Half Separation Pay. Officers who are involuntarily separated for cause may receive half separation pay for the following reasons:

a. Drug or alcohol abuse rehabilitation failure;

b. For the convenience of the Government, or

c. Security.

4. Officers involuntarily separated due to substandard performance or misconduct do not receive separation pay.

5. All programs are subject to the availability of appropriations

B. Recoupment. 10 U.S.C. § 2005.

1. Policy. The Government will recoup educational costs from individuals who participate in certain advanced education or bonus programs and fail to complete their educational requirements or military service obligations. *See* 10 U.S.C. § 2005; s*ee also* AR 600-8-24, para. 1-16, and AR 37-104-4, Chap. 31. This applies to both voluntary and involuntary separations.

2. Procedures.

a. Defense Finance and Accounting Service (DFAS) procedure initiated by the officer's local commander.

b. Recoupment must be accomplished prior to separation.

c. Army policy is to attempt recoupment in all cases. The SA directs recoupment in most cases.

d. Separation boards may be required to make findings and recommendations on recoupment.

X. OTHER CONSIDERATIONS RELATED TO SEPARATIONS.

A. Involuntary Separation of Officers with Access to Sensitive Programs. *See* AR 600-8-24, para. 1-19.

1. Coordination with supporting security officials required. Separation will not occur unless the security official concurs with the action.

2. Applies to officers in the following categories:

a. Knowledge of sensitive compartmented information (SCI);

b. Nuclear Weapon Personnel Reliability Program assignment;

c. Knowledge of Single Integrated Operational Plan—Extremely Sensitive Information (SIOP-ESI);

d. Special Access Program (SAP) knowledge, and

e. Presidential Support assignment.

B. Separation in a Foreign Country. *See* AR 600-8-24, para. 1-29.

1. Normally, officers are not fully separated from OCONUS commands. Rather, these officers are returned to the U.S. and processed for final separation at CONUS-based separation/transfer points.

2. Exceptions.

a. An officer's request for separation in a foreign country may be approved if the foreign government concerned consents.

(1) The officer must obtain all necessary documents for his or her lawful presence in the foreign country prior to separation.

(2) The officer's Army Service Component Command (MACOM) may disapprove the request for overseas separation.

b. The Army may separate officers confined in a foreign penal institution pursuant to the sentence of a foreign court, but there are limits to this exception:

(1) DA must approve separation during confinement;

(2) Foreign authorities must take final action on the case before separation, and

(3) The foreign government concerned must consent to the officer's separation in its territory.

C. Referral for Physical Disability Evaluation. *See* AR 600-8-24, para. 1-24.

1. Triggered when it is determined that an officer being processed for REFRAD, separation, retirement, or elimination has a medical impairment that does not meet medical retention standards.

2. Officers under investigation for an offense chargeable under the UCMJ that could result in dismissal or punitive discharge may not be referred for or continue disability processing unless:

a. The investigation ends without charges;

b. The commander exercising court-martial jurisdiction dismisses charges, or

c. The commander exercising court-martial jurisdiction refers the charge(s) for trial to a court-martial that cannot adjudge a dismissal or punitive discharge.

3. Officers pending certain involuntary REFRAD or involuntary elimination under AR 600-8-24, Ch. 4, or who request resignation for the good of the service or separation, and resignation or retirement in lieu of elimination, will be processed under both AR 600-8-24 and the medical/physical evaluation board system.

a. If the physical disability evaluation results in a finding of physical fitness, the Army Physical Disability Agency will approve the findings for the SA and forward them for processing with the separation action.

b. If the physical disability evaluation results in a finding of physical unfitness, both actions will be forwarded to the SA for determination of appropriate disposition.

4. When an officer is processed for separation or retirement for reasons other than those listed in AR 600-8-24, para. 1-24b (e.g., REFRAD due to civil conviction, elimination, and resignation for the good of the service), then physical disability processing takes precedence.

XI. COMMANDER'S RESPONSIBILITIES.

A. Documentation.

B. Ensure counseling requirements of AR 600-8-24, para. 1-13, are properly completed.

1. Required for commissioned officers with less than 10 years active federal commissioned service.

a. Triggered when such officers submit a request for voluntary REFRAD or an unqualified resignation.

b. Counseling is by the first COL in the officer's chain of command or supervision. Chaplains, JAs, and medical officers will be counseled by a senior officer of their branch in the chain of technical supervision or as specifically designated by their branch.

2. Counseling must include the following:

a. Advice concerning the opportunities available in the military;

b. Discussion of the officer's previously achieved investment in the Army;

c. A determination as to whether the officer has satisfied all applicable service obligations;

d. A determination that the officer is not under investigation or charges, awaiting the results of trial, or being considered for administrative elimination;

e. A determination that the officer is not AWOL, in the confinement of civil authorities, suffering from a severe mental disease or defect, or in default in respect to public property or public funds;

f. Advice encouraging a RA officer to accept an appointment in the USAR; RC officers will be encouraged to retain their commissioned status in the USAR, and

g. The addresses of agencies that can provide the officer with information about USAR career opportunities.

C. Take the Proper Action. In determining what action to take when faced with officer misconduct or poor performance, the commander should decide:

1. Should the officer be retained on AD?

2. Should the officer be eligible for reappointment or recall to AD at some later time?

3. Should the officer lose his or her commission?

XII. CONCLUSION.

CHAPTER F

ADVERSE ADMINISTRATIVE ACTIONS

TABLE OF CONTENTS

I. INTRODUCTION.

Commanders have a spectrum of administrative military personnel actions which they can use to train, motivate, improve, and rehabilitate Soldiers whose performance is unsatisfactory or who exhibit other problems which interfere with duty performance or the unit's mission. If Soldiers fail to respond to motivation and rehabilitation, other administrative tools are available which commanders can use to take appropriate remedial or adverse action, or to separate Soldiers from the Army.

This outline reviews twelve administrative actions short of administrative separation which you can expect to see most often. Appendix A is a chart which lists these actions in a tabular form. Each section also lists the appropriate references (a consolidated list of Army references is provided below

This outline should be supplemented by reference to the applicable regulation and to appropriate local regulations and policies. In particular, when discussing certain adverse administrative actions, this outline frequently makes reference to certain provisions of AR 635-200, Active Duty Enlisted Administrative Separations. For actions involving reserve component Soldiers, readers should use the appropriate provisions of AR 135-178, Enlisted Administrative Separations.

II. CONSOLIDATED LIST OF ARMY REFERENCES.

A. AR 25-400-2, The Army Records Information Management System (ARIMS).

B. DA Pam 25-403, Guide to Recordkeeping in the Army.

C. AR 27-10, Military Justice.

D. AR 190-5, Motor Vehicle Traffic Supervision.

E. AR 380-67, Personnel Security Program.

F. AR 600-8-2, Suspension of Favorable Personnel Actions (FLAGS).

G. AR 600-8-10, Leaves and Passes.

H. AR 600-8-19, Enlisted Promotions and Reductions.

I. AR 600-9, The Army Body Composition Program.

J. AR 600-20, Army Command Policy.

K. AR 600-37, Unfavorable Information.

L. AR 600-85, Army Substance Abuse Program.

M. AR 601-280, Army Retention Program.

N. AR 635-200, Active Duty Enlisted Administrative Separations.

III. DUE PROCESS OF LAW - THE STARTING POINT.

A. The Constitution.

1. Bill of Rights (e.g., Fourth, Fifth, and Sixth Amendments) generally inapplicable to military administrative proceedings.

2. When challenged in court on alleged denial of constitutional due process (Fifth Amendment), military position is there is no constitutional life, liberty, or property interest affected by our administrative actions.

B. Our Regulations.

1. Must follow procedures in regulations—they are more than "guidelines." Regulatory requirements ensure consistency and fairness in the processing of actions and the full development of necessary administrative records. Although federal courts are very hesitant to second guess the armed forces on the substance of decisions, they will grant relief if we fail to follow our own regulations.

2. "Minimum" due process. Even when our regulatory procedures do not have formal due process requirements, commanders should always provide basic due process protections, at a minimum. Soldiers should be afforded notice of the intended action and the reason therefore, as well as an opportunity to be heard.

3. When reviewing past actions, the Courts look at the regulations in effect at the time and any representations made by the agency that rise to a modification in policy, to determine whether the individual received due process and what, if any, remedy they are entitled.

IV. SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS).

A. Reference. AR 600-8-2, Suspension of Favorable Personnel Actions (FLAGS).

1. Other Services.

a. Navy. Not Applicable.

b. Marines. MCO P1070/12 with CH 1 (IRAM).

c. Air Force. AFI 36-2502.

B. Purpose.

1. A suspension of favorable personnel actions (or "flag") is an administrative hold placed on a Soldier which prevents most favorable personnel actions (e.g., promotion, awards, school attendance, payment of reenlistment bonuses, etc.) while the Soldier's status is "unfavorable". A separate flag is required for each investigation, incident or action.

2. A flag itself is not an adverse action. Its purpose is to stay favorable proceedings delaying their effective date until a Soldier is in good standing. Flags can have an adverse effect, however, based on the delayed timing of favorable actions; i.e. missed training opportunities and hampering career progression.

3. Proper flagging is essential to appropriately handling administrative actions. This includes ensuring that flags are removed promptly.

C. Types. There are two types of flags, "transferable" and "nontransferable" actions. The impact of the action will vary depending upon the flag's basis and type:

a. Non-transferable flags. Prevent transfer to another unit; appointment, reappointment, reenlistment, extension, entry on active duty or active duty for training (for reserve personnel); reassignment; promotion or reevaluation for promotion; awards and decorations; attendance at civil or military schools; unqualified resignation or discharge; retirement; advance or

excess leave; payment of enlistment or selective reenlistment bonus; assumption of command; family member travel to an overseas command; and command sponsorship of family members in overseas command. A Soldier flagged with a non-transferrable flag may PCS if it is in the best interest of the Army, decided on a case by case basis (*See* para 2-8, AR 600-8-2).

b. Transferable flags. The flagged Soldier may be transferred to another unit.

D. Requirements for Imposing a FLAG. The regulation requires a commander to impose a flag under the following circumstances:

a. Non-transferable:

(1) Commander's Investigation. When suspect or subject of investigation. Interpreted broadly to include any action that could result in disciplinary action, financial loss or loss of rank/pay/privileges.

(2) Law Enforcement Investigation. When subject of a U.S. Army CID (or service equivalent), military police or civilian law enforcement investigation.

(3) Subject to Adverse Actions. Including: nonjudicial punishment; UCMJ (preferral of charges or pretrial confinement); civilian criminal charges; administrative reduction; nonpunitive reprimand; and absent without leave (AWOL).

(4) Pending administrative separation or discharge.

(5) Pending removal or consideration of removal from command, promotion, or school selection list.

(6) Referred Officer Evaluation Report (OER) or Relief for Cause Non-Commissioned Officer Evaluation Report (NCOER).

(7) Security violations.

(8) Drug abuse or alcohol abuse adverse action.

(9) Non-recommendation for an automatic promotion (Private through Specialist, Chief Warrant Officer 2, First Lieutenant)

(10) Lautenberg Amendment. Soldiers with qualifying conviction of domestic violence.

(11) Family Care Plan. Soldiers who fail to provide and maintain a valid family care plan.

(12) Professional Licensing/Credentialing/Certification (Army Medical Department healthcare workers and veterinarians; Chaplains; and Judge Advocate personnel)

b. Transferable:

(1) Headquarters, Department of the Army (HQDA) directs reassignment of a flagged Soldier;

(2) Punishment phase of non-judicial punishment or court-martial (that does not include confinement or restraint).

(3) APFT (Army Physical Fitness Test) failure;

(4) Non-compliance with Army Body Composition Program.

E. Procedure.

1. Any commander may direct the imposition of a flag.

2. Battalion S1 prepares DA Form 268, Report to Suspend Favorable Personnel Action (FLAG), and submits Standard Installation/Division Personnel System (SIDPERS) transaction. Properly administered, the flag system has two components:

   a. A SIDPERS transaction that codes a Soldier's records in the Army's automated personnel database and prevents favorable personnel transactions.

   b. The battalion adjutant (S1 or equivalent) manages the flagging system at his unit, keeping unit leadership and unit personnel clerks aware of the flag, and permitting lifting the flag when appropriate. The battalion Personnel Action Center (PAC) produces a monthly report for each of its companies, listing all Soldiers with flags and their type. This report should be screened at both battalion (in the PAC) and at unit (company) levels to ensure that all Soldiers who should be flagged are, and those who should have had their flags removed no longer are on the roster. ***Battalion Commander must review and sign report for flags over 6 months old.***

3. The flagging authority, unit commander, or first line supervisor will notify the Soldier in writing within 2 working days.

4. Commanders lift flags when the incident, investigation or action has concluded, using the same form (DA Form 268). The date the Soldier's status changed is the effective date of the suspension's removal.

F. Approval Authority. Any commander or general officer staff head.

G. Appeal. None.

H. Records. DA Form 268 maintained for closed flags for one year. DA Form 268 maintained for one year for all Soldiers discharged while flagged. No permanent record of flag itself, although there may well be a permanent record of the underlying adverse action which required the flag.

V. EXTRA TRAINING OR INSTRUCTION.

A. Reference. AR 600-20, Army Command Policy, paragraph 4-6b; AR 27-10, Military Justice, paragraph 3-3c.

1. Other Services.

a. Navy/Marines. JAGMAN 0103. OPNAVINST 3120.2C, Section 142.2.

b. Air Force. AFI 36-3208.

B. Purpose. An effective, non-punitive, administrative corrective measure used when a Soldier's duty performance has been substandard or deficient.

C. Procedure. No formal procedure.

1. Any leader may order a Soldier to train to overcome a deficiency.

a. Must be directly related to the deficiency.

b. Must be aimed at improving the Soldier's performance.

2. Not punishment; continues until deficiency is overcome.

D. Approval Authority. Any commander. An inherent power of command. May be delegated.

E. Appeal. No specific procedure; *however* "Care should be taken at all levels of command to ensure that training and instruction are not used in an oppressive manner to evade the procedural safeguards applying to imposing nonjudicial punishment." (see Bullying provisions of AR 600-20, para. 4-19).

F. Records. None; *however*. . .

1. "Deficiencies *satisfactorily corrected* by means of training and instruction will not be noted in the official records of the Soldier[] concerned." AR 600-20, paragraph 4-6b(2) (emphasis added).

2. If the problem merits it, consider counseling with a view towards separation and, if appropriate, proceed to separation.

VI. REVOCATION OF PASS PRIVILEGES.

A. Reference. AR 600-8-10, Leave and Passes, Chapter 5, Section XIV; AR 27-10, Military Justice, paragraph 3-3a.

1. Other Services

a. Navy.MILPERSMAN 1050-290 (only via NJP/C-M).

b. Marines. Not Applicable.

c. Air Force. Not Applicable.

B. Purpose. To reinforce training and to maintain good order and discipline.

C. Procedure. No formal procedure.

1. Regular passes usually do not require a DA Form 31 (although one may be used). If a Soldier's pass privileges are revoked, the Soldier's immediate commander or his or her representative should inform the Soldier in writing. If DA Form 31 is used for regular passes, indicate disapproval on the form.

2. Commanders should grant passes (defined as short, nonchargeable, authorized absences from post or place of duty during normal off-duty hours) to those Soldiers whose performance of duty and conduct merits approval. If a Soldier's performance of duty and conduct do not merit approval, do not approve a pass.

D. Approval Authority. Unit commander.

E. Appeal. No special procedures.

F. Records. None required. Consider written counseling with a view towards separation.

VII. COUNSELING WITH A VIEW TOWARDS SEPARATION.

A. Reference. AR 635-200, Active Duty Enlisted Administrative Separations, paragraph 1-16 and Chapter 17.

1. Other Services.

a. Navy. MILPERSMAN 1910-202.

b. Marines. MCO P1900.16F with CH 2 (MARCORSEPMAN).

c. Air Force. AFI 36-3208.

B. Purpose. An administrative prerequisite to many administrative separations; a counseling with a view towards separation serves as a warning to a Soldier to improve performance or face discharge. It also is an attempt by the Army to protect its investment in the Soldier's recruiting and training costs. *Compare with* general counseling (AR 600-20, paragraph 2-3) (basic leadership tool used to ensure Soldiers are prepared to carry out the duties efficiently and accomplish the mission). Performance counseling is a command obligation.

C. Procedure.

1. ***May*** be used at any time. As a prerequisite to processing a Soldier for discharge under the following provisions of AR 635-200, the command **must** complete at least one recorded counseling:

a. Involuntary separation due to parenthood, paragraph 5-8.

b. Personality disorder, paragraph 5-13.

c. Other designated physical or mental condition, paragraph 5-17.

d. Entry level performance and conduct, Chapter 11.

e. Unsatisfactory performance, Chapter 13.

f. Minor disciplinary infractions or a pattern of misconduct, paragraphs 14-12a and 14-12b.

g. Failure to meet body composition standards, Chapter 18.

2. The counseling should formally notify the Soldier of:

a. The date and reason for counseling;

b. The fact that separation may be initiated if behavior continues;

c. The type of discharge that could result from possible separation;

d. The effect of each type of discharge; and

e. The likelihood that the Soldier will be successful in any attempt to have the discharge characterization changed.

D. The command must give the Soldier a reasonable opportunity to overcome the deficiencies. Evidence must document that the deficiency continued after the initial formal counseling.

E. Approval Authority. None. Counseling may be conducted by "a responsible official." AR 635-200, paragraph 1-16b.

F. Appeal. None. However, DA Form 4856 (Counseling Form), includes a section for the Soldier's comments, including a block for "agree" and a block for "disagree".

G. Records.

1. To be used as a prerequisite for separation, each counseling session must be recorded in writing.

2. DA Form 4856 (General Counseling Form) normally should be used for this purpose. Often local overprint form with types of discharge and potential effects will be used.

3. Filed in unit personnel files. No permanent, long-term record, unless incorporated into separation action. Maintain until Soldier departs unit; disposition thereafter per the Army Record Information Management System (ARIMS), AR 25-400-2.

4. Commander's Notebook. Generally may not be used in lieu of counseling given to Soldier. Beware of Freedom of Information Act and Privacy Act access. Generally, no right to access under FOIA if:

a. Prepared voluntarily.

b. Used only as a memory aid by preparer.

5. Article 15 (DA Form 2627) does not satisfy requirement in and of itself. Rather, units should have the legal clerk/legal center prepare a DA Form 4856 to accompany each Article 15.

VIII. REHABILITATIVE TRANSFER.

A. References.

1. AR 635-200, Active Duty Enlisted Administrative Separations, paragraph 1-16c; AR 25-400-2, The Army Records Information Management System (ARIMS).

2. Other Services.

a. Navy/Marines. Not Applicable.

b. Air Force. Not Applicable.

B. Purpose. A Soldier must be recycled or reassigned to a new unit at least once before separation action can be initiated under AR 635-200 for:

1. Entry level performance and conduct, Chapter 11.

2. Unsatisfactory performance, Chapter 13.

3. Minor disciplinary infractions or a pattern of misconduct, paragraphs 14-12a and 14-12b.

C. Procedure.

1. Period required.

a. Trainees: recycle between training companies where feasible; if not, between training platoons.

b. Soldiers in regular units: reassign between battalion-sized or brigade-sized units at least once, with a minimum of three months in each unit, where possible.

2. Due process and appeal rights are very limited. The company-level commander requests the transfer, and the request is processed through command channels to the approval authority. No other formal due process rights for the Soldier.

3. PCS is normally not available. Exception for "meritorious cases where . . . a Soldier [has] potential to be a distinct asset to the Army [with] a change in commanders, associates, and living or working conditions." AR 635-200, paragraph 1-16c(3). GCMCA may authorize PCS within the same command. Requests for transfer to another command may also be submitted to HQDA.

D. Approval Authority.

1. Not specified in AR 635-200, paragraph 1-16. Logically, first commander with authority over the gaining and losing unit.

2. Separation Authority may waive requirement for rehabilitative transfer.

a. Routine, common practice in many units.

b. If the commander wishes to waive the requirement, he/she may do so where "common sense and sound judgment indicate that such transfer will serve no useful purpose". Make sure there is something in the file to *support* the commander's *conclusion* that transfer would:

(1) Create serious disciplinary problems or a hazard to the military mission or to the Soldier, or

(2) Be inappropriate because the Soldier is resisting rehabilitation attempts, or

(3) Rehabilitation would not be in the best interest of the Army as it would not produce a quality Soldier.

E. Appeal. No specific provisions.

F. Records. No specific provisions. In practice, losing unit should document reasons for rehabilitation in counseling with a view towards separation. The Record Retention Schedule – Army (RRS-A) classifies documents related to counseling of rehabilitative transfers as "KEN" or Keep Event No Longer Needed. The triggering "event" is rehabilitative transfer, at which point the documents are forwarded to the gaining activity, whether it is an on or off post transfer.

IX. ADMINISTRATIVE REPRIMAND, CENSURE, OR ADMONITION.

A. References. AR 600-37, Unfavorable Information; AR 25-400-2, The Army Records Information Management System (ARIMS).

1. Other Services.

a. Navy/Marines. JAGMAN 0114 (NJP or Secretarial only).

b. Air Force. AFI 36-3208.

B. Purpose.

1. Documents unfavorable information, i.e. misconduct or poor performance, in official personnel files.

2. Ensures unsubstantiated, irrelevant, untimely or incomplete, unfavorable information is not filed in official personnel files.

3. Be wary of information originating *solely* from intelligence and personnel security files containing derogatory information concerning loyalty and subversion. This information requires special handling (*See*, *e.g.,* AR 600-37, Unfavorable Information, Chapter 4; AR 380-67, Personnel Security Program, Chapter 8).

C. The terms “reprimand”, “censure” and “admonition” are not defined in the regulation and any distinction between the three has been lost. Memoranda of reprimand have become the standard.

D. Procedure.

1. Drafting and initiating the letter.

a. For enlisted Soldiers. Initiated by the person's immediate commander, any higher commander in the chain of command, **a supervisor**, school commandant, general officer, or GCMCA. (all, but the supervisor may direct filing in the MPRJ or “local” file.)

b. For officers. As above, plus **any rating official**, and less “supervisor” and “school commandant.” (Commanders must be senior in grade and date of rank to the recipient.)

2. Contents. (*See* Figure 1, *infra*)

a. Reason for reprimand.

b. A statement that the reprimand was imposed as an administrative measure and not as punishment under Article 15. AR 27-10, paragraph 3-3b(2).

c. If intended for filing in the OMPF, the reprimand and the document referring the reprimand should indicate where the drafter desires to file the reprimand and the length of time the record is intended to remain filed.

d. Notice and rebuttal by the Soldier. AR 600-37, paragraphs 3-2 and 3-6.

(1) Notice (a copy of the reprimand & subsequent information).

(2) Rebuttal.

(3) No right to counsel, but local legal assistance and Trial Defense Services will often try to see Soldiers, time permitting.

E. Appeal. AR 600-37, chapter 7.

1. Local filing. No formal appeal process.

2. OMPF filing. Appealed to DA Suitability Evaluation Board (DASEB).

a. Removal: Document is untrue or unjust. Normally, consideration of these appeals is restricted to SSG and above. The burden rests with the Soldier to provide evidence of a clear and convincing nature.

b. Transfer from P-fiche to R-fiche: Document is untrue, unjust, or the reprimand has served its intended purpose and its transfer would be in the best interests of the Army. Again, appeals normally restricted to SSG and above. The burden is twofold:

(1) must provide substantial evidence that the conditions have been met; and

(2) must wait at least **one year** since imposition of the reprimand and have received at least **one evaluation report other than academic**.

F. Records. Memorandum maintained in local unit files for the period stated in the letter, not to exceed three years, or until reassignment of recipient to a new GCMCA, whichever is sooner, or permanently on the OMPF.

COMPANY A
16TH SIGNAL BATTALION, 29TH SIGNAL GROUP
FORT ARLINGTON, VIRGINIA 11111

ABCD-EFG 7 June 2014

MEMORANDUM FOR PV2 Kathleen B. Nash, Company A, 16th Signal Battalion, 29th Signal Group, Fort Arlington, Virginia 11111

SUBJECT: Written Reprimand UP AR 600-37

1. You are hereby reprimanded for your conduct on 22, 24, 26, and 31 May. On those dates, you were absent without authority from your appointed place of duty. Specifically, on 22, 24, 26, and 31 May, you failed to report to the unit supply room at Company A, 16th Signal Battalion, 29th Signal Group, at the appointed time, 0800, to begin your duties. Furthermore, you were formally counseled on a number of prior occasions and orally admonished for similar offenses.

2. You are expected to be at your appointed place of duty at the appointed time unless excused by proper authority. Your persistent tardiness will not be tolerated in this unit.

3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under UCMJ, Article 15.

4. I intend to file this written reprimand in your unit personnel file. You have 72 hours from the receipt of this reprimand to submit matters in rebuttal or on your behalf. I will withhold my decision on imposing and filing this reprimand until I receive and consider your response.

JOHN SMITH
Captain, SC
Commanding

Figure 1

X. LOCALLY IMPOSED (OR "FIELD") BAR TO REENLISTMENT.

A. Reference. AR 601-280, Army Retention Program, Chapter 8, and Army Directive 2012-03 (Army Retention Initiatives) to be included in the next revision of AR 601-280.

1. Other Services.

a. Navy. BUPERSINST 1610.10B.

b. Marines. MCO P1040.31 (Career Planning & Development Guide).

c. Air Force. AFI 36-2606.

B. Purpose.

1. "Only [S]oldiers of high moral character, personal competence, and demonstrated adaptability to the requirements of the professional [S]oldier's moral code will be reenlisted in the Active Army. . . . Soldiers who cannot, or do not, measure up to such standards . . . will be barred from further service . . ." AR 601-280, para 8-2a.

2. A potentially rehabilitative tool: puts pressure on Soldier to shape up; sets up Soldiers who fail to do so for separation.

3. Discretionary grounds for bar to reenlistment.

a. Untrainable Soldiers, often identified by failure to perform the basic tasks required of their PMOS or loss of PMOS qualification with inability to be retrained. This includes Soldiers that meet the minimum standard, but lack potential to supervise.

b. Unsuitable Soldiers, undefined in the regulation.

c. AR 601-280, paragraph 8-4d, lists 21 examples, including, but not limited to: tardiness; loss of clothing or equipment; substandard personal appearance or hygiene; indebtedness; nonjudicial punishment; traffic violations; inability to follow orders; apathy; cannot adapt to military life; failure to manage personal affairs; behavior which brings discredit upon the unit or Army; failure to pass APFT or weapons qualification; noncompetitive for promotion; excessive sick calls without medical justification; lateness returning from pass/leave; causing trouble in the civilian community; loss of PMOS when reclassification inappropriate; and immoral acts.

4. Mandatory grounds for bar to reenlistment when discharge under administrative procedures is not warranted. AR 601-280, paragraph 8-4.

a. Single Soldier and dual-service couples with dependent family members when Soldier has been counseled IAW AR 600-20, Chapter 5, and does not have an approved family member care plan on file within 2 months.

b. Single Soldiers and dual-service couples with dependent family members with instructions of overseas assignment, if unable to provide the name of a guardian who will care for their family members in CONUS in the event of evacuation from overseas.

c. Loss of PMOS due to fault of the Soldier.

d. Soldier denied Command List Integration for promotion by unit commander.

e. Soldiers with an incident involving the use of illegal drugs or alcohol within the current enlistment resulting in an officially filed reprimand, a finding of guilty at an Article 15, a civilian conviction, or a court-martial conviction.

f. Soldiers with 2 or more separate field grade Article 15’s resulting in a finding of guilty (during the current enlistment).

g. Soldiers AWOL more than 96 hours during the current enlistment.

5. Commander's option: Commander will initiate bar to reenlistment or proceed directly to separation action UP 635-200. AR 601-280, paragraph 8-4e.

a. Soldiers who do not make satisfactory progress in the Army Body Composition Program (*See* AR 600-9).

b. Soldiers who fail two consecutive APFTs (*see* AR 350-41).

c. Soldiers who are removed for cause from a noncommissioned officer education system (NCOES) course.

C. Procedure. AR 601-280, paragraph 8-5.

1. Initiating the bar.

a. Any commander in Soldier's chain of command may initiate.

b. Bars are usually not appropriate during a Soldier's first 90 days or last 30 days in a unit. If circumstances warrant, Soldier may be barred, but the certificate should explain the timing.

c. Use DA Form 4126-R.

2. Notice and rebuttal by the Soldier.

a. If Soldier requests, allow seven days for comment. An extension may be granted by the Commander on a case-by-case basis.

b. Rebuttal attached to DA Form, 4126-R.

c. No right to counsel. TDS or legal assistance will generally try to see Soldier.

3. Initiating commander attaches Soldier's rebuttal (if any) and forwards through chain of command to approval authority. Personal action by each commander or acting commander required. Any commander may disapprove the action and return it to the initiating commander.

4. Restrictions.

a. May not approve bar after Soldier separates from active duty.

b. May not enter bar in Soldier's records after Soldier separates from active duty.

c. May not retain Soldier involuntarily past ETS in order to approve bar.

5. Unit level commander informs Soldier that the bar was reviewed and what action was taken using back side of DA Form 4126-R, Bar Certificate, if bar is approved.

6. Periodic review by the unit commander.

a. At least once every three months after date of approval, and 30 days before the Soldier's PCS or ETS.

b. At the three month periodic review, if the command does not intend to lift the bar, it must advise Soldiers that separation action will ensue if the bar is not lifted at the completion of the second three month review.

c. Must lift bar or initiate separation under AR 635-200 after second review (unless Soldier has more than 18 years, but less than 20 years, or active federal service). AR 601-280, paragraph 8-6. These Soldiers will be required to retire on the last day of the month when retirement eligibility is attained.

D. Approval Authority. Depends upon Soldier's active Federal service (AFS) on date of bar initiation. (Note: many commands may improperly rely upon previous practice, when AFS at ETS controlled.)

1. Less than 10 years AFS on date bar was initiated: LTC commander in chain of command or SPCMCA.

2. Ten years or more AFS on date bar was initiated: general officer in chain of command or GCMCA.

3. Commander who initiates bar cannot approve bar.

4. If bar initiated above company level, approval authority must be GCMCA, GO in command, or HQDA.

E. Appeal.

1. Soldier has seven days to submit appeal.

2. If otherwise qualified, Soldier will not be involuntarily separated while appeal is pending.

3. Appellate authority. Depends upon Soldier's AFS on date of bar initiation and approval authority.

a. Less than 10 years AFS on date bar was initiated: general officer in command or GCMCA.

b. Soldiers with 10 years or more AFS on date of bar initiation, or bar approved by GCMCA/GO in command: HRC.

c. Bar approved by HRC: no appeal.

F. Records. DA Form 4126-R (still) filed permanently in (active duty) Soldier's Military Personnel File (MPF) (formerly Military Personnel Records Jacket (MPRJ)). Reserve component Soldiers still use the MPRJ. Approved bar annotated on Soldier's DA Form 2-1.

XI. THE QUALITATIVE MANAGEMENT PROGRAM (OR "QMP") BAR TO REENLISTMENT.

A. Reference. AR 635-200, Chapter 19.

1. Other Services.

a. Navy. BUPERINST 1610.10B.

b. Marines. MCO P1040.31 (Career Planning & Development Guide).

c. Air Force. AFI 36-3208.

B. Purpose. Eliminate Soldiers who are either unproductive or unlikely to be promoted. Meant to enhance the quality of the career enlisted force, selectively retaining the best qualified, denying continued service to nonproductive Soldiers and encouraging Soldiers to maintain their eligibility for further service. Not intended to be rehabilitative; in reality a fast track to separation.

C. Procedure.

1. DA promotion boards annually review the files of all Soldiers in the grades of Staff Sergeant (E-6) or higher. The boards select Soldiers who are candidates for QMP.

2. Notification packet mailed from DA to installation or overseas command, who forwards packet to first LTC (or higher) commander in Soldier's chain of command. Commander must serve packet on Soldier expeditiously. Packet contains:

    a. Instruction letter to commander,

    b. Instruction letter to Soldier,

    c. Document(s) which triggered the decision, and

    d. Soldier's statement of option.

3. Using DA Form 4941-R, a Soldier has seven days from date of receipt to elect one of five options:

    a. Appeal;

    b. Do nothing and face separation;

    c. Request immediate voluntary discharge under AR 635-200 and forfeit any chance to receive separation pay;

    d. Retire, if retirement eligible;

    e. Extend to retirement eligibility, if memorandum date is between 17 years, 9 months AFS and 20 years AFS.

D. Approval Authority. DA. Action has already been approved when it is received in the field. Soldier's action is just a statement of option, and perhaps an appeal.

E. Appeal.

1. Grounds.

a. Material error in Soldier's record when reviewed by selection board.

b. Improved duty performance.

2. Must be submitted to chain of command w/in 60 days of completing DA Form 4941-R.

3. Must arrive at HRC w/in 30 days of receipt from Soldier.

4. Due to limitations on access to commanders and legal advisors, USAR AGR Soldiers have 90 days to submit DA Form 4941-R to chain of command. Command has 30 days of receipt from Soldier to submit comments to HRC.

5. Considerations on appeal. Appeals, particularly those submitted on the basis of improved duty performance, without strong, personal chain of command support are rarely successful.

F. Records. Maintained by DA as part of OMPF.

XII. THE ARMY BODY COMPOSITION PROGRAM.

A. Reference. AR 600-9, The Army Body Composition Program; AR 635-200, Active Duty Enlisted Administrative Separations.

1. Other Services.

a. Navy. OPNAVINST 6100.6H.

b. Marines. MCO 6110.3.

c. Air Force. AFI 40-502.

B. Purpose. To ensure that all Soldiers:

1. Are able to meet the physical demands of their duties under combat conditions; and

2. Present a trim military appearance at all times.

C. Procedure.

1. Commanders and supervisors will monitor Soldiers to ensure that they maintain proper weight. At minimum, Soldiers will be weighed when they take the APFT or at least every 6 months. Commander may direct weight check if a Soldier presents an unmilitary appearance.

2. All Soldiers scheduled to attend professional military schooling will be screened before departure. If the Soldier exceeds the screening table weight, he will not be allowed to depart unless his commander determines that he meets body fat composition standards. Soldiers arriving overweight at any DA select school or those who PCS to a professional military school will be processed for disenrollment.

3. Soldiers exceeding the screening table weight will be tested for body fat using the “tape” test.

4. Commanders will flag overweight personnel IAW AR 600-8-2. Flagged personnel:

a. Are nonpromotable;

b. Cannot receive awards and decorations;

c. Will not be assigned to command positions;

d. Will not be authorized to attend professional military schooling (provided GCMCA finds the Soldier's failure to meet body fat standards was the result of a lack of self-discipline and approves disenrollment, *see* AR 600-9, paragraph 3-2d(4)); and

e. Will not be allowed to reenlist or extend unless:

(1) The GCMCA approves an extension of a Soldier who either has a temporary medical condition that precludes weight loss or is pregnant and otherwise qualified for reenlistment (AR 600-9, paragraph 3-3b); or

(2) The GCMCA approves an extension of a Soldier who has completed a minimum of 18 years active federal service. Application for retirement will be submitted at the time the extension is approved. (AR 600-9, paragraph 3-3e).

5. Flagged personnel will be enrolled in the Army Body Composition Program (ABCP).

a. The loss of 3-8 pounds or 1% of body fat per month is deemed to be satisfactory progress. Overweight Soldiers who fail to make satisfactory progress within 6 months will either be processed for a bar to reenlistment or will have separation proceedings initiated against them. Commander must notify the Soldier in writing that separation is being considered, and must consider the Soldier's response.

b. Overweight Soldiers who are reenrolled in the ABCP within 12 months of successfully completing an enrollment in the AWCP will be processed for separation, provided no medical condition exists. *See* AR 635-200, paragraph 18-2a(2).

c. The ABCP provides a "grace period" for second-time enrollees. Soldiers are afforded 90 days to achieve standard when reenrolled in the ABCP after 12 months, but within 36 months from the date of previous removal from the ABCP if no medical cause.

6. There are specific requirements to refer the Soldier for medical evaluation/screening and nutrition counseling. Additionally, the unit is responsible for properly weighing and measuring the individual each month to monitor progress. In order to be removed from the program, the Soldier must meet the body composition standards (body fat) and not merely meet the screening table weight.

D. Approval Authority.

1. Authority to place a Soldier in the weight control program: company-level commander.

2. Separation authority for active-component enlisted Soldiers.

a. LTC-level commander (if using notification procedures) or SPCMCA.

b. Soldiers with six or more years of service may elect to have their case heard before an administrative board.

E. Appeal. No specific procedure.

F. Records.

1. Records will be maintained in unit (Bn S1/PAC) files as active during period that individual is in the program. Upon transfer, separation, or satisfactory completion of the program files in MPRJ.

2. Upon transfer from one unit to another, the losing commander will forward a memorandum to the gaining commander indicating the status of the Soldier's participation in a body composition program, and forward any records.

XIII. DRUNK OR DRUGGED DRIVING - ADMINISTRATIVE SANCTIONS.

A. Reference. AR 190-5, Motor Vehicle Traffic Supervision; AR 600-85, Army Substance Abuse Program.

1. Other Services.

a. Navy/Marines. Not Applicable.

b. Air Force. AFI 36-810.

B. Purpose. Drunk driving (including drugged driving) administrative sanctions operate in concert with the Army's Alcohol and Substance Abuse Program (ASAP) to prevent alcohol and drug abuse, identify abusers, rehabilitate those abusers who warrant retention, and separate those who do not.

C. Procedures.

1. Withdrawal of driving privileges. AR 190-5, paragraph 2-4a (3).

a. **Suspension** is immediate pending resolution of drunk driving charges, regardless of the geographic location of the incident for all DoD affiliates, brought in the following circumstances:

(1) Refusal to take or complete a lawfully requested chemical test to determine contents of blood for alcohol or other drugs;

(2) Operating a motor vehicle with a blood alcohol content (BAC) of 0.08% by volume or higher or in violation of the law of the jurisdiction that is being assimilated on the installation;

(3) Operating a motor vehicle with a BAC of at least 0.05% by volume but less than 0.08% blood alcohol by volume in violation of the law of the jurisdiction in which the vehicle is being operated, if the jurisdiction imposes a suspension solely on the basis of the BAC; or

(4) On an arrest report or other official documentation of the circumstances of an apprehension for intoxicated driving.

b. **Limited hearing**. AR 190-5, paragraph 2-6. A person whose driving privileges are suspended has 14 days from the notice of suspension in which to request a hearing. If requested, the installation commander or designated hearing officer must conduct the hearing within 14 days. The hearing officer must issue a decision within 14 duty days of the hearing. If no decision has been made by that time full driving privileges will be restored until the individual is notified of the decision. Issues addressed:

(1) Did the law enforcement official have reasonable grounds to believe the person was DWI or in actual physical control of the motor vehicle while under the influence of alcohol or other drugs?

(2) Was the apprehension or citation lawful?

(3) Was the person lawfully requested to submit to a test for alcohol or other drug content of blood, breath, or urine and was he informed of the consequences of refusal to take or fail to complete such test?

(4) Did the person refuse to submit to the test for alcohol or other drug content of blood, breath, or urine? Did the person fail to complete the test? Do the results of a completed test indicate a BAC of .08% or higher? Do the results indicate the presence of other drugs?

(5) Was the testing method used valid and reliable? Were the results accurately evaluated?

c. **Revocation** for period of one year mandatory on conviction or other findings that confirm the charge. AR 190-5, paragraphs 2-4b and 2-6c.

(1) Lawfully apprehended for DWI and refused to submit to or to complete a test to measure the alcohol content in the blood, or detect the presence of any other drug.

(2) Conviction, NJP, or military or civilian administrative action resulted in suspension or revocation of a driver's license for DWI.

(3) Compute from date of original suspension, exclusive of periods when full driving privileges restored pending resolution of charges.

d. **Restricted privileges**. AR 190-5, paragraph 2-10. Specifically tailored to permit the subject to drive under restricted conditions (e.g., for mission requirements and unusual personal or family hardship).

(1) May be requested at any time.

(2) GCMCA acts on all DWI/DUI requests for restricted privileges.

(3) Such privileges will not be granted to any person whose DL or right to operate a motor vehicle is under suspension or revocation by a state, federal, or host nation licensing authority.

2. Referral for evaluation by the alcohol and substance abuse program. AR 190-5, paragraph 2-8.

a. Mandatory (within 14 days).

b. Enrollment results IAW AR 600-85.

3. General Officer Memorandum of Reprimand (GOMOR). AR 190-5, paragraph 2-7. (*See* Figure 2, *infra*).

a. Mandatory. Must be issued to **all** active duty Soldiers.

b. General officer or officer frocked to the grade of Brigadier General may issue.

c. Based on:

(1) Conviction of intoxicated driving or driving under the influence of alcohol or other drugs, on or off the installation;

(2) Refusal to take or failure to complete a lawfully requested test to measure alcohol or drug content of the blood, breath, or urine, either on or off the installation, when there is reasonable belief of driving under the influence of alcohol or drugs;

(3) Driving or being in physical control of a motor vehicle on post when the blood alcohol content is 0.08% or higher, irrespective of other charges, or off post when the blood alcohol content is in violation of state laws; or

(4) Driving or being in physical control of a motor vehicle, either on or off the installation, when lawfully conducted chemical tests reflect the presence of illegal drugs.

d. Filing is IAW AR 600-37. The General Officer may:

(1) Decide not to file the GOMOR,

(2) Decide to file the GOMOR in the Soldier's Unit Personnel File, or

(3) Decide to file the GOMOR in the Soldier's OMPF.

4. Consider other administrative actions. AR 190-5, paragraph 2-7b.

a. Administrative reduction per AR 600-8-19.

b. Bar to reenlistment per AR 601-280.

c. Administrative separation per AR 635-200.

Department of the Army
52d Infantry Division (Mechanized) and Fort Arlington
Fort Arlington, Virginia 11111-1111

ABCD-EF-G 7 June 2014

MEMORANDUM FOR 1LT John Smith, Company A, 2d Battalion, 11th Infantry, Fort Arlington, Virginia 11111

SUBJECT: Written Reprimand UP AR 600-37

1. I herby reprimand you for your conduct on 1 May 2014. At approximately 2200 on 1 May 2014, you were apprehended while driving your privately owned vehicle on Fort Arlington. The arresting officer cited you for driving under the influence of intoxicating liquor. Subsequently, on 3 June 2014, you were convicted of that offense after a trial on the merits in the Federal Magistrate's Court.

2. Your conduct demonstrates a serious disregard for your own safety and that of others. Such conduct raises grave doubts as to whether you can perform your duties. Your lack of judgment in this incident calls into question whether you deserve the special trust and confidence that the President of the United States has reposed in you as a commissioned officer. I charge you to conduct yourself in a manner that is worthy of an officer in the United States Army.

3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under Article 15, UCMJ.

4. I intend to file this written reprimand in your Official Military Personnel File. You have 72 hours from the receipt of this reprimand to submit matters in rebuttal or on your behalf. I will withhold my decision on imposing and filing this reprimand until I receive and consider any response you may make.

RICHARD J. JOHNSON
Major General, USA
Commanding

Figure 2

XIV. REMOVAL FROM PROMOTION LIST.

A. Reference. AR 600-8-19, Chapter 2, Section II, Processing Enlisted Promotion to Private E-2, Private First Class, and Specialist; Chapter 3, Section XI (Conducting a Removal Board for Soldiers on recommended List) and Chapter 4, Section V (Processing Removal from a Centralized Promotion List).

1. Other Services.

a. Navy. DODI 1320.4 and 1320.12.

b. Marines. MCO P1070/12 with CH 1 (IRAM).

c. Air Force. AFI 36-2501 & AFI 36-2502.

B. Purpose. To take administrative action against those Soldiers who have been selected for promotion, but whose conduct or duty performance no longer merits promotion.

C. Procedure.

1. Decentralized Promotions: Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4). Eligible Soldiers will be automatically promoted, without waivers. Unit commander may promote eligible Soldiers, with waivers, provided they have promotion capability within their percentage waiver restriction. Unit commander may also decide to withhold automatic promotion by submitting a DA Form 4187 in the month preceding the automatic promotion. DA Form 4187 denying promotion will be submitted NLT than the 20th day of the month preceding the automatic promotion.

2. <u>Semi-Centralized Promotions:</u> Soldiers selected for promotion to SGT (E-5) and SSG (E-6). (Local board considers Soldiers for promotion to SGT and SSG. Field grade commander of unit authorized LTC commander or higher approves the list.).

a. The command will inform Soldiers through normal channels of the removal action in writing NLT 5 duty days after removal. Immediate removal from the promotion list without further due process is required under certain circumstances listed in paragraph 3-26e, including:

(1) Failure to Qualify for cause for MOS-required Security Clearance,

(2) Failure to reenlist or extend to meet a service remaining obligation,

(3) Local or DA Bar to Reenlistment,

(4) Reduction in Grade,

(5) Signing a Declination of Continued Service Statement,

(6) Enrolled in the Army Body Composition Program,

(7) Mandatory reclassification as result of inefficiency or misconduct,

(8) Release from active duty or enlisted status to attend a Warrant Office Candidate Course or Office Candidate School,

(9) Failure to maintain the minimum promotion points required to compete,

(10) Denied waiver to reenlist,

(11) When the promotion authority determines that the Soldiers promotion packet contains fraudulent documents,

(12) Soldier fails to complete training required for MOS for cause or academic reasons,

(13) When promotion authority has approved removal board recommendation that soldier be removed from a recommended list,

(14) Erroneous selection (that is, did not meet one of more of the eligibility criteria),

(15) Soldier refuses (in writing) to attend the required NCOES course (when a SGT (P) fails to complete WLC within 270 days post deployment,

(16) Failure of Record APFT, and

(17) Dropped From Rolls as a Deserter.

b. In addition to these conditions the following adverse actions require removal of a Soldier from a recommended list:

(1) Conviction by court-martial, including summary court-martial,

(2) Nonjudicial punishment imposed under provision of Article 15, UCMJ (not including summarized proceedings), regardless of whether the punishment is suspended,

(3) Initiation of administrative separation proceedings under the provisions of AR 635-200, and

(4) Officially filed memoranda of reprimand.

c. A removal board UP AR 600-8-19, paragraph 3-28, will be convened if immediate removal is not justified, as stated above, under paragraphs 3-26e or 3-26f, provided the soldier receives written explanation for the proposed removal 15 days prior.

(1) AR 15-6 procedures do not apply.

(2) Commander will give at least 15 days written notice to Soldier.

(3) Soldier may be present and recorder will arrange for presence of requested witnesses, if reasonably available.

(4) Recorder will provide statements of witnesses who cannot attend the board to the Soldier and the board members.

(5) Soldier may:

(a) Appear personally or decline to appear;

(b) Challenge members for cause;

(c) Request any reasonably available witness whose testimony he/she believes pertinent;

(d) Question witnesses;

(e) Present written affidavits of witnesses unable to appear; and

(f) Remain silent, make a sworn or unsworn statement, and submit to examination by the board.

(6) The board will:

(a) Fully and impartially evaluate the case,

(b) Make a recommendation, and

(c) Prepare a written report and submit it to the promotion authority.

(7) The promotion authority will approve or disapprove the board's recommendation and notify the Soldier of his decision. The promotion authority may lessen but not increase severity of board's recommendation.

(8) A new board may be directed if the promotion authority determines that the board failed to consider all available evidence in the case or there was an error in conducting the board that has a material adverse effect on an individual's substantial rights if the error cannot be corrected without prejudice to the Soldier.

3. Centralized Promotions: Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9). (Soldiers selected for promotion by DA-level board.)

a. Commanders may recommend removal from a DA list. Removal may be based on substandard duty performance. The recommendation for removal must be fully documented and justified.

b. Commanders must submit a recommendation for removal if the Soldier is flagged due to noncompliance with AR 600-9 (Army Body Composition Program).

c. Removal without referral to the Soldier (AR 600-8-19, para 4-16a(2)). Commanders will notify CDR, HRC, by message for immediate removal of any Soldier who has been:

(1) Reduced,

(2) Discharged,

(3) Dropped from the rolls,

(4) Approved for retirement,

(5) Barred from reenlistment due to signing a declination of continued service statement, AWOL, local bar, or court-martial during current enlistment,

(6) Was considered in error,

(7) Was recommended by an approved reduction board to be removed from a promotion list,

(8) Declines promotion in accordance with this regulation,

(9) Is defined as failing to attend, having failed to complete for cause or academic reasons or being denied enrollment to the required NCOES course for cause, or

(10) Is a SFC(P) or MSG(P) who lost his/her security clearance for cause, or is permanently disqualified from receiving a security clearance.

(11) Has a qualifying conviction for domestic violence under the Lautenberg Amendment IAW AR 600-20.

d. Other cases. If the reason for removal is not listed in paragraph 4-16a(2), the recommendation for removal must be referred to the Soldier and the Soldier must be given 15 days to submit matters in rebuttal.

(1) Upon initiation, must impose flag. Once imposed the flag can only be removed by HQDA. *See* AR 600-8-2, paragraph 1-12c.

(2) Forward recommendation and Soldier's rebuttal will be submitted for review through command channels to the GCMCA.

(3) Recommendation may be disapproved at any level of command. The disapproval will be returned through command channels to the originator with the reason for disapproval.

(4) DA makes final decision.

D. Approval Authority.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4): unit commander.

2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6): field grade commander of unit authorized a LTC commander or higher.

3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9): CDR, HRC.

E. Appeal. No specific procedure. Soldiers removed from recommended list and later "completely" exonerated will be reinstated. To be completely exonerated, the action that caused the initial removal must have been erroneous or should not have been imposed so the Soldier is free of any blame or accusation.

F. Records.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4). Maintain copy of enlisted advancement report and all DA Forms 4187 in unit (battalion) current file area (CFA) until the completion of action. When no longer needed for conducting business, then retire to Records Holding Area/Army Electronic Archive (RHA/AEA).

2. Documents relating to removal from promotion lists for enlisted selection boards held in offices other than those having Army-wide responsibility and in TOE Units should be kept in CFA until the record is 5 years old, and then destroyed. This applies to files associated with both semi-centralized and centralized promotions.

3. Files held at offices having Army-wide responsibility will be kept in CFA until no longer needed for conducting business, then retired to RHA/AEA. The RHA/AEA will transfer to the National Archives when record is 20 years old.

XV. ADMINISTRATIVE REDUCTION FOR MISCONDUCT OR INEFFICIENCY.

A. Reference. AR 600-8-19, Chapter 10.

1. Other Services.

a. Navy. Not Applicable.

b. Marines. MCO P1400.32D (MARCORPOMAN).

c. Air Force. AFI 36-2503.

B. Purpose.

1. Misconduct. A Soldier convicted by a civil court (domestic or foreign) or adjudged a juvenile offender by a civil court (domestic or foreign) will be reduced or considered for reduction. AR 600-8-19, paragraph 10-3a.

2. Inefficiency. "Inefficiency is a demonstration of characteristics that shows that the person cannot perform duties and responsibilities of the grade and MOS. Inefficiency may also include an act or conduct that clearly shows that the Soldier lacks those abilities and qualities normally required and expected of an individual of that grade and experience. Commanders may consider misconduct, including conviction by a civil court, as bearing on inefficiency. A Soldier may be reduced under this authority for long-standing unpaid personal debts that he or she has not made a reasonable effort to pay." AR 600-8-19, paragraph 10-5.

C. Reduction Authorities.

1. SPC/CPL and below - Company, troop, battery, and separate detachment commanders.

2. SGT and SSG - Field grade commander of any organization authorized a LTC or higher grade commander.

3. SFC, MSG, and SGM - Commanders of organizations authorized a COL or higher grade commander.

D. Procedure.

1. Civil Court Conviction (domestic or foreign, or adjudication as a juvenile offender). AR 600-8-19, Table 10-2.

a. Soldier will be reduced to PVT, E-1, if sentence includes death or confinement for one year or more (not suspended). Board action not required. Reduction proceeds regardless of appeal status. If the conviction is reversed the Soldier will be reinstated.

b. The command will consider reducing the Soldier (one or more grades) if sentenced to confinement for more than 30 days but less than one year (not suspended) or confinement for one year or more (suspended). Board action not required to reduce one grade. However board action required for all Soldiers (except PFC and below) when reducing a Soldier more than one grade.

c. The command may consider reduction for all other offenses. Board action required for SGT or above and SPC/CPL when seeking to reduce the Soldier more than one grade.

2. Inefficiency. AR 600-8-19, paragraphs 10-5 and 10-6.

a. Soldier cannot perform duties and responsibilities of the grade and MOS. Inefficiency includes long standing unpaid debts that the Soldier has not made a reasonable effort to pay.

b. Command must document inefficiency. Should establish a pattern of inefficiency rather than identify a specific incident. This convention cannot be used to reduce Soldiers who have been acquitted at court-martial, in lieu of Article 15, UCMJ, or to reduce Soldiers for a single act of misconduct.

c. Soldier must have been in unit at least 90 days.

3. Soldier gets notice and opportunity to respond.

a. SPC/CPL - board when reducing more than one grade.

b. SGT and above - reduction board is required.

4. Reduction Boards. AR 600-8-19, paragraph 10-7.

a. Must have both officers and enlisted members.

b. At least three voting members.

c. Members unbiased.

d. Recorder without vote appointed.

e. Board has officer or enlisted Soldier or both of same sex as Soldier being considered for reduction.

f. For inefficiency cases only, one board member will be familiar with Soldier's MOS or field of specialization.

g. If Soldier is a minority and requests (in writing) a minority member on board, generally must provide a minority member.

E. Appeal.

1. SSG and below - next higher authority.

2. SFC and above - first general officer in chain of command.

F. Records. RRS-A is the same as that for files associated with removing Soldiers from promotion lists.

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

POSITIVE TOOLS FOR PROMOTING GOOD ORDER AND DISCIPLINE

	COMMUNICATE	COUNSELING	TRAINING OR INSTRUCTION	BUDDY TEAMS	ANY NUMBER OF OTHER TOOLS…
Grounds for Action	Need to communicate with Soldier	Need to communicate with Soldier	Need to improve Soldier	Need to improve Soldier	
Ultimate Result	Soldier becomes a better Soldier	Soldier becomes a better Soldier	Soldier becomes a better Soldier	Soldier becomes a better Soldier	Soldier becomes a better Soldier
Regulation	FM 6-22; AR 600-20	FM 6-22; AR 600-20	AR 600-20, para 4-6b	FM 6-22; AR 600-20	FM 6-22; AR 600-20
Who Initiates	Any leader	Any leader	Any leader	Any leader	Any leader
Board hearing	No	No	No	No	No
Entitled to Counsel	No	No	No	No	No
SJA Review	No	No	No	No	No
Approval Authority	"[I]nherent power of command."	"[I]nherent power of command."	"[I]nherent power[] of command."	"[I]nherent power of command."	"[I]nherent power of command."
Appeal Authority	No formal appeal	No formal appeal	No formal appeal	No formal appeal	No formal appeal

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

TOOLS FOR PROMOTING GOOD ORDER AND DISCIPLINE – ADVERSE ADMINISTRATIVE ACTIONS

	ORAL ADMONITION	WRITTEN COUNSELING	CORRECTIVE TRAINING	REVOCATION OF PASS PRIVILEGES	SUSPENSION OF FAVORABLE PERSONNEL ACTION
Grounds for Action	Misconduct or unsatisfactory performance	Misconduct or unsatisfactory performance	Soldier deficient in any aspect of duty or conduct	Soldier deficient in any aspect of duty or conduct	Other adverse action contemplated or investigation pending
Ultimate Result	Soldier corrects the problem	Soldier corrects the problem	Soldier corrects the problem	Soldier not permitted to leave post or place of duty during normal off-duty hours	Many favorable personnel actions barred temporarily
Regulation	FM 6-22; AR 600-20	FM 6-22; AR 600-20	AR 600-20, para 4-6b; AR 27-10	AR 600-8-10, para 5-27	AR 600-8-2
Who Initiates	Any leader	Any leader	Any leader	Any leader	Commander or GO staff head
Board hearing	No	No	No	No	No
Entitled to Counsel	No	No	No	No	No (but see AR 27-3, para 3-6g(4)(i))
SJA Review	No	No	No	No	No
Approval Authority	"[I]nherent power of command."	"[I]nherent power of command."	"[I]nherent power of command."	Unit Commander	Cdr or GO staff head
Appeal Authority	No formal appeal	No formal appeal	No formal appeal	No formal appeal	No formal appeal

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

	WRITTEN ADMINISTRATIVE REPRIMAND/ADMONITION/CONCERN	GENERAL OFFICER MEMORANDUM OF REPRIMAND	LOCAL (OR FIELD) BAR TO REENLISTMENT	DA OR QMP BAR TO REENLISTMENT
Grounds for Action	Misconduct or unsatisfactory performance	Misconduct or unsatisfactory performance	Untrainable, unsuitable, PT failure, NCOES RFC, weight control failure; [no family care plan or no guardian, if applicable]	Moral or ethical problems; declining performance; no potential for continued service
Ultimate Result	Written reprimand may be filed in Soldier's permanent records	Written reprimand may be filed in Soldier's permanent records	Soldier can't reenlist, and may face separation action in six months	Soldier will be separated in 90 days, unless appeal successful
Regulation	AR 600-37, chap 3	AR 600-37, chap 3	AR 601-280, chap 8	AR 635-200, chap 19
Who Initiates	Cdr, supervisor (enl) or rater (off), school cmdt	Cdr, supervisor (enl) or rater (off), school cmdt, GO or GCMCA	Any commander	SSG & +: all records reviewed automatically by HQDA promo boards
Board hearing	No	No	No	Record review; see above
Entitled to Counsel	No (but see AR 27-3, para 3-6g(4)(j))	No (but see AR 27-3, para 3-6g(4)(j))	No (but see AR 27-3, para 3-6g(4)(f))	No (but see AR 27-3, para 3-6g(4)(f))
SJA Review	No	No	No	No
Approval Authority	OMPF: GO or GCMCA	OMPF: GO or GCMCA	<10 yrs svc: LTC cdr; >10: GO or GCMCA	HQDA promotion selection board
Appeal Authority	OMPF: DASEB	OMPF: DASEB	<10 yrs svc: GO or GCMCA; >10 yrs: DA	Commander, US Army Enlisted Records Center

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

TOOLS FOR PROMOTING GOOD ORDER AND DISCIPLINE – ADVERSE ADMINISTRATIVE ACTIONS

	REMOVAL FROM SGT OR SSG PROMOTION LIST	REMOVAL FROM SFC, MSG, OR SGM PROM LIST	REMOVAL FROM OFFICER PROMOTION LIST	REDUCTION FOR INEFFICIENCY (ENLISTED)	REDUCTION FOR CIVIL CONVICTION (ENLISTED)
Grounds for Action	Poor duty perf, Art. 15 punishment; pending discharge; 19 other grounds	Substandard duty performance; 11 other grounds	Referred OER or AER, Art. 15, OMPF reprimand; weight control failure; other derogatory info	Unable to perform duties & responsibilities required of rank and MOS	Any civilian conviction. Mandatory if confined for 1 yr or more (unsuspended)
Ultimate Result	Soldier is removed from promotion standing list			Soldier is reduced one rank	Soldier is reduced one or more ranks
Regulation	AR 600-8-19, chap 3	AR 600-8-19, chap 4	10 U.S.C. § 629(a); AR 600-8-29	AR 600-8-19, chap 10	
Who Initiates	Any commander	Any commander	Any commander	Any commander	Any commander
Board hearing	Yes (not full AR 15-6 board)	No	DA Promotion Review Board considers paper case	Yes, if Soldier is SGT or above, unless reduction is for unsuspended sentence of confinement for one year or more	
Entitled to counsel	No	No	No	Yes (provided by Trial Defense Service)	
SJA Review	No	No	No	No	No
Approval Authority	LTC-level commander	DA Standby Advisory Board	The Secretary of the Army	PV2-CPL: company level commander SGT-SSG: field grade commander SFC-CSM: COL or higher commander	
Appeal Authority	No formal appeal	No formal appeal	No formal appeal	Next higher cdr for SSG & below First GO for SFC & above	

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

	INVOLUNTARY MOS RECLASSIFICATION	FLYING EVALUATION BOARD	ADVERSE NCOER/OER	RELIEF FOR CAUSE	SUSPENSION OR REVOCATION OF SECURITY CLEARANCE
Grounds for Action	Misconduct, loss of qualifications, medical reasons, conviction	When a pilot's performance is doubtful, including misconduct, unsatisfactory performance, and lack of proficiency	Unsatisfactory performance, misconduct, lack of promotion potential	Failure in the performance of duty such as unsatisfactory performance or misconduct	Credible derogatory information (AR 380-67, para. 2-200).
Ultimate Result	Soldier is re-classed	Loss of flight status	Adverse NCOER/OER in file	Soldier is relieved	Security clearance is suspended or revoked
Regulation	AR 614-200, para 3-18	AR 600-105, Ch 6	AR 623-3; DA Pam 623-3	AR 623-3; DA Pam 623-3; AR 600-20, para 2-17	AR 380-67
Who Initiates	Commander	Brigade and regimental commander, or higher	Rater	Rater (or other authorized)	Commander (forwards to Cdr, CCF)
Board hearing	No	Yes	No	No	No, just investigation
Entitled to Counsel	No	Yes	Legal Assistance Attorney	Legal Assistance Attorney	No
SJA Review	No	Yes	No	No	No
Approval Authority	HRC, Field Reclassification Authority	GCMCA	Senior Rater	Senior Rater; may be GCMCA. CDR must be by GCMCA	CCF Commander
Appeal Authority	HRC	MACOM Commander	HRC	HRC	Higher level of authority

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

	DRUNK DRIVING SANCTIONS	COUNSELING WITH VIEW TOWARDS SEPARATION	REHABILITATIVE TRANSFER	ADMINISTRATIVE SEPARATION
Grounds for Action	Refusal to test; BAC > .08% (or between .05% and .08% depending on local law); or any official report of DWI	Cdr contemplates separation for parenthood (5-8), personality disorder (5-13), entry level perf (ch 11), unsat perf (ch 13), or misconduct (ch 14)		Parenthood, personality disorder, unsatisfactory performance, ASAP failure, misconduct, overweight
Ultimate Result	Privilege to drive on post or in overseas command suspended or revoked	Soldier on notice that cont. poor performance may lead to separation, and consequences	Soldier gets a fresh start in a new unit	Separation from the Army
Regulation	AR 190-5, chap 2	AR 635-200, para 1-16		AR 635-200
Who Initiates	Installation commander or designee not assigned to law enforcement duties	"a responsible official"	Commander	Commander
Board hearing	W/in 14 days, on request	No	No	Depends on year in service and type of discharge
Entitled to Counsel	No (but see AR 27-3, para 3-6g(4)(w))	No	No	Yes
SJA Review	No	No	No	Yes
Approval Authority	Installation commander	None	Commander w/ auth over losing and gaining unit	Special Court-martial Convening Authority (General Discharge); General Court-Martial Convening Authority (OTH Discharge)
Appeal Authority	GCMCA may grant restricted privileges	No formal appeal	No formal appeal	No formal appeal, but Army Discharge Review Board & ABCMR

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

TOOLS FOR PROMOTING GOOD ORDER AND DISCIPLINE – PUNITIVE ACTIONS

	ARTICLE 15	SUMMARY COURTS-MARTIAL	COURTS-MARTIAL
Grounds for Action	Misconduct, crime	Misconduct, crime	Misconduct, crime
Ultimate Result	Fine, loss of rank, restriction	Fine, loss of rank, confinement	Fine, loss of rank, punitive discharge, confinement, death
Regulation	UCMJ Article 15, AR 27-10	AR 27-10, MCM, UCMJ Articles 16-76	AR 27-10, MCM, UCMJ Articles 16-76
Who Initiates	Commander	Commander	Commander
Board hearing	No.	Court-martial with SCMO	Court-martial with panel
Entitled to Counsel	Advice of counsel	Advice of counsel	Yes
SJA Review	Yes	Yes	Yes
Approval Authority	Commander	Commander	GCMCA
Appeal Authority	Next higher Commander	Next higher Commander	Army Court of Criminal Appeals

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CHAPTER G

ARMY EQUAL OPPORTUNITY (EO) AND SEXUAL HARASMENT LAW

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January 2015

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C. AR 600-13, ARMY POLICY FOR THE ASSIGNMENT OF FEMALE SOLDIERS

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G. ARMY DIR. 2012-11 (EXCEPTION TO THE DIRECT GROUND COMBAT ASSIGNMENT RULE) (7 MAY 12).

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I. ARMY DIR. 2014-16 (EXPANDING POSITIONS IN OPEN OCCUPATIONS FOR THE ASSIGNMENT OF FEMALE SOLDIERS) (17 JUN 14).

I. INTRODUCTION.

A. Equal Opportunity (EO) ensures "fair treatment for all persons based solely on merit, fitness, and capability in support of readiness." ARMY REG. (AR) 600-20, ARMY COMMAND POLICY, para 6-1.

B. Policy. "The U.S. Army will provide EO and fair treatment for military personnel and Family members without regard to race, color, gender, religion, national origin, and provide an environment free of unlawful discrimination and offensive behavior." This policy:

- Applies both on and off post, during duty and nonduty hours;
- Applies to working, living, and recreational environments (including both on-post and off-post housing). AR 600-20, para 6-2 a.

C. The Army approaches EO from a Soldier readiness point of view. "To accomplish any mission, leaders must ensure that their units are properly trained and that their Soldiers, their equipment, and they, themselves, are in the proper state of readiness at all times. Soldiers must be committed to accomplishing the mission through unit cohesion developed as a result of a healthy leadership climate. Leaders at all levels promote individual readiness by developing competence and confidence in their subordinates. **A leadership climate in which all [S]oldiers perceive that they are treated with fairness, justice, and equity is crucial to the development of this confidence.**" DA PAM 600-26, DEPARTMENT OF THE ARMY AFFIRMATIVE ACTION PLAN, para 1-4b (23 May 1990) (emphasis added).

II. THE ARMY'S EQUAL OPPORTUNITY (EO) PROGRAM.

A. Who. Applies to Soldiers, Department of the Army civilians, and Family members.

B. What. "Soldiers will not be accessed, classified, trained, assigned, promoted, or otherwise managed on the basis of race, color, religion, gender, or national origin." AR 600-20, para 6-2b. There has been a long standing exception to this rule for the assignment of female Soldiers based on statute and DoD policy (see AR 600-13, para 1-12, Army Policy for the Assignment of Female Soldiers). However, there has been significant change in this policy in recent years and AR 600-13 must now be read with References E, F, G, H, and I.

C. When. Applies both on and off duty.

D. Where. Applies both on and off post.

E. How. Designed to work through the chain of command, as a command function. "Alternative agencies" serve as a safety valve for the chain of command, or when the chain of command is the problem; *see infra*.

F. Why. "[M]aximize human potential and to ensure fair treatment for all persons based solely on merit, fitness, and capability in support of readiness." AR 600-20, para 6-1.

III. RELATION TO OTHER POLICIES & PROGRAMS.

A. Although the Army's EO policy applies to Soldiers, civilian employees, and Family members, recognize that civilian employees enjoy additional protections.

1. Equal Employment Opportunity (EEO) is a separate program for Army civilian employees. Title VII of the Civil Rights Act of 1964, as amended (codified at 42 U.S.C. § 2000e *et seq.*), implemented in the Army's Equal Employment Opportunity (EEO) program. *See* AR 690-600, Equal Employment Opportunity Discrimination Complaints . *See also*, 29 C.F.R. Part 1614, Federal Sector EEO Complaints Processing.

2. Army civilian employees who are covered by a collective bargaining agreement (CBA) may enjoy additional protections under the CBA.

B. A servicemember's failure to comply with the Army's EO policy may amount to criminal misconduct under the UCMJ.

C. Other programs and agencies directly or indirectly support the EO program.

1. Armed Forces Disciplinary Control Board. AR 190-24, Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations.

2. Housing referral program. AR 420-1 Army Facilities Management, paragraph 3-37.

3. Other "alternative agencies"; *see infra*.

4. Defense Equal Opportunity Management Institute, Patrick AFB, FL. Website http://www.deomi.org. Mission: DEOMI will assist its customers in optimizing their mission readiness and capabilities by promoting human dignity through equity, education, diversity, cultural competency, research, and consultation world-wide.

D. Assignment policy for women.

1. The Army's EO program is independent of the Army's assignment policy for female Soldiers, which is currently in the process of being significantly amended. *See* U.S. DEP'T OF DEF., REP. TO CONG. ON THE REVIEW OF LAWS, POLICIES AND REG. RESTRICTING THE SERV. OF FEMALE MEMBERS IN THE U.S. ARMED FORCES (2012) (hereinafter DOD REP. TO CONG.). In the report to Congress, DoD provided notice to Congress of an exception to the 1994 policy that would allow the Army, Marine Corps, and Navy to open positions at the battalion level of direct ground combat units, in select occupational specialties currently open to women. DoD previously excluded women from units that physically collocate and remain with closed units (i.e., units assigned a direct combat mission). The report to Congress also announced the elimination of the physically collocated exclusion.

a. While female Soldiers were previously prohibited from serving in specialties, positions, or units with a primary mission to engage in direct ground combat, Army policy has been significantly amended in recent years. "Effective immediately, the Department of the Army is opening all position in open occupations to women." *See* ARMY DIR. 2014-16 (EXPANDING POSITIONS IN OPEN OCCUPATIONS FOR THE ASSIGNMENT OF FEMALE SOLDIERS) (17 JUN 14). Certain occupations in engineer, field artillery, infantry, armor and special operations remain closed, though additional changes are expected. Please note that AR 600-13 should be read in conjunction with References E, F, G, H, and I for this reason.

IV. STAFFING. AR 600-20, Chapter 6.

A. Equal Opportunity Advisor (EOA).

1. Role. Understanding and articulating EO policy; recognizing and assessing indicators of discrimination; recommending remedies; collecting, organizing, and interpreting demographic data; EO training; EO complaint processing. Senior Enlisted EOA's may conduct inquiries and make recommendations as required.

2. Assigned to the special staff of commanders at installations, organizations, and agencies that are brigade-level (or equivalent) and higher. Primary, full-time duty. Has direct access to commander. Commander must be EO Advisor's rater or senior rater.

3. Trained at DEOMI in 15-week course.

4. Where assigned.

a. Brigade-level and higher units; installations to 10,000 Soldiers; base support battalions: SFC (E-7) or higher.

b. Installations over 10,000 Soldiers: MSG (E-8) and SFC.

c. Division: LTC, MSG, SFC x 2.

d. Corps: LTC, SGM, MSG, SFC.

e. Army Commands: LTC, SGM, MSG/SFC.

5. EOA's provide assistance to investigating officers conducting EO complaint investigations. AR 600-20, Appendix C-6(d).

B. Equal Opportunity Representative (EOR).

1. Role. Assist commanders at the battalion level and below in carrying out the EO program in their units. *May not* conduct investigations. AR 600-20, paragraph 6-3(l).

2. Assigned to battalion and company size organizations. Not a full time duty. Regulation requires assigning EOR in rank of SGT(P) through 1LT.

V. EO COMPLAINT PROCESSING.

A. AR 600-20, Appendix C.

B. Applies to Soldiers, DA civilian employees, and Family members (but DA civilian employees will generally use more specific means (the EEO complaint process; *see* para IV.A.1 *supra*).

C. Informal Complaint. AR 600-20, Appendix C-1(a).

1. Any complaint that the Soldier, employee, or Family member does not wish to file in writing.

2. Not subject to time suspense or reporting.

3. Attempted resolution at the lowest possible level.

4. The outcome should be documented with a memorandum of record.

D. Formal Complaint. AR 600-20, Appendix C-1(b).

1. Complainants do NOT have to file an informal complaint first. Complainant may choose to do so, however.

2. Formal complaint filed using a sworn statement (DA Form 7279).

a. Basis of complaint.

b. Dates, parties, witnesses.

c. Requested remedy.

3. Timely submission required (within 60 calendar days of the incident). Complaint processed through chain of command or alternative agency.

a. Reporting complaint to chain of command is "strongly encouraged," but NOT required.

b. "Alternative agencies" are available when complainant perceives chain of command as the problem:

(1) Higher echelons of chain of command.

(2) Inspector General. Investigation governed by AR 20-1, not AR 600-20. DA Form 7279 not used. IG confidentiality policy applies. EO timelines not used.

(3) Chaplain.

(4) Provost Marshall, Criminal Investigation Command.

(5) Medical agency personnel.

(6) Staff Judge Advocate.

(7) Chief, Community Housing Referral and Relocation Services Office.

4. The EO complaint process, in itself, provides no promises of confidentiality. Note, however, that other regulations may provide confidentiality to complainants (e.g., Inspector General, Staff Judge Advocate legal assistance attorney, Chaplain).

5. Actions by "alternative agencies." See AR 600-20, Appendix C-2 (Except for IG, see AR 600-20 Appendix C-3 and para. VI.D.3b(3) above).

a. Initial actions by these alternative agencies are the same for informal and formal complaints.

b. Upon receipt of EO complaint, the alternative agency must: talk with the complainant, advise him/her of his/her rights and responsibilities, gather as much information as possible (including what the reasons were for using the alternative agency and what the complainant's expectations are for resolution of the complaint), tell complainant what role (if any) that agency will have in resolving the complaint, tell complainant what support services are available from other organizations, what the complaint processing procedures are (mainly the differences between informal and formal complaints) and what will be done with the complaint. Appendix C-2.

c. Agency annotates receipt of formal complaint on DA Form 7279 (except IG).

d. If resolution is beyond agency's charter, refer complainant to appropriate agency or commander, with complainant's consent. Referral must be made within 3 calendar days.

e. Most "alternative agencies" do not have an independent investigatory charter. Exceptions: Inspectors General and higher commanders in the chain of command.

6. Investigation. *Commander* will either conduct an investigation personally or immediately appoint an investigating officer according to the provisions of AR 15-6. AR 600-20, Appendix C-4(b).

a. Referral to battalion/brigade *commander* for appointment of investigating officer under AR 15-6.

b. Fourteen days (3 weekend drill periods for Reservists) to complete the investigation. Possible extension of 30 days (2 weekend drill periods).

c. The investigating officer will meet with a legal advisor to review how the investigation will be conducted under AR 15-6 and AR 600-20. The legal advice should include regulatory requirements, how investigations are conducted, and how to question an individual suspected of violating the UCMJ. A legal review must be conducted after the investigation is complete.

7. General Court Martial Convening Authority (GCMCA) Notification. All formal complaints will be reported within 3 calendar days to the first GCMCA in the chain of command. AR 600-20, para. C-4a.

8. Reprisal Plan. AR 600-20, para. C-4c. The most often overlooked part of the formal EO complaint. Commander must implement a written plan to protect the complainant, any named witnesses, and the alleged perpetrator from acts of reprisal. See para. C-4c. for required contents of the plan. Plan should not become an administrative burden; it need only consist of a one-page list of actions to be accomplished. *Investigating officer must include the plan as an exhibit in the ROI.* The "plan" will include, at a minimum, specified meetings and discussions with the complainant; subject and key witnesses.

9. Feedback. Written feedback to complainant within 14 days (3 weekend drill periods) after acknowledgment of complaint.

a. Summary of investigative results.

b. Remedial actions taken.

c. Copy of DA Form 7279-R provided to complainant.

10. Appeal in writing to the next higher commander, up to GCMCA.

a. Within 7 days following notification of results of investigation and acknowledgment of actions taken by the command to resolve the complaint.

b. Options outside the EO system.

11. Follow up. Thirty to forty-five days after final decision on the complaint, Equal Opportunity Advisor conducts an assessment on all EO complaints, substantiated and unsubstantiated, to determine effectiveness of any corrective action taken and to detect reprisal.

12. File maintained by the EOA for two years.

13. Complaints against promotable colonels, active or retired GOs, IGs, members of the Senior Executive Service or Executive Schedule personnel must be transferred directly to the Investigations Division, US Army Inspector General Agency, ATTN: SAIG-IN, Pentagon, Washington DC 20310-1700 by rapid but confidential means within 5 calendar days of receipt. AR 600-20, Appendix C-2c.

VI. SANCTIONS.

A. Soldiers. (AR 600-20, Appendix C-7(a)(1)).

1. Administrative action.

2. Action under the Uniform Code of Military Justice (UCMJ).

B. Civilian employees.

1. May be subjected to administrative discipline in accordance with the current Army Table of Penalties (AR 690-700, chap 751, Table 1-1). Penalties range from a written reprimand to removal.

2. No requirement for victims to file EEO complaints. A victim may seek redress or not, as he or she sees fit, but the right of the service to discipline employees who harass or discriminate is not affected in either event. *Hostetter v. United States*, 739 F.2d 983, 984 (4th Cir. 1984).

VII. OFF-POST ACTIVITIES.

A. In the United States.

1. Establishments open to the general public.

a. Title II of Civil Rights Act of 1964, 42 U.S.C. §§ 2000a - 2000a-6: Public Accommodations.

b. Command enforcement: off-limits sanction. AR 600-20, para 6-8; AR 190-24, para 2-6.

2. Private establishments. AR 600-20, para 6-8c.

a. General rule: A commander may not apply off-limits sanctions to a bona fide private establishment, club, activity, or organization.

b. Exception: A private entity may be placed off limits if the following conditions are met:

(1) Open to military personnel in general or Soldiers who meet specific criteria (*e.g.*, E-5 and above) but segregates or discriminates against other Soldiers solely on the basis of race, color, religion, gender, or national origin.

(2) It is not primarily political or religious in nature.

(3) Commander, in consultation with SJA and other staff officers, determines facts support allegations of discrimination. Must give entity an opportunity to challenge or refute allegations.

(4) Commander must make reasonable efforts to bring about the voluntary termination of discriminatory practices.

(5) Commander determines that continued discrimination will undermine morale, discipline, or loyalty of Soldiers.

B. Overseas. AR 600-20, para 6-8a.

1. Title II does not apply.

2. Commander's options:

a. Off-limits sanction.

b. Local law.

C. Off-post housing policy. Designed to eliminate discrimination in housing on the basis of race, color, religion, gender, national origin, age, physical disability, or familial status.

1. General.

a. Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended. 42 U.S.C. §§ 3601-3631.

2. Command Enforcement: restrictive sanctions. Alleged incidents of housing discrimination must be referred to the Housing Services Office (HSO) for a preliminary inquiry. *See* AR 420-1, paragraph 3-37.

a. If the basic facts of the preliminary inquiry appear to confirm the complaint, the Garrison Commander will initiate an informal hearing with the agent. OSJA participation in the hearing is authorized.

b. A legal review is required (1) after the preliminary inquiry; (2) after the informal hearing; and (3) before the Garrison Commander's final decision.

c. Garrison Commander may impose restrictive sanctions.

VIII. SEXUAL HARASSMENT POLICY REFERENCES.

A. DOD: DoD Dir. 1350.2

B. Army: AR 600-20, Chapter 7 and Appendix C. *See also*, Army Directive 2013-17 (Sexual Harassment/Assault Prevention in Initial Military Training); ALARACT 007-2012, Sexual Harassment/Assault Response and Prevention (SHARP Implementation Guidance; HQDA EXORD 221-12, 2012 Sexual Harassment/Assault Response and Prevention (SHARP) Program Synchronization Order

C. Guard: NGR 600-21; NGR 600-22/ANGI 36-3

D. Navy: SECNAVINST 5300.26D; ALNAV 042/00 (Civilian Sex Harassment Complaints).

E. Marines: MCO 1000.9A; MCO 1700.23F

F. Air Force: AFI 36-2706

IX. DEFINING SEXUAL HARASSMENT.

A. DoD Definition. DoD Dir 1350.2.

1. Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

a. Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or

b. Submission to, or rejection of, such conduct by a person is used as a basis for career or employment decisions affecting that person; or

c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive environment.

2. Such conduct, to be actionable as "abusive work environment" harassment, need not result in concrete psychological harm to the victim, but rather need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive.

3. "Workplace" is an expansive term for military members and may include conduct on or off duty, 24 hours a day.

4. Any person in a supervisory or command position who uses or condones any form of sexual behavior to control, influence, or affect the career, pay or job of another Soldier or civilian employee is engaging in sexual harassment.

5. Any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is engaging in sexual harassment.

(AR 600-20 adopts this definition with minor differences.)

B. Title VII (of the Civil Rights Act of 1964) definition.

1. Title VII is implemented in the federal government through the Code of Federal Regulations (CFR). 29 CFR § 1604.11 contains the following definition of sexual harassment:

a. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

2. Sexual harassment in violation of Title VII is also defined by the courts, as discussed below in paragraph D.

C. 10 USC § 1561 Definition (111 Stat. 1629 (1997)).

1. The National Defense Authorization Act for fiscal year 1998 added section 1561 to Title 10 of the U.S. Code. The section includes a definition of sexual harassment similar (but not identical) to the definition in DoD Dir. 1350.2 and AR 600-20. This newer statutory definition is broader than the Title VII definition of sexual harassment.

a. Conduct (constituting a form of sex discrimination) that:

(1) Involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when:

(a) Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay or career;

(b) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or

(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment; and

(d) Is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive.

b. Any use or condonation by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the armed forces or a civilian employee of the Department of Defense.

c. Any deliberate or repeated unwelcome verbal comment or gesture of a sexual nature in the workplace by any member of the armed forces or civilian employee of the Department of Defense.

D. Types of Sexual Harassment

1. Old Terms: Traditionally, federal courts categorized sexual harassment claims as Quid Pro Quo or Hostile Work Environment:

a. "Quid Pro Quo." A request for sexual favors in return for a job benefit, or in connection with the threat of the loss of a job, grade, or an unfavorable performance rating if the employee fails to grant the requested favors.

b. “Hostile Work Environment.” Deliberate or repeated verbal comments, gestures, or physical contact of a sexual nature that create an offensive or hostile workplace.

2. Current Terms: The Supreme Court appears to reject the traditional model in two decisions handed down in 1998. In Ellerth, the Supreme Court discussed whether the "quid pro quo" and "hostile environment" terms had outlived their usefulness. “The terms quid pro quo and hostile work environment are helpful, perhaps in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this they are of limited utility.” Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998); Faragher v. Boca Raton, 524 U.S. 775 (1998). The current labels for sexual harassment are “tangible employment action” harassment and “hostile work environment” harassment.

a. The Ellerth/Faragher framework delineates two categories of sexual harassment claims:

(1) Those alleging a "tangible employment action" for which employers are held strictly liable, and

(2) Those asserting no tangible employment action, in which case employers may assert the affirmative defense that (1) the employer exercises reasonable care to prevent and correct promptly sexually harassing behavior; and (2) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid or reduce the harm otherwise.

b. "Tangible Employment Action" harassment. Sexual harassment that results in a negative tangible employment action. This type of harassment almost invariably involves harassment by the supervisor.

(1) The action must constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

(2) A tangible employment action would not include a "bruised ego," a demotion without change in pay, benefits, duties, or prestige, or a reassignment to a more inconvenient job. Id.

(3) Although direct economic harm is an important indicator of a tangible adverse employment action, it is not the *sine qua non*. If employer's act substantially decreases employee's earning potential and causes significant disruption in his or her working conditions, a tangible employment action may be found. Durham Life Insurance Co. v. Evans, 166 F.3d 139, 153 (3d Cir. 1999).

(4) Job transfer was a tangible employment action, despite the fact that no loss of pay occurred, where new position was "objectively worse—such as being less prestigious or less interesting or providing less room for advancement." Sharp v. Houston, 164 F.3d 923, 933 (5th Cir. 1999).

(5) Supervisor's threats to terminate employee if she did not submit to sexual acts and allowing her to keep her job after she submitted is tangible employment action. *See* Min Jin v. Metro. Life Ins. Co., 295 F.3d 335, 349 (2d Cir. 2002).

(6) Constructive discharge (harassment so severe /oppressive that staying on the job while seeking redress is intolerable). A compound hostile work environment constructive discharge claim under Title VII must show working conditions so intolerable that a reasonable person would have felt compelled to resign. The Supreme Court has held that constructive discharge is a tangible employment action for purposes of applying Ellerth and Faragher, but only when an official act underlies the constructive discharge. Pa. State Police v. Suders, 542 U.S. 129, 140-41 (2004).

(7) Sexual advances must be "unwelcome." 29 C.F.R. §1604.11(a).

c. Hostile Environment harassment. Sexual harassment that is so objectively offensive as to alter the conditions of employment even though the victim suffers no tangible employment action.

(1) The conduct must be "severe or pervasive." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). Single act versus pattern of conduct: the requirement for repeated exposure will vary inversely with the severity of the offensiveness of the incidents.

(2) Do not measure the conduct in isolation. Look at all the circumstances, such as frequency of the discriminatory conduct, its severity, whether it is physically threatening or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

(3) "'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" Faragher v. Boca Raton, 524 U.S. 775, 788 (1998).

(4) The conduct must be unwelcome. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986); Beard v. Flying J, Inc., 266 F.3d 792, 797 (8th Cir. 2001).

(5) Complainant's Participation.

(a) Employee's hostile work environment claim was rejected because of her active and often enthusiastic participation in sexual shenanigans. Reed v. Shepard, 939 F.2d 484, 491-92 (7th Cir. 1991).

(b) But employees do not forfeit their rights to be free of a sexually offensive workplace merely because they participate to some degree in sexual horseplay, especially when they engage in such behavior defensively. *See* Carr v. Allison Gas Turbine Div., 32 F.3d 1007 (7th Cir. 1994)(Employee's use of vulgar language is not fatal to her claim because she otherwise made clear that she did not welcome the sexually-directed actions of others).

(6) Psychological and emotional work environment as a condition of employment. A violation can be shown either by evidence that the misconduct interfered with an employee's work or that the environment could "reasonably be perceived and is perceived as hostile or abusive." Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

(8) "Reasonable person" and "reasonable victim" test. Objective/subjective elements. Harris v. Forklift Systems Inc., 510 U.S. 17 (1993); Rabidue v Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986). A "sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Farragher v. Boca Raton, 524 U.S. 775 (1998).

(9) Need not necessarily be directed at complainant. Evidence of harassment directed at employees other than the plaintiff is relevant to show a hostile work environment. Hall v. Gus Construction Co., Inc., 842 F.2d 1010 (8th Cir. 1988); Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988).

(10) The harassing official need not be of the opposite sex as the complainant. EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989); Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998).

(11) Female plaintiff is not required to show that only women were subjected to harassment, so long as she shows that women were primary target of such harassment. Beard v. Flying J, Inc., 266 F.3d 792 (8th Cir. 2001)(Male supervisor also harassed male employees by among other things, speaking to them in sexual terms).

X. PROCESSING SEXUAL HARASSMENT COMPLAINTS.

A. Three methods, depending on how complaint arises.

1. Equal Opportunity (EO) complaint process.

2. Equal Employment Opportunity (EEO) complaint process.

3. 10 U.S.C. § 1561 complaint process.

B. EO complaint process. (AR 600-20, Appendix C).

1. Available to Soldiers, Family members, and civilian employees, but primarily used by military personnel who believe they have been sexually harassed. DA civilian employees will generally use more specific means; see paragraph C. below (EEO complaint process).

2. Fact-gathering usually done by AR 15-6 investigation.

3. Filing and processing of sexual harassment complaints follow the same procedures as outlined in appendix C for EO complaints.

4. Charges of sexual misconduct are to be processed through legal/ law enforcement channels, not EO channels.

C. EEO complaint process. (29 CFR § 1614; AR 690-600).

1. Available only to civilian employees, not military personnel. Civilian employees may use the EEO process even if the alleged sexual harasser is military.

2. Fact-gathering done by EEO counselor (informal complaint) and DoD Office of Complaints Investigation investigator (formal complaint).

D 10 U.S.C. § 1561 complaint process.

1. 10 U.S.C. § 1561. The National Defense Authorization Act for fiscal year 1998 added section 1561 to Title 10 of the U.S. Code. It applies to complaints of sexual harassment by a member of the Armed Forces or a civilian employee of the DoD received by a commanding officer or officer in charge from a member of the command or a civilian employee under the supervision of the officer. 10 U.S.C. § 1561 established new requirements for processing sexual harassment complaints.

2. AR 600-20 implements 10 U.S.C. § 1561 when a **military member** alleges sexual harassment. The regulation prescribes the following requirements for formal EO/sexual harassment complaints. See, AR 600-20, Appendix C.

a. *Reports to GCMCA*. Must be reported within 72 hours to the General Courts Martial Convening Authority (GCMCA). The commander must also provide a progress report to the GCMCA 21 days after the date on which the investigation commenced and 14 days thereafter until complete.

b. *Timelines for investigation.* The commander to whom the complaint is referred must conduct an investigation, either personally or through appointment of an investigating officer, within 14 calendar days [or three MUTA 4 (Multiple Unit Training Assembly) weekend drill periods for Reserve components] after receipt of the complaint.

(1) If, due to extenuating circumstances, it is impossible to conduct a completed investigation within this time period, the commander may obtain an extension from the next higher commander for usually not more than 30 calendar days [or two MUTA 4 drill periods for Reserve components]. Any additional extensions must be approved in writing by the first general officer in the chain of command.

(2) Failure to adhere to the above prescribed timelines will result in automatic referral of the complaint to the next higher echelon commander for investigation and resolution.

c. Written feedback.

(1) The commander must provide written feedback to the complainant not later than 14 calendar days [or the end of the third MUTA 4 period for Reserve components] after receiving the complaint and then provide updates every 14 calendar days [or three MUTA 4 drill periods] until final resolution. Feedback must be consistent with the Privacy Act and FOIA.

(2) *Written feedback to alleged perpetrator*. The commander must also provide written feedback to the alleged perpetrator on the outcome of the investigation and subsequent actions to be taken by the chain of command. Feedback must be consistent with the Privacy Act and FOIA.

d. *Appeals*. The complainant or alleged perpetrator may file an appeal within 7 calendar days [or at the next MUTA 4 drill period for Reserve components] following notification of the results of investigation. The commander then has 3 calendar days [or one MUTA 4 drill period for Reserve components] to refer the appeal to the next higher unit commander. The appellate commander then has 14 calendar days [or three MUTA 4 periods for Reserve components] to review the case, act on the appeal, and provide written feedback to the complainant on the results of the appeal

e. *Final resolution*. Complaints not resolved at brigade level may be appealed to the GCMCA. Decisions at this level are final.

f. *Complaints from non-TPU (Troop Program Unit) Reservists*. If the complainant is a reservist serving in the IRR (Individual Ready Reserves) or not assigned to a unit, the complaint procedures are the same as for active duty personnel. Upon receiving a complaint from members of the IRR or IMA (Individual Mobilization Augmentee), from Soldiers performing ADSW (Active Duty Special Work) or TTAD (Temporary Tour of Active Duty), or from any reservist not a member of a troop program unit, commanders must make every attempt to resolve the complaint prior to the completion of the Soldier's AD (Active Duty) tour.

(1) If not resolved prior to REFRAD (Release From Active Duty), the timelines will be modified. The Active or reserve component commander has 30 calendar days from the filing of the complaint to notify the complainant of the results of the investigation/actions taken to resolve the complaint.

(2) The complainant and subject have 30 calendar days from notification of the results of investigation to file an appeal.

(3) Notification of the final decision must be provided to the complainant and subject within 30 calendar days of the receipt of the appeal.

g. *Complaints from non-TPU members filed after the AD tour has ended.* If the complaint is filed after the AD tour has ended, the complainant will file a sworn complaint on DA Form 7279 to HRC EOA. The complaint will then be forwarded to the appropriate commander of the subject of the complaint for investigation. Timelines are same as those described in subparagraph f. (1)-(3) above.

3. The impact of 10 U.S.C. § 1561 when a **civilian employee** alleges sexual harassment.

a. DoD's implementation of 10 U.S.C. § 1561 for civilian employees was issued through a directive-type memorandum from Assistant Secretary of Defense for Force Management (SUBJECT: Interim Policy for DoD Implementation of 10 U.S.C. 1561: Sexual Harassment Investigations and Reports for Civilian Employees of the Military Services, dated February 9, 1999).

b. Establish a separate Point of Contact ("1561 POC") to handle 10 USC §1561 complaints. That person should be separate from the Equal Employment Opportunity (EEO) Officer to avoid any perceived conflict-of-interest issues. AR 690-600, paragraph 3-11 provides guidance regarding the 1561 POC.

c. The 1561 POC shall, within 48 hours after initial contact by an aggrieved person, submit in writing as detailed a description as possible of the allegation to the appropriate commanding officer or military officer-in-charge.

d. Within 72 hours of receipt of written notification from a 1561 POC, a commanding officer, or officer-in-charge shall:

(1) Forward the complaint or a detailed description of the allegation to the GCMCA;

(2) Commence, or cause the commencement of, an investigation of the complaint; and

(3) Advise the complainant of the commencement of the investigation.

e. Duration of investigation.

(1) To the extent practicable, a commanding officer shall ensure that the investigation of the complaint is completed not later than 14 days after the date on which the investigation is commenced.

(2) If it is not practical to complete the investigation in 14 days, the commanding officer shall submit a report on the progress made in completing the investigation to the GCMCA within 21 days of the start of the investigation and every 14 days thereafter until it is completed.

f. Report on investigation. To the extent practicable, a commanding officer receiving such a complaint shall:

(1) Determine if the allegations have been substantiated within 3 days of receipt of the investigation report;

(2) Notify the aggrieved person in writing within 6 days of receipt of the investigation findings of the investigation findings, the decision made on substantiation of the allegations and the decision on corrective action taken or proposed;

(3) Submit a final report on the results of the investigation, including any action taken as a result of the investigation, to the GCMCA (within 20 days from the start of the investigation, if practicable).

g. If the aggrieved civilian employee raises the complaint with the EEO Office rather than with the 1561 POC, the EEO Counselor should determine if the civilian employee is *directly* supervised by a military commanding officer or military officer-in-charge.

(1) If not, the EEO Counselor will continue with the EEO procedures of 29 C.F.R. §1614.

(2) If so, the EEO Counselor will advise the civilian employee of the 1561 POC and inform the civilian employee that he or she must contact the 1561 POC in order to file a complaint under those provisions. The EEO Counselor shall then continue processing the complaint under the EEO procedures of 29 C.F.R. §1614.

XI. LIABILITY.

A. Whether the employer is vicariously liable for sexual harassment depends on who committed the harassment, whether it resulted in a "tangible employment action," and the employer's response to the misconduct.

1. Sexual Harassment by Supervisor.

a. Tangible Employment Action Case. If the harassment is by the employee's supervisor and results in a tangible employment action, the agency is strictly, or automatically, liable under Title VII. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998); Faragher v. Boca Raton, 524 U.S. 775, 777 (1998).

b. Hostile Environment Case. If the harassment is by the employee's supervisor, does *not* result in a tangible employment action, but is so offensive as to alter the employee's conditions of employment, the agency is liable under Title VII *unless*:

(1) The agency shows it exercised reasonable care to prevent or correct promptly any sexually harassing behavior, and

(2) The agency shows the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the agency or to avoid harm otherwise. Ellerth, 524 U.S. at 763-64.

Note: This 2-prong test is an affirmative defense subject to proof by a preponderance of evidence.

(4) A published procedure for handling sexual harassment complaints, disseminated to the workforce, and suitable to the employment circumstances *may* be sufficient to show that the agency exercised reasonable care to prevent and promptly correct sexually harassing behavior. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

2. Sexual Harassment by Non-Supervisor (Co-Worker). If the harassment is by the employee's co-worker, the agency is liable if the agency knew or should have known of the harassing conduct and failed to take prompt and effective corrective action. Ellerth, 524 U.S. 742 (1998). See also 29 CFR 1604.11(d). This is a negligence standard.

a. What constitutes an adequate response to sex harassment? Although it is a fact-specific inquiry, it has been held that the more severe and frequent the harassment, the less likely that a nonpunitive remedy will be deemed adequate. *See* Knabe v. Boury Corp., 114 F.3d 407, 413 (3d Cir. 1997)(warning to harasser that violations of sex harassment policy could result in discharge deemed adequate response where plaintiff failed to present evidence that it was not reasonably calculated to end harassment); Spicer v. Commonwealth of Va., 66 F.3d 705, 711 (4th Cir. 1995)(employer not required to make most effective response possible; where employer's prompt response resulted in cessation of complained-of conduct, liability ceased); Crowley v. L.L. Bean, Inc., 303 F.3d 387, 401 (1st Cir. 2002).

B. The Civil Rights Act of 1991 permits federal *civilian* employees who prove intentional discrimination to recover up to $300,000 in compensatory damages for future pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

C. Personal liability. Agency officials may be sued in their individual (personal) capacities and held personally liable for sexual harassment.

1. Agency officials, including members of the Armed Forces, who are sued for common law torts are entitled to immunity under the Westfall Act so long as the alleged tort was committed *within the scope of their employment.* Federal Employees Liability Reform and Tort Compensation Act, (codified at and amending 28 U.S.C. § 2671, 2674, 2679).

2. The statutory immunity provided by the Westfall Act requires that Department of Justice certify that the actions of the agency official were within the course and scope of employment. This certification can be challenged in court.

a. Mackey v. Milam, 154 F.3d 648 (6th Cir. 1998) (Certification by United States Attorney under Westfall Act that federal employee was acting within scope of his employment does not conclusively establish as correct the substitution of United States as defendant in place of the employee, but provides prima facie evidence that the employee was acting within scope of his employment. Under the Westfall Act, whether a federal employee was acting within the scope of his employment is a question of law made in accordance with the law of the state where the conduct occurred.) *See also* Osborn v. Haley, 549 U.S. 225 (2007).

3. *Feres* doctrine bars common-law tort suits by servicemembers against superiors in personal capacity for violations of civil rights that arise incident to military service. *See generally* Feres v. United States, 340 U.S. 135 (1950).

4. *"Bivens"* claims for constitutional torts not generally actionable by service members, because courts consistently find that special factors (e.g., military discipline) counsel hesitation or that Congress intended another remedy (e.g., UCMJ) to be exclusive. *See generally* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and Chappell v. Wallace, 462 U.S. 296 (1983). The constitutional claim must arise "incident to service." Id.

XII. SANCTIONS AGAINST HARASSERS.

A. Military members.

1. Administrative action.

a. Full spectrum of adverse administrative actions available against Soldiers who engage in sexual harassment.

b. IAW AR 623-3, Ch. 3-19, "[r]ating officials *will ensure* that evaluations document any substantiated findings, in an Army or DoD investigation or inquiry, that a rated Soldier committed an act of sexual harassment or sexual assault; failed to report a sexual harassment or sexual assault; failed to respond to a report of sexual harassment or sexual assault; or retaliated against a person making such a report." [emphasis added]. See also AR 600-20, Ch. 6-11.

2. Action under the Uniform Code of Military Justice (UCMJ).

B. Civilian employees.

1. May be subjected to administrative discipline in accordance with the current Army Table of Penalties (AR 690-700, chap 751, Table 1-1).

2. No requirement for victims to file EEO complaints. A victim may seek redress or not, as he or she sees fit, but the right of the service to discipline employees who harass or discriminate is not affected in either event. Hostetter v. United States, 739 F.2d 983 (4th Cir. 1984).

XIII. CONCLUSION.

"Neither men nor women should have to run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982).

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CHAPTER H

ADMINISTRATIVE INVESTIGATIONS

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I. REFERENCES.

A. 50 U.S.C., App §456(j), Military Selective Service Act.

B. DODD 7050.06, Military Whistleblower Protection, 23 July 2007.

C. DODI 1300.06, Conscientious Objectors, 31 May 2007.

D. DODI 2310.05, Accounting for Missing Persons—Boards of Inquiry, 31 January 2000 (w/change 1, 14 March 2008).

E. DODI 6055.07, Mishap Notification, Investigation, Reporting, and Record Keeping, 6 June 2011.

F. AR 15-6, Procedure for Investigating Officers and Boards of Officers, 2 October 2006.

G. AR 20-1, Inspector General Activities and Procedures, 29 November 2010 (w/RAR 3 July 2012).

H. AR 385-10, The Army Safety Program, 27 November 2013.

I. AR 600-8-1, Army Casualty Program, 30 April 2007 (as amended by Army Directive 2009-02, The Army Casualty Program (Dover Media Access and Family Travel), 3 April 2009).

J. AR 600-8-4, Line of Duty Policy, Procedures, and Investigations, 4 September 2008.

K. AR 600-34, Fatal Training/Operational Accident Presentations to the Next of Kin, 2 January 2003.

L. AR 600-43, Conscientious Objection, 21 August 2006.

M. AR 735-5, Policies and Procedures for Property Accountability, 10 May 2013 (w/RAR 22 August 2013)

N. Army Directive 2010-01, Conduct of AR 15-6 Investigations Into Suspected Suicides and Requirements for Suicide Incident Family Briefs, 26 March 2010.

O. Army Directive 2010-02, Guidance for Reporting Requirements and Redacting Investigations Reports of Deaths and Fatalities, 26 March 2010.

P. DA Pam 735-5, Financial Liability Officer's Guide, 9 April 2007.

Q. The Assistance and Investigations Guide, The U.S. Army Inspector General School, April 2013. http://tigs-online.ignet.army.mil/tigu_online/index.htm.

II. JOINT INVESTIGATIONS.

A. All the Services have specific procedures for various types of administrative investigations. In the absence of more specific regulatory guidance, the Army uses AR 15-6, Procedure for Investigating Officers and Boards of Officers. AR 15-6 contains the basic rules for Army regulatory boards. If an investigation is appointed under a specific regulation, that regulation will control the proceedings.

B. Some of the more likely types of investigations that Army judge advocates (JA) may encounter include: accident investigations (including friendly fire incidents), which may require both a Safety Accident Investigation and a Legal Accident Investigation under AR 385-10 and AR 600-34; Line of Duty Investigations under AR 600-8-4; and Financial Liability Investigations under AR 735-5. If an accident results in death of a Soldier, judge advocates might also assist with the family briefing to the next-of-kin under AR 600-34. While deployed, judge advocates must be familiar with the friendly fire reporting and investigation requirements as well as the hostile death investigation requirement of AR 600-8-1. With the dramatic increase in joint operations, Army judge advocates should also be familiar with the basic regulations relied upon by the other Services.

C. The Air Force has no single general regulation or instruction governing command-directed investigations similar to the Army's AR 15-6. Instead, the Air Force relies solely upon a commander's inherent authority to investigate matters under their responsibility. While some types of investigations are governed by specific instruction (e.g., *AFI 91-204, Safety Investigations and Reports,* 24 Sep 08; *AFI 36-2910, Line of Duty (Misconduct) Determinations,* 4 Oct 02, w/Change 2: 5 Apr 10), command-directed investigations use AFI 90-301, *Inspector General Complaints,* 23 Aug 11, w/Change 1 6 Jun 12, as a guide, but its provisions are not mandatory.

D. The Navy and Marine Corps rely upon JAGINST 5800.7F, *The Manual of the Judge Advocate General*, 26 Jun 12, also known as the "JAGMAN," for guidance regarding command investigations. It divides administrative investigations into more specific types than does AR 15-6, to include litigation report investigations, courts and boards of inquiry, and command investigations. The JAGMAN also covers line of duty/misconduct investigations and loss of government property investigations, as well as a variety of other required investigations.

E. The Coast Guard reference for investigations is COMDTINST M5830.1A, *Administrative Investigations Manual*, September 2007. Like the JAGMAN, it includes a "preliminary inquiry," an informal inquiry directed by a commander to assist the commander determine what type of investigation, if any, is warranted by the situation.

F. Administrative investigations in all services follow similar basic concepts. Detailed analysis of Air Force, Navy, and Coast Guard Investigation requirements is beyond the scope of this outline. Reference to those Services' policies is for clarification only. Legal advisors should turn to the appropriate Service authorities for detailed guidance when dealing with Service specific investigations.

G. There is currently no joint publication governing investigations (although DODI 6055.07, *Mishap Notification, Investigation, Reporting, and Record Keeping*, provides guidance on joint accident investigations). In the event an investigation is required in a joint environment, judge advocates should determine which Service's regulation is most applicable and then an investigation under that regulation should be conducted. When determining which Service's regulation is most applicable consider the possible uses of the investigation, whether a particular Service requires a certain investigation, which Service has the most at stake in the outcome of the investigation, any local or command guidance regarding joint investigations, and other matters that would contribute to an informed decision. Since investigations in all services follow similar basic concepts and will result in a thorough investigation if conducted properly, the regulation ultimately used is not as important as is choosing and following a particular authorized regulation. Under no circumstances should regulations be combined and a "hybrid" investigation created. Pick a regulation and follow it! The Services are shown great deference in regards to administrative matters as long as regulations are followed correctly.

III. R.C.M. 303 PRELIMINARY INQUIRY.

A. If a commander receives information that a member of his or her command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander is required to make or cause to be made a preliminary inquiry into the charges or suspected offenses.

B. The R.C.M. 303 preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of MPI/CID (see AR 195-2, *Criminal Investigation Activities*, Appendix B, for criminal offense investigative responsibility among CID, MPI, and unit commanders).

C. The commander should gather all reasonably available evidence on:

1. Guilt or innocence;

2. Aggravation; and

3. Extenuation and Mitigation.

D. A person who is an "accuser" under Article 1(9), UCMJ, may not convene a special or general court-martial [R.C.M. 504(c)(1)]. Therefore, any commander who is a special or general courts-martial convening authority should appoint another officer in the command to conduct the preliminary inquiry and allow others to prefer charges, if necessary.

E. This inquiry is not the same as an Article 32 (UCMJ) investigation. Nor should it be confused with the preliminary inquiry authorized under USN/USMC and Coast Guard regulations. Those regulations authorize a commander to conduct a preliminary inquiry into a matter in order to determine whether more detailed investigation is required and if so, what type. Commanders may also decide that further investigation is not required. Preliminary inquiries under USN/USMC and Coast Guard regulations typically have a three-day suspense. Army regulations do not provide for this type of basic inquiry, although in practice commanders often conduct “commander’s inquiries.”

IV. AR 15-6 INVESTIGATIONS.

A. AR 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS

1. Applicability. Applies to the Active Army, the Army National Guard, and the U.S. Army Reserve, unless otherwise stated within the regulation.

2. Purpose:

a) Establishes procedures for investigations and boards of officers not specifically authorized by any other directive. AR 15-6 or any part of it may be made applicable to investigations or boards that are authorized by another directive, but only by specific provision in that directive or in the memorandum of appointment (i.e., AR 635-200, Active Duty Enlisted Administrative Separations, authorizing formal separation boards IAW AR 15-6 for enlisted Soldiers.) In case of a conflict between the provisions of AR 15-6, when made applicable, and the provisions of a specific directive authorizing the investigation or board, the specific regulation governs.

b) Even when not specifically made applicable, AR 15-6 may be used as a general guide for investigations or boards authorized by another directive, but in that case, its provisions are not mandatory (i.e. AR 385-10, *The Army Safety Program*, authorizes safety accident investigations but does not incorporate AR 15-6.)

3. Function of an AR 15-6 Investigation. An AR 15-6 investigation is used to ascertain facts and report them to the appropriate appointing authority. It is the duty of the investigating officer or board to ascertain and consider the evidence on all sides of each issue, thoroughly and impartially, and to make findings and recommendations that are warranted by the facts and that comply with the instructions of the appointing authority.

B. TYPES OF INVESTIGATIONS AND BOARDS: FORMAL AND INFORMAL.

1. Formal or Informal, Investigation or Board of Officers.

a) When deciding whether to use formal or informal procedures, consider the purpose of the inquiry, seriousness of the subject matter, complexity of the issues involved, need for documentation, and desirability of providing a hearing for persons whose conduct is being investigated.

b) Investigations: Proceedings that involve a single officer using informal procedures.

c) Board of officers: Proceedings that involve more than one investigating officer using formal or informal procedures or a single officer using formal procedures.

2. Formal (Chapter 5).

a) Generally, formal boards are used to provide a hearing for a named respondent. The board offers extensive due process rights to respondents (notice and time to prepare, right to be present at all open sessions, representation by counsel, ability to challenge members for cause, to present evidence and object to evidence, to cross examine witnesses, and to make argument).

b) Formal boards include a president, voting members, and a recorder who presents evidence on behalf of the government. A Judge Advocate (JA) is normally appointed as recorder but is not a voting member. If a recorder is not appointed, the junior member of the board acts as recorder and is a voting member. Additionally, a non-voting legal advisor may be appointed to the board.

c) Formal AR 15-6 investigations are not normally used unless required by regulation. Examples: Officer and enlisted separation boards (AR 600-8-24 and AR 635-200) and Flying Evaluation Boards (AR 600-105).

3. Informal (Chapter 4).

a) Informal investigations may be used to investigate any matter, to include individual conduct. The fact that an individual may have an interest in the matter under investigation or that the information may reflect adversely on that individual does not require that the proceedings constitute a hearing for that individual. Even if the purpose of the investigation is to inquire into the conduct or performance of a particular individual, formal procedures are not mandatory unless required by other regulations or by higher authority.

b) Informal investigations provide great flexibility. Generally, only one investigating officer (IO) is appointed (though multiple officers could be appointed); there is no formal hearing that is open to the public; statements are taken at informal sessions; and there is no named respondent with a right to counsel (unless required by Art 31(b), UCMJ); right to cross-examine witnesses; etc.

C. APPOINTING AUTHORITY. (Para. 2-1)

1. Formal proceedings. Must consult with JA or legal advisor prior to appointing a formal board.

a) Any general court-martial or special court-martial convening authority.

b) Any general officer.

c) Any commander or principal staff officer in the grade of colonel or above at the installation, activity, or unit level.

d) Any state adjutant general.

e) DA GS-14 or above civilian supervisor assigned as a division or department chief.

2. Informal proceedings.

a) Any officer or supervisor authorized to appoint a formal board.

b) A commander at any level.

c) A principal staff officer or supervisor in grade of major or above.

3. Special cases. Only a General Court-Martial Convening Authority (GCMCA) can appoint investigation or board if:

    a) Property damage of $1,000,000 or more.

    b) Loss or destruction of Army aircraft or missile.

    c) Injury or illness likely to result in death or permanent total disability.

    d) Death of one or more persons.

    e) Death of one or more persons by friendly fire.

4. Friendly Fire Mishaps.

    a) DoDI 6055.07, defines friendly fire as a circumstance in which members of a U.S. or friendly military forces, U.S. or friendly official government employees, U.S. DoD or friendly national contractor personnel, and nongovernmental organizations or private volunteer organizations, who, while accompanying or operating with U.S. Armed Forces, are mistakenly or accidentally killed or wounded in action by U.S. or friendly forces actively engaged with an enemy or who are directing fire at a hostile force or what is thought to be a hostile force. (Definition also includes incidents where only damage or destruction of U.S. or friendly military property occurs).

    b) DoDI 6055.07 states that the Combatant Commander *or his or her designee* will convene a legal investigation for all incidents of friendly fire. US Central Command has delegated this authority to: Service Component Commanders, General Officer/Flag Officer in command of subordinate Joint Command or Joint Task Force, and General Officer/Flag Officer commanders with GCMCA. (CENTCOM Commander Policy - Friendly Fire Reporting, Investigation, and Dissemination, 14 June 2013).

    c) AR 600-8-1 requires commanders to complete an AR 15-6 investigation of all friendly fire incidents that result in the death **or** wounding of a Soldier.

    d) AR 600-8-1 requires all AR 15-6 investigations into friendly fire incidents be convened by the GCMCA. This includes injury cases as well as fatality cases. (NOTE: In practice, this does not conflict with DODI 6055.07 since the Combatant Commander will or has delegated authority to a GCMCA to convene the investigation.)

e) In May 2007, the Army Vice Chief of Staff published detailed guidance regarding the reporting and investigation requirements for all incidents of friendly fire. Units must follow the following procedures for all friendly fire incidents, whether resulting in death or injury, as soon as personnel on the ground suspect that a friendly fire incident has occurred:

(1) The unit must provide immediate telephonic notice through the Casualty Assistance Center to the Army Casualty and Mortuary Affairs Operation Center (CMAOC). For time sensitive assistance contact the CMAOC Operations Center at 800-626-3317 COMM: 502-613-9025. DSN: 983-9025. OCONUS dial country code 001 or OCONUS DSN code (312).

(2) Generate an initial casualty report IAW AR 600-8-1, approved by a field grade officer, through command channels to the Combatant Commander.

(3) Initiate an AR 15-6 investigation (Appointed by GCMCA; approved by Combatant Commander *or his or her designee* IAW DODI 6055.07 and AR 600-8-1. See discussion above).

(4) Contact USACR/SC (COMM: (334) 255-2660/3410, DSN: 558) and initiate safety investigation based upon CRC guidance.

(5) Contact the local Criminal Investigation Division. They will provide forensics assistance to the AR 15-6 Officer or conduct investigation if criminal action or negligence is suspected or substantiated.

(6) Submit supplemental casualty report when there is a substantial change to the initial report (i.e., when inflicting force is discovered).

(7) Once approved by the Combatant Commander *or his or her designee*, submit the AR 15-6 proceedings to the CMAOC.

(8) Continue coordination with the CMAOC to provide an AR 600-34 family presentation for fatality cases.

f) DODI 6055.07 also requires units to furnish the Commander, U.S. Joint Forces Command (USJFCOM), with completed privileged friendly fire safety investigations. USJFCOM is the lead agent for friendly fire mishap analysis. It maintains a joint database of pertinent causal factors and is responsible for developing plans designed to prevent or mitigate future friendly fire mishaps.

g) DODI 6055.07 authorizes combatant commanders to delegate their authority to subordinates. These delegations should be reviewed prior to any deployment.

5. Hostile death investigations.

    a) AR 600-8-1 requires AR 15–6 investigations for all hostile deaths.

    b) Hostile deaths are those resulting from a terrorist activity – such as by an IED or VBIED - or casualties caused “in action” – such as a direct-fire engagement with an opposing force.

    c) IAW AR 15-6, the GCMCA may, in writing, delegate appointing/approval authority to a subordinate commander exercising SPCMCA for hostile death cases only. This authority may not be further delegated.

    d) If evidence is discovered during a hostile death investigation, convened pursuant to this delegation, that indicates that the death(s) may have been the result of friendly fire, the investigating officer will immediately suspend the investigation and inform the appointing authority and legal advisor. At this time, the friendly fire reporting and investigation requirements must be followed. This requires the GCMCA to appoint a new investigation into the friendly fire incident. The GCMCA may appoint the same officer who was conducting the hostile death investigation if the officer is otherwise qualified. Any evidence from the hostile fire investigation should be provided to and considered by the investigating officer or board conducting the friendly fire investigation.

6. Suspected Suicides.

    a) Army Directive 2010-01 requires AR 15-6 investigations for all suspected suicides. This requirement does not apply to suicide attempts.

    b) The appointing authority is a GCMCA, as in most other investigations into deaths.

    c) The investigation should focus on suicide prevention: “The purpose of an AR 15-6 investigation into a suspected suicide is to identify the circumstances, methods, and contributing factors surrounding the event. The investigations should examine the Soldier’s behavior before the event; actions by the chain of command; and potential improvements to the unit’s, installation’s, or Army’s suicide prevention program. The completed investigations should provide clear, relevant, and practical recommendation(s) to prevent future suicides.”

d) The AR 15-6 investigation will serve as the basis for the Suicide Incident Family Brief that must be offered to the primary NOK (and to the parents of the decedent when they are secondary NOK, when practical) for confirmed cases of suicide that occur on or after 15 April 2010. The Suicide Incident Family Brief should be conducted utilizing the procedures for Fatal Training/Operational Accident Presentations to Next of Kin described in AR 600-34 (*see infra* Part VI of this outline).

D. METHOD OF APPOINTMENT – The Memorandum of Appointment. (Para. 2-1)

1. Formal. Must be in writing but, when necessary, may be appointed orally and later confirmed in writing.

2. Informal. Orally or in writing. Written memorandum of appointment is preferred.

3. Memorandum of appointments should specify purpose and scope of investigation and nature of findings and recommendations required. Appointing authority should include any special instructions or guidance for the investigating officer. AR 15-6 includes examples of memorandums of appointment but the examples provided are minimal. The memorandum of appointment is important and should include enough detail as is necessary to fully inform and guide the investigating officer. Any changes to the scope of the investigation should be documented in writing.

E. WHO MAY BE APPOINTED – The Investigating Officer. (Para. 2-1)

1. Only those **best qualified for the duty by reason of education, training, experience, length of service, and temperament should be appointed** as investigating officers (IO) and board members.

2. Commissioned/Warrant Officer/GS-13 or higher.

3. Investigating officers and voting board members must be senior to any individual whose conduct is under investigation, unless military exigencies make this impracticable. Non-voting members (i.e., legal advisor, judge advocate recorder) do not have to be senior.

4. Specific regulations may require additional qualifications (i.e., officers, professionally certified, security clearance.)

F. CONDUCTING THE INFORMAL INVESTIGATION. (Chapter 3/4)

1. Before starting. The IO must review all written materials provided by the appointing authority and meet with the legal advisor prior to beginning an informal investigation. The legal advisor should explain the rules and legal concerns for AR 15-6 investigations and assist the IO develop an investigation plan. Make sure the IO gets an Investigating Officer Guidebook with checklist and has access to AR 15-6 and other applicable regulations.

2. Investigation Plan.

    a) Purpose of the Investigation. What are the questions that need answering? What specific findings and recommendations must be made? What is the timeline? The memorandum of appointment should address these matters.

    b) Facts known and gaps (and more importantly how to fill the gaps.).

    c) Potential witnesses and order of interviewing.

    d) Physical and documentary evidence required.

    e) Possible Criminal or Counter-Intelligence implications? Article 31 Uniform Code of Military Justice (UCMJ) warnings? Privacy Act requirements?

    f) Regulations and laws involved.

    g) Chronology (of investigation as well as incident under investigation).

3. Rules of Evidence.

    a) Generally, an IO is not bound by the Military Rules of Evidence (MREs).

    b) Anything that in the minds of reasonable persons is **relevant and material** to an issue may be accepted as evidence. All evidence is given such weight as circumstances warrant.

    For example, medical records, counseling statements, police reports and other records may be considered regardless of whether the preparer of the record is available to give a statement or testify in person.

    c) Limitations.

(1) Privileged communications. The rules in section V, part III, MCM, concerning privileged communications between lawyer and client (MRE 502), privileged communications with clergy (MRE 503), and husband-wife privilege (MRE 504) apply.

(2) Polygraph tests. The person involved in the test must consent to the use of any evidence regarding the results, or regarding the taking or refusing of a polygraph.

(3) "Off the record" statements are not allowed. Findings and recommendations cannot be based on statements not contained in the report of investigation.

(4) Statements regarding disease or injury. A Soldier cannot be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury. Any such statement against interest is invalid under 10 USC 1219 and may not be considered on the issue of the origin, incurrence, or aggravation of the disease or injury.

d) Ordering witnesses to testify.

(1) Investigating officers, generally do not have subpoena power to compel witnesses to appear and testify. Commanders and supervisors may order military personnel and civilian employees to appear and testify.

(2) No military witness can be compelled to incriminate himself or herself (UCMJ Article 31) or to make a statement or produce evidence that is not material to an issue that might tend to degrade them.

(3) No witness not subject to the UCMJ can be required to make a statement or produce evidence that would violate the 5th Amendment to the US Constitution.

(4) If a witness invokes UCMJ Article 31 or the 5th Amendment, the IO must stop questioning and contact the legal advisor. The legal advisor should assist the IO determine if the invocation is well taken. This may require sending the witness to see a legal assistance or Trial Defense Service attorney for advice. If the IO, in consultation with the legal advisor, determines that the invocation is not well taken, the IO may order military and civilian employee witnesses to testify, or they may contact the witness' supervisor for assistance.

(5) Weingarten rights (5 U.S.C. 7114(a)(2)(B)) may be necessary for bargaining unit member employees.

(a) If a civilian employee who is a member of a certified bargaining unit represented by a labor organization reasonably believes that he or she might be disciplined as a result of an interview; and requests union representation, then the employee is entitled to have a union representative present during the interview.

(b) If a bargaining unit member requests union representation, the IO should consult with the legal advisor. The IO's options are to grant the request, discontinue the interview, or offer the employee the choice between continuing the interview unaccompanied by a union representative and having no interview at all.

e) Involuntary admissions. A confession or admission obtained by unlawful coercion or inducement likely to affect its truthfulness will not be accepted as evidence.

f) Bad faith unlawful searches. If members of the Armed Forces acting in their official capacity conduct or direct a search that they know is unlawful, evidence obtained as a result of that search may not be accepted or considered against any respondent whose personal rights were violated by the search. Such evidence is acceptable only if it can reasonably be determined by the legal advisor or, if none, by the investigating officer or president that the evidence would inevitably have been discovered. In all other cases, evidence obtained as a result of any search or inspection may be accepted, even if it has been or would be ruled inadmissible in a criminal proceeding. This exclusionary provision is applicable only when a respondent is involved, in other words, during a formal investigation.

G. FINDINGS AND RECOMMENDATIONS. (Para. 3-10 thru 3-13)

1. Findings.

a) Clear concise statement of fact readily deduced from evidence in record. Includes negative findings (evidence does not establish a fact). Should not exceed scope of appointment. Should refer back to evidence gathered in the investigation such as "Statement of LTC Y," or "Exhibit 1."

b) Standard is preponderance of the evidence: findings must be supported by greater weight of evidence than supports a contrary conclusion. Weight not determined by number of witnesses but by considering all evidence and factors such as demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, and other indicators of veracity.

c) Investigating Officer should work with the legal advisor to develop the findings based on the record of investigation facts, the commander's appointment memorandum, and any applicable regulation.

2. Recommendations.

a) The recommendations must be consistent with the findings. They can be negative (e.g., no further action taken). The legal advisor should ensure that the recommendations make sense and are supported by the record of investigation.

b) Investigating officers and boards make recommendations according to their understanding of the rules, regulations, and customs of the service, guided by fairness both to the Government and to individuals.

3. Deliberations and Voting (Boards of Officers).

a) Deliberations are conducted in private. Only voting members of the board may deliberate and vote. If consultation with non-voting member is required, named respondent, if any, has right to attend consultation.

b) Board with more than one member reaches decisions by voting. Majority vote controls. In the event of a tie, president's vote determines.

H. LEGAL REVIEW. (Para. 2-3.b.)

1. Not all AR 15-6 investigations require a legal review. A legal review is required for serious or complex cases, such as death or serious bodily injury cases; or where findings and recommendations may result in adverse administrative action or will be relied upon by higher HQs.

2. Determines whether the investigation complies with requirements in the appointing order and other legal requirements, the effects of any errors in the investigation, whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence (preponderance of the evidence), and whether the recommendations are consistent with the findings.

3. Effects of errors.

a) Appointing errors. If the appointing authority does not have the authority to appoint the particular investigation, the proceedings are a nullity unless an appropriate authority ratifies the appointment.

b) Substantial errors. Errors that have a material adverse effect on an individual's substantial rights. If the error can be corrected without substantial prejudice to the individual concerned, the appointing authority may return the investigation to the same IO or board for correction. If respondent fails to point out the error, it may be considered "harmless" (para. 2-3.c.(4)).

c) Harmless errors. Defects in the proceedings that do not have a material adverse effect on an individual's substantial rights.

4. There is no inherent conflict of interest or prohibition against the legal advisor conducting the legal review, however, the decision to do so should be a deliberate decision. It is recommended that a second attorney conduct the legal review in high-profile or complex cases.

5. If a judge advocate finds an investigation legally insufficient, he or she should work with the IO to try to remedy the error(s). Negotiation, good advice, and wise counsel should be used by the judge advocate to resolve the legal insufficiencies. Under no circumstances should the legal advisor or the judge advocate conducting the legal review rewrite any portion of the report of investigation without the IO's permission, or try to hide anything from the report from the appointing authority. If the legal insufficiencies cannot be resolved, the judge advocate should prepare an appropriate legal review describing the errors for the appointing authority. Just like the IO's report, however, the appointing authority is not bound by the legal review.

I. ACTION BY APPOINTING AUTHORITY. (Para. 2-3)

1. Options.

a) Approve as is.

b) Disapprove, and/or return for additional investigation. May consider all relevant information, even information not considered by IO. Unless otherwise provided by another directive (i.e., AR 635-200, appointing authority bound by board recommendation of retention,) appointing authority is not bound by findings or recommendations; may take action less favorable than recommended.

c) Substitute findings and recommendations.

2. Appointing authority decision can be documented on DA Form 1574 (Report of Proceedings by Investigating Officer/Board of Officers) or can be documented in separate memorandum. If documented on a separate memorandum, the DA Form 1574, if used, should still be annotated and signed by the appointing authority.

3. Once approved by the appointing authority, the report of investigation becomes an official agency decision thus subject to the provisions of the Freedom of Information Act (5 USC § 552).

J. ADVERSE ADMINISTRATIVE ACTION. (Para. 1-9) No adverse administrative action may be taken by a commander based on an informal AR 15-6 investigation until the following occurs unless another regulation that action is being taken under provides appropriate due process procedures.

1. Notice is given to the subject of the investigation of the allegations against him or her. The subject is given a copy of the investigation subject to any required redactions.

2. The subject is given a reasonable opportunity to rebut the allegations (AR 15-6 does not require a specific time period).

3. The Commander must consider the subject's rebuttal to the investigation, if submitted in a timely manner, before taking any adverse action.

K. RELEASE OF AR 15-6 INVESTIGATIVE REPORTS AND MATERIALS. (Para. 3-18)

1. AR 15-6 documents hold no special, automatic status under either the Privacy Act or the Freedom of Information Act. The individual parts of a report of investigation must be analyzed under both laws to determine suitability for release.

2. No part of a report should be released (unless specifically authorized by law or regulation such as a valid Freedom of Information Act request) without the approval of the appointing authority.

3. MAINTENANCE AND STORAGE. Army Records Information Management System (ARIMS) and Record Retention Schedule – Army (RRS-A). www.arims.army.mil. Investigations must be retained by the approving authority for five years, and then destroyed or shipped for permanent storage IAW ARIMS.

V. AR 385-10 ACCIDENT INVESTIGATIONS.

A. AR 385-10, THE ARMY SAFETY PROGRAM (27 November 2013)

1. Applicability. Active Army, the Army National Guard, and the U.S. Army Reserve. It also applies to Army civilian employees and the US Army Corps of Engineers and Civil Works activities and tenants and volunteers.

2. Purpose: Provides policy on Army safety management procedures. Chapter 3 provides policies and procedures for initial notification, investigating, reporting, and submitting reports of Army accidents and incidents.

3. Function of an AR 385-10 Accident Investigation (Chapter 3). To determine the facts and causes of accidents in order to prevent future accidents, and to assess liability to determine the most likely organization to initiate corrective actions. The primary purpose of investigating and reporting Army accidents is prevention. A safety investigation cannot be used as the basis for disciplinary action.

B. WHAT IS AN ACCIDENT? (Para. 3-3)

1. An Army accident is defined as an unplanned event, or series of events, which results in one or more of the following:

   a) Occupational illness to Army military or Army civilian personnel.

   b) Injury to on–duty Army civilian personnel.

   c) Injury to Army military on–duty or off–duty.

   d) Damage to Army property.

   e) Damage to public or private property, and/or injury or illness to non–Army personnel caused by Army operations

2. Accident classes are used to determine reporting and investigation requirements. (Para. 3-4)

   a) Class A: Damage totaling $2M or more; accidents involving aircraft destroyed/missing/abandoned; injury/occupational illness resulting in fatality or permanent total disability. Unmanned aircraft system (UAS) accidents are classified based on the cost to repair/replace and not automatically as an “aircraft.” Thus, an accidentally destroyed UAS costing less than $2M is not a class A accident. (Note: friendly fire fatalities must be reported and investigated as a Class A accident.)

   b) Class B: Damage between $500k - $2M; injury/occupational illness resulting in permanent, partial disability; three or more personnel hospitalized as in-patients in a single occurrence.

   c) Class C: Damage between $50k - $500k; a nonfatal injury/occupational illness that causes one or more days away from work or training beyond the day or shift on which it occurred or disability at any time (that does not meet the definition of Class A or B and is a day(s) away from work case).

d) Class D: Damage between $2k - $50k; a nonfatal injury/occupational illness resulting in restricted work, transfer, medical treatment greater than first aid; needle sticks/cuts from contaminated objects; medical removal under OSHA standard; occupational hearing loss; work-related tuberculosis.

e) Class E Aviation Accident: Damage less than $2k.

f) Class F Aviation Incident: Damage to Army aircraft engines as a result of unavoidable internal or external foreign object damage.

C. INITIAL NOTIFICATION AND REPORTING. (Para 3-5 and 3-8)

1. All Army accidents and incidents, including occupational illnesses and injuries, regardless of how minor, are reportable to the unit/local safety office. The unit/local safety office will determine the reporting and investigative requirements for the accident.

2. Immediate notification to the US Army Combat Readiness/Safety Center (USACR/SC) (https://safety.army.mil/) All Class A, all Class B, and Class C Aviation accidents and incidents (includes in-flight and on-ground, and unmanned aerial systems.)

D. CATEGORIES OF ACCIDENT INVESTIGATION REPORTS. (Para. 3-10)

1. Limited-Use Safety Accident Investigation Reports.

a) Close-hold, internal communications of DA whose sole purpose is prevention of subsequent DA accidents. To encourage open and frank discussion of the accident, the Army will use its best efforts to prevent disclosure of statements provided under a promise of confidentiality.

b) Required for all flight/flight related and fratricide/friendly fire accidents. They also may be used for accidents involving other complex weapon systems, equipment, or military-unique items, and military unique equipment/operations/exercises when the determination of causal factors is vital to the national defense as determined by Cdr, USACR/SC.

c) These reports cannot be used as evidence or to obtain evidence for disciplinary action, in determining the misconduct or line-of-duty status of any person, before any evaluation board, or to determine liability in administrative claims for or against the government.

d) Witnesses may be given the option of making their statement under a promise of confidentiality if they are unwilling to make a complete statement without such a promise and the investigation board believes it is necessary to obtain a statement from a witness.

e) Confidential witness interviews and accident board findings, recommendations, and analysis are privileged. Only the Freedom of Information Act Initial (FOIA) Denial Authority for safety investigations, Cdr, USACR/SC, may release that information. Excerpts from safety investigation reports composed purely of factual material may be released to other investigators and to the public under FOIA.

2. General-Use Safety Accident Investigation Reports.

a) These reports are prepared to record data concerning all recordable DA accidents not covered by the Limited-Use Safety Accident Investigation Report.

b) Intended for accident prevention purposes only. May not be used as evidence in any disciplinary, administrative, or legal action (punitive).

c) Promises of confidentiality cannot be made that information will be treated as exempt from mandatory disclosure in response to a request under the FOIA.

3. Both limited use and general use reports contain privileged information. Federal courts have recognized the need to protect certain information within these reports to further accident prevention within the military and to protect national security. In both types of accident reports, the board's findings, analysis, and recommendations are privileged and protected from release under FOIA. Within a Limited Use Accident Report, the confidential witness statements are also protected from release. The Supreme Court upheld the privilege for confidential witness statements in U.S. v. Weber Aircraft Corp., 465 U.S. 792 (1984).

E. CONDUCTING THE ACCIDENT INVESTIGATION. (Para. 3-12 thru 3-15) The type and extent of the investigation depends upon the class and type of accident.

1. Appointing authority. Commander with general court-martial jurisdiction over the installation or unit responsible for the operation, personnel, or materiel involved in the accident; Commander, US Army Reserve Command, for US Army Reserve units; and State Adjutant General for National Guard units.

2. Board of Officers. The following accidents must be investigated by a board consisting of at least three members.

a) All on-duty Class A and B accidents.

(1) Upon notification of a Class A or B accident, the Director of Army Safety (DASAF) will determine whether a Centralized Accident Investigation or a Installation-Level Accident Investigation will be conducted.

(2) Centralized Accident Investigation Board. Some members provided by Army Combat Readiness Center and some provided from the local command.

(3) Local Accident Investigative Board. Members provided from the local command.

b) Any accident that an appointing authority, or Cdr, USACR/SC, believes may involve a potential hazard serious enough to warrant investigation by multimember board.

3. Single-Officer Board. The following accidents must be investigated by a board consisting of at least one member: Class C Aircraft Accidents.

4. Single-Officer Investigations (does not require formal board appointment orders.) The following accidents will be investigated by one or more officers, warrant officers, safety officers/NCOs, supervisors, or DA safety and occupational health specialists GS 9 or higher.

a) All off-duty military accidents.

b) Class C and D ground accidents.

c) Aircraft Class D, E, and F accidents and Class E and FOD incidents.

5. Board Composition.

a) Must be Army officers or warrant officers, DA safety and occupational health specialist/manager/engineer GS-9 or higher, full-time technicians holding federally recognized officer or warrant officer status, DoD medical officer or DoD contracted medical officers, qualified DoD maintenance personnel, subject matter expert senior NCOs, E-5 and above in MOS 93U, 33U, 52D (UAS accidents), DoD weather officers, any other personnel approved by Cdr, USACR/SC.

b) For Class A and B accidents, board members will not be from the same unit that incurred the accident (battalion/ company/battery/troop or detachment.) Rank/grade/specialty requirement varies with type of accident.

c) Note special board member requirements of AR 385-10, para. 3-15 (depending on the type or circumstances of incident, the safety board may also require a medical officer or flight surgeon, qualified maintenance officer or technician, weather officer, master or senior aviator, UAS operator, or Army marine warrant officer.)

6. Joint Safety Investigations. For accidents involving multiple services' property, a single Joint board may be convened. Service safety service commanders decide on board members and president. Board's proceedings will be recorded in the format required by each Service.

7. Report Timelines. Class A, B, and C on-duty accidents must be completed and submitted to USACR/SC within 90 calendar days. Classes D, E, and F on-duty accidents must be completed and submitted to USACR/SC within 30 calendar days. All off-duty accidents must be completed and submitted to USACR/SC within 30 calendar days.

8. Review. The USACR/SC will review all accident reports.

F. LEGAL ACCIDENT INVESTIGATION (LEGAL INVESTIGATION). (Para. 3-10) (Formerly known as the collateral investigation.) See also AR 600-34 for guidance (which current version uses the term "collateral" investigation).

1. Used to obtain and preserve all available evidence for use in litigation, claims, disciplinary action, or adverse administrative action. Such investigations are often conducted simultaneously but independently of the accident safety investigation. They are essential to protect the privileged information of safety reports as they ensure an alternate source of information. Safety personnel may not be used to conduct or assist with the legal investigation, but they are authorized to the entire legal investigation.

2. Legal Accident Investigations are required:

a) For all Class A accidents, to include cases of friendly fire;

b) As directed by the SJA IAW the claims regulation (AR 27-20);

c) On accidents where there is a potential claim or litigation for or against the government or government contractor; or

d) On accidents with a high degree of public interest or anticipated disciplinary or adverse administrative action against any individual.

3. Commanders may direct a legal investigation into any other accident. The investigation will normally use AR 27-20 procedures if related to potential claim. If not, AR 15-6 informal procedures should be used.

4. Legal investigations into fatal training/operational accidents must be completed within 30 days of the accident. Upon written request, the appointing authority may grant delays in 10-day increments (AR 600-34, para 3-5).

G. PRIORITY AND SHARING OF INFORMATION. (Para. 3-24 thru 3-27)

1. The safety investigation has priority (collection of evidence/access to scene) over the legal investigation and all other investigations except a criminal investigation conducted by military police or Criminal Investigation Division, which has priority over witnesses and evidence.

2. The safety investigation may obtain all information collected by the legal or MP/CID criminal investigations, as well as medical and personnel records of personnel involved in the accident..

3. Safety Accident Investigation Reports will not be enclosed in any other report unless the sole purpose of the report is accident prevention.

4. Other Army authorized investigators may obtain only factual information from the safety investigation.

5. Information that will not be given the legal investigation include (punitive):

a) Witness statements taken by safety board members.

b) Preliminary or final, findings, analysis, and recommendations.

c) Voice recordings of intra-cockpit communications without Cdr, USACR/SC authorization.

H. RELEASE OF INFORMATION FROM ACCIDENT INVESTIGATION REPORTS. (Para. 3-28 and 3-29)

1. AR 385-10, para. 3-20.i and AR 600-34, para. 4-2(f) make unauthorized disclosure of privileged safety information punishable under Article 92, UCMJ.

2. The Combat Readiness Center is the repository for Class A, B, C, D, and E accident reports, and Class E and F incident reports.

3. Freedom of Information Act requests for Class A, B, or C safety accident reports must be referred to the USACR/SC.

4. Local safety offices are authorized to release Class D and E general use reports if release otherwise appropriate under the Freedom of Information Act. Units wishing to withhold information from a Class D and E report should send it to the Commander, Combat Readiness Center, who is the initial denial authority for safety reports.

VI. AR 600-34 FATAL TRAINING/OPERATIONAL ACCIDENT PRESENTATIONS TO NEXT OF KIN.

A. AR 600-34 – FATAL TRAINING/OPERATIONAL ACCIDENT PRESENTATIONS TO THE NEXT OF KIN.

1. Applicability. Active Army, Army National Guard, and US Army Reserve.

2. Purpose. Prescribes mandated tasks that govern collateral investigations, as they apply to fatal training/operational accidents, and provides guidance and direction for preparing and delivering primary next of kin (PNOK) presentations. This regulation implements guidance published in DODI 1300.18.

3. Function of an AR 600-34 Family Presentation. To provide a thorough explanation of releasable investigative results of fatal training/operational accidents to the deceased's PNOK; ensure the family understands the circumstances of the accident; and ensure the family is reassured of the Army's concern regarding the tragedy and is aware of the compassion of Army leaders. Information concerning the accident or accident investigation may not be released to Congress, the media, or the public before it is presented to the PNOK.

B. ARMY IMPLEMENTATION.

1. Key definitions.

a) Fatal training accidents include those accidents associated with non-combat military exercises or training activities that are designed to develop a Soldier's physical ability or to maintain or increase individual/collective combat and/or peacekeeping skills.

b) Fatal operational accidents are those deaths associated with active duty military exercises or activities occurring in a designated war zone or toward designated missions related to current war operations or other contingency operations, contributing directly or indirectly to the death.

c) PNOK. The legal next of kin. That person of any age most closely related to the individual according to the line of succession. Seniority, as determined by age, will control when the persons are of equal relationship.

2. Collateral investigations are required for: (Chapter 3)

   a) All on-duty Class A accidents resulting in a Soldier's death.

   b) Anticipated litigation for or against the Government or Government contractor.

   c) Anticipated disciplinary or adverse action against any individual.

   d) Probable high public interest.

   e) All suspected cases of friendly fire.

3. Presentations are required for: (Para. 4-1)

   a) All fatal training/operational accidents investigated under AR 15-6, AR 385-10, and AR 600-34.

   b) Special interest cases or cases in which there is probable high public interest, as determined by The Adjutant General.

   c) All suspected cases of Friendly Fire.

   d) In general, fatal accidents that are hostile, but do not occur as a result of engagement with the enemy.

   e) Though not required by AR 600-34, Suicide Incident Family Briefs utilizing the same procedures are required for confirmed cases of suicide that occur on or after 15 April 2010 (Army Directive 2010-01; *see supra* Part IV.C.6. of this outline).

4. Updates to PNOK. If the appointing/approval authority grants an extension of the 30-day requirement to complete the legal investigation, the approval authority is responsible for the release of information from the investigation to the PNOK.

   a) The approving authority's legal office must review each update to ensure that it contains no admission of liability, waiver of any defense, offer of compensation or any statement that might jeopardize the Army's litigation posture.

b) The update is provided to the Casualty and Mortuary Affairs Operation Center (CMAOC) who will direct the Casualty Assistance officer (CAO) to provide the update to the family.

5. Preparing the presentation to the PNOK. (Chapter 4)

a) Once the investigation is complete, the CMAOC contacts the Army command commander and the collateral investigation appointing/approval authority in order to coordinate appointment of the briefer who is "most often the deceased Soldier's colonel or brigade level commander."

b) The command is ultimately responsible to provide an O6 to present the briefing as the CMAOC does not provide briefing teams.

c) Within 24-hours of completion of the investigation, the CAO must notify the PNOK that the Army is prepared to discuss the results of the investigation with the family.

d) The CAO then follows up with the PNOK to arrange for the presentation date and forward the preferred dates (primary and secondary) to the CMAOC.

6. Briefing Team.

a) At a minimum, the briefing team must consist of the briefer (an O6 from the chain of command), the family's CAO, and a chaplain from the mishap unit.

b) The briefer must consider including the SJA or legal advisor or PAO representative when it is apparent that a family has invited, or may invite, the local media or a family legal representative will attend the presentation.

c) The CAO must work with the PNOK to obtain a list of people the PNOK intends to invite to the presentation to enable the presentation team to determine the family's intent to invite media or legal representation.

d) NOTE: The Army is prohibited from putting conditions or limitations upon those whom the family wishes to invite to the presentation (para. 4-3.h.).

e) The briefer must also consider including an interpreter if the PNOK or other attending family members do not understand English.

7. Conducting the Family Presentation. (Chapter 5)

a) The briefer's primary responsibility is to meet personally with the PNOK and deliver a thorough open explanation of the releasable facts and circumstances surrounding the accident. At a minimum, the briefer must provide the following.

(1) An explanation of the unit's mission which highlights the Soldier's significant contributions to the mission and the Army;

(2) An accurate account of the facts and circumstances leading up to the accident, the sequence of events that caused the accident, and a very clear explanation of primary and contributing factors causing the accident as determined by the collateral investigation.

(3) Actions taken at the unit level to correct any deficiencies.

b) Most PNOK prefer to receive the family presentation in the family home.

c) Style of presentation.

(1) Dialogue with no notes but with maps and diagrams of training areas. This works best for a briefer who is intimately familiar with the accident and investigation.

(2) Bullet briefing charts. These work well as they tend to help the briefer stay focused. Charts must be reviewed and approved in advance by the SJA.

(3) Simple notes and an executive summary. Written materials must be reviewed and approved by the SJA and copies should be left with the PNOK if requested.

8. Completion of Family Presentation. Within two weeks of the presentation, the briefer must submit an AAR through the appointing authority and MACOM to the TAG.

9. SJA Requirements.

a) The OSJA is required to review the presentation to ensure that it contains no admission of liability, waiver of any defense, offer of compensation, or any other statement that might jeopardize the Army's litigation posture. This may include review of briefing charts, notes, and executive summaries.

b) The SJA or legal advisor must provide a non-redacted copy of the collateral investigation report to CMAOC.

c) The regulation is not intended to provide the PNOK with information not otherwise releasable under the Privacy Act or the Freedom of Information Act.

(1) The SJA must redact the collateral investigation report and prepare the required number of copies. At a minimum, the briefer, each team member, and each PNOK will be given a redacted copy.

(2) The SJA also must prepare a letter to accompany the redacted version of the report delivered to the family and will explaining, in general terms, the reasons for the redactions.

d) More detailed guidance concerning redaction of reports of investigation related to deaths is contained in Army Directive 2010-02.

10. Release of the Collateral Investigation. (Para. 3-6) The investigation will be released in the following order:

a) PNOK and other family members designated by the PNOK;

b) Members of Congress, upon request; and

c) Members of the public and media (after a valid FOIA request).

VII. AR 600-8-4 LINE OF DUTY INVESTIGATIONS.

A. AR 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS

1. Applicability. Applies to the Active Army, the Army National Guard, the US Army Reserve, ROTC Simultaneous Membership Program Cadets, US Military Academy Cadets, Senior ROTC Cadets, and applicants for enrollment while performing authorized travel to or from or while attending training or a practice cruise.

2. Purpose. Prescribes policies and procedures for investigating the circumstances of disease, injury, or death of a Soldier. Provides standards and considerations used in determining line of duty status.

3. Function of an AR 600-84 Line of Duty Investigation. To determine the duty status of Soldiers who die or sustain certain injuries, diseases, or illnesses, and to determine whether such death, injury, disease, or illness occurred in the line of duty.

B. POSSIBLE OUTCOMES.

1. In Line of Duty (ILD – Soldier in authorized status and injury not proximately caused by intentional misconduct or willful negligence)

2. Not in Line of Duty-Not Due to Own Misconduct (NLD-NDOM – Soldier in unauthorized status but injury not caused by intentional misconduct or willful negligence).

3. Not in Line of Duty-Due to Own Misconduct (NLD-DOM – Soldier's intentional misconduct or willful negligence proximate cause of injuries, regardless of status).

C. IMPACT OF DETERMINATION. (Para. 2-2)

1. In Line of Duty. Soldier may be entitled to:

a) Army Disability Retirement or Separation Compensation,

b) DVA Compensation and Hospitalization Benefits.

2. Not in Line of Duty - Not Due to Own Misconduct and Due to Own Misconduct:

a) If on active duty, Soldier denied disability retirement or separation compensation.

b) If disabled after leaving AD, Soldier may be denied DVA disability or hospitalization benefits.

c) May be denied civil service preference.

3. Not in Line of Duty-Due to Own Misconduct:

a) Days lost > 1 added to service obligation.

b) Days lost > 1 may be excluded from computations for pay and allowances.

c) May result in loss of pay where disease (not injury) immediately follows intemperate use of drugs (includes alcohol).

D. TWO-STEP ANALYSIS:

1. Did the Soldier's intentional misconduct or willful negligence proximately cause the injury, illness, or death?

a) Injury, illness, or death caused by Soldiers own misconduct can never be in line of duty.

b) Violation of a regulation by itself is not misconduct, it is simple negligence. Regulatory violations should be considered in the analysis, however.

2. What was the Soldier's status?

a) Duty status refers to an authorized duty status – on leave, on pass, present for duty, versus unauthorized status – AWOL, deserter, DFR. Unless mentally unsound, a Soldier in an unauthorized status can never be injured ILD. (Para. 4-7)

b) It does not refer to worker's compensation or claim's theories of "performing military duties" or "job-related."

3. Examples:

a) In Line of Duty. Soldier is injured in car crash while on leave. Crash is caused by another driver's negligence. Soldier is considered to be in the line of duty.

b) Not in Line of Duty, Not Due to Own Misconduct: Soldier is AWOL (while mentally sound), but otherwise doing nothing wrong. While walking down the street, Soldier is hit by a car that jumps the curve and is seriously injured. Soldier is considered to be not in the line of duty, but not due to own misconduct. NOTE: NLOD-NDOM may also be based on an EPTS condition, not aggravated by service.

c) Not in Line of Duty, Due to Own Misconduct: Soldier gets drunk at a party and attempts to drive home but is involved in an accident on the way. If the intoxication caused the accident, Soldier is considered to be not in the line of duty due to own misconduct.

E. PROCEDURES.

1. Presumptive Finding of In Line of Duty – No investigation is required when:

a) A disease does not involve a factor cited at paragraph 3 below.

b) Injury is clearly incurred as the result of enemy action or terrorist attack.

c) Death by natural causes or death occurs while a passenger on a common commercial carrier or military aircraft.

d) NOTE: See para. I.3. below for additional information for death cases.

2. Informal Investigation (Para 3-1 thru 3-6)

a) No misconduct is suspected.

b) No negligence is suspected.

c) Formal investigation is not required.

d) At a minimum, the MTF representative and commander must sign a DA Form 2173. Supporting exhibits should be attached.

e) Special court-martial convening authority (SPCMCA) is appointing and approving authority. (National Guard appointing authority is commander of at least battalion or squadron size unit). SPCMCA should approve informal investigation in writing "By Authority of the Secretary of the Army."

f) NOTE: Informal investigation can only result in an ILD determination except in the case where the MTF finds that a condition existed prior to service (EPTS). In that event, the status would be NLD-NDOM.

3. Formal Investigation. (Para. 3-7 thru 3-12)

a) Appointing Authority is the SPCMCA.

b) Final approving authority is the General court-martial convening authority (GCMCA). May be delegated to field grade officer on the GCMCA's staff.

c) Investigating officer must be senior in grade to the individual investigated. May be commissioned officer, warrant officer, or commissioned officer of another US military service in joint activities where Army has been designated as the executive agent.

d) Formal investigations are required when any of the following factors are present:

(1) Strange or doubtful circumstances or is apparently due to misconduct or willful negligence.

(2) Injury or death involving alcohol or drug abuse.

(3) Self-inflicted injuries or possible suicide.

(4) Injury or death incurred while AWOL.

(5) Training death of a USAR/ARNG Soldier.

(6) Injury or death of a USAR or ARNG member while traveling to or from authorized training or duty.

(7) Injury or death occurring while en route to final acceptance in the Army.

(8) USAR/ARNG Soldier serving active duty tour of 30 days or less is disabled by disease.

(9) In connection with an appeal of an unfavorable finding of alcohol or drug abuse.

(10) A valid request for formal investigation is made (e.g., requested by the Physical Disability Agency).

e) Evidentiary standards and presumptions:

(1) Soldier is presumed ILD UNLESS refuted by "substantial" evidence contained in the investigation.

(2) A finding or determination must be supported by a greater weight of evidence than supports any different conclusion.

(3) A reasonable person must be convinced of the truth or falseness of a fact considering equally direct and indirect evidence.

(4) KEY: Must use the rules in Appendix B.

(5) The general guidance contained in AR 15-6 applies unless AR 600-8-4 provides more specific or different guidance.

4. Timeline.

a) Informal: 40 calendar days after incident.

b) Formal: 75 calendar days after incident.

F. PROCEDURAL DUE PROCESS REQUIREMENTS.

1. During Evidence Collection: Soldier not required to make a statement against interest. Soldier must be advised that he or she does not have to make a statement against interest. If Soldier is not informed of right not to make statement, or is forced to make statement, it cannot be used in making the LOD determination (10 USC § 1219).

2. Regarding Adverse Findings: Investigating officer must provide Soldier with written notice of proposed adverse finding, a copy of the investigation, and the supporting evidence. Investigating officer must issue warning regarding making statements against interest. Investigating officer must give a reasonable opportunity to reply in writing and to offer rebuttal. If investigating officer receives a response, it must be considered before finalizing findings. If investigating officer does not receive a response, the investigating officer may proceed to finalize the findings.

3. Formal investigations must receive a legal review before a final determination is made. Informal investigations may receive a legal review but it is not required. (Para. 3-9)

G. FINAL APPROVING AUTHORITY (GCMCA OR FIELD GRADE DESIGNEE) DECISION.

1. Final approving authority either approves or disapproves the finding under the authority of the Secretary of the Army.

2. The report must be forwarded to the service member through his command.

3. The transmittal letter must notify the service member of his right not to make a statement against interest and of his appellate rights.

H. APPELLATE RIGHTS. (Para. 4-17)

1. The service member may appeal in writing within 30 days after receipt of the notice of adverse finding.

2. The service member's appeal is to the final approving authority.

3. The final approving authority may only change the finding to "in line of duty," based on substantial new evidence.

I. SPECIAL CONSIDERATIONS.

1. Always consult the rules of Appendix B. The regulation also discusses and provides direction regarding pregnancies, venereal disease, conditions existing prior to service, intoxication and drug use, vehicle accidents, etc. throughout chapter 4.

2. Mental responsibility, emotional disorder, suicide, and suicide attempts.

a) Soldier may not be held responsible for acts if, as the result of, mental defect, disease or derangement, Soldier unable to comprehend or appreciate the nature of conduct. These disorders are presumed ILD unless they existed prior to service (EPTS). Personality disorders, by their nature, are considered EPTS.

b) Suicide and suicide attempt line of duty investigations must determine whether Soldier was mentally sound. Investigating officer must, therefore, inquire into the Soldier's background. A mental health officer must review the evidence and render an opinion whether the Soldier was mentally sound at the time of the incident. If mentally unsound, the medical officer must determine if the condition existed EPTS..

c) Self-inflicted injuries by a mentally sound Soldier should be considered misconduct.

3. Cases Involving Death.

a) Prior to 10 September 2001, deaths did not require a line of duty determination. Congress authorized the payment of Survivor benefit Plan benefits to Service members who die on active duty "in the line of duty" regardless of amount of time of service (FY 02 National Defense Authorization Act).

b) All active-duty deaths on or after 10 September 2001 require a line of duty determination. An investigation is required for all deaths except death by natural causes, or when death occurs while a passenger on a common commercial carrier or military aircraft, or death as the result of combat, attack by terrorists or other forces antagonistic to the interests of the United States, or in friendly-fire incidents, or while a prisoner of war.

VIII. AR 735-5 FINANCIAL LIABILITY INVESTIGATIONS OF PROPERTY LOSS (FLIPL) (CHAPTERS 13 AND 14)

A. AR 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY.

1. Applicability. Applies to the Active Army, the Army National Guard, and the US Army Reserve.

2. Purpose: Prescribes the basic policies and procedures in accounting for Army property.

3. Tools:

a) Financial liability officers should use DA Pam 735-5, Financial Liability Officer's Guide, during their investigation.

b) Units must use DA Form 7531, Checklist and Tracking Document for Financial Liability Investigations of Property Loss, to track investigations.

4. Function of an AR 735-5 Financial Liability Investigation of Property Loss.

a) A FLIPL is used to document the circumstances concerning the loss, damage, or destruction (LDD) of Government property and serves as, or supports a voucher for adjusting the property from accountable records. It also documents a charge of financial liability assessed against an individual or entity, or provides for the relief from financial liability.

b) It is used to enforce property accountability and is not intended as corrective action or punishment. Commanders, however, are not precluded from using administrative or disciplinary measures, such as reprimand, Article 15, if appropriate as the result of LDD of Government property.

B. ALTERNATIVES TO FINANCIAL LIABILITY INVESTIGATIONS.

1. Statement of Charges/Cash Collection Voucher when liability is admitted and the charge does not exceed one month's base pay. (These two functions have been combined on DD Form 362)

2. Cash sales of hand tools and organizational clothing and individual equipment (also completed on a DD Form 362).

3. Unit level commanders may adjust losses of durable hand tools up to $500 per incident, if no negligence or misconduct is involved.

4. Abandonment order (by O6 or above) may be used in combat, large-scale field exercises simulating combat, military advisor activities, or to meet other military requirements.

5. Damage statement. Approval authority may sign damage statement when there is no evidence of negligence or misconduct.

6. Recovery of property unlawfully held by civilians is authorized — show proof it is U.S. property and do not breach the peace.

7. AR 15-6 investigations and other collateral investigations can be used in conjunction with the DD Form 200 (replaced DA Form 4697) as a substitute for financial liability investigation investigations.

C. MANDATORY FLIPLs. (Para. 13-3) A unit must initiate to account for LDD of Government equipment when:

1. An individual refuses to admit liability and negligence or misconduct is suspected.

2. Property is lost by an outgoing accountable officer, unless voluntary reimbursement is made for the full value of the loss.

3. The amount of loss or damage exceeds an individual's monthly base pay, even if liability is admitted.

4. The damage to government quarters or furnishings exceeds one month's base pay.

5. The loss involves certain bulk petroleum products (exceeding allowable loss and $1000).

6. A specified type of controlled item is lost or destroyed (requires AR 15-6 investigation).

7. A higher authority or other DA regulation directs a financial liability investigation.

8. Loss involves public funds or other negotiable instruments greater than $750, or any such loss and the individual does not voluntarily reimburse Army.

9. Loss or damage involves government vehicle, cost exceeds $1000, and responsible party not relieved of liability.

10. Loss resulted from fire, theft, or natural disaster.

11. Loss involves certain recoverable items.

12. Losses due to combat where equipment is determined captured, abandoned or a physical loss (no residue).

13. Certain ammunition losses require AR 15-6 investigation (See AR 190-11, Appendix E).

D. JOINT FINANCIAL LIABILITY INVESTIGATIONS.

1. Absent a loan agreement stating otherwise, the regulation of the Service that owns the property (property is located on that service's property account) is the appropriate regulation to apply.

2. The Army and Air Force have a reciprocal agreement outlined in paragraph 14-36 of AR 735-5 that explains the process for processing financial liability investigations that find Air Force personnel liable for the loss, damage, or destruction of Army property. Upon completion of the investigation, it should be forwarded to the appropriate Air Force approval authority for final action and possible collection.

3. For all other situations where non-Army personnel are found to be liable for the loss, damage, or destruction of Army property, the procedures of AR 735-5, paragraph 14-35 should be followed. Upon completion of the investigation, the respondent will be formally notified and requested to make payment in full. If after 60 days, the respondent fails to pay, the investigation should be sent to the respondent's servicing finance office for processing.

4. Financial liability investigations that find contractors liable should be processed IAW the applicable contract through the contracting office.

E. INITIATING THE FLIPL. (Para. 13-7 and 13-8)

1. Timeline. Upon discovering the LDD of Government equipment, the hand receipt holder, accountable officer, or person with most knowledge of the incident will initiate a FLIPL within:

   a) Active Army: 15 calendar days.

   b) Army Reserve and National Guard: 75 calendar days.

2. AR 15-6 Investigation. Certain losses (controlled items and weapons/ammunition identified in AR 190-11, App E) require an AR 15-6 investigation as the underlying investigative mechanism. A DD Form 200 (FLIPL) will be completed as the adjustment document, but the appointing or approving authority should not conduct a separate FLIPL.

3. Initiation is complete when forwarded to the appointing/approving authority for appointment of a financial liability officer (investigating officer).

4. Government Property Damaged or Lost by Contractors (Para. 13-20). The approving authority will compile all documentation regarding the LDD and forward to the contracting officer responsible for monitoring the contract, who will investigate the loss.

F. APPROVING/APPOINTING AUTHORITY. (Para. 13-17)

1. The approving authority is an Army officer, or DA civilian employee authorized to appoint a financial liability officer and to approve financial liability investigations "by authority of the Secretary of the Army." The approving authority does not have to be a court-martial convening authority. The following personnel are approving authorities for FLIPLs.

    a) For final loss or damage $5,000 or less, the first lieutenant colonel (O5) in the rating chain is the approval authority (if delegated) except for equipment classified as communications security (COMSEC), sensitive items, or equipment containing personal identification information (PII).

    b) For final loss or damage greater than $5,000 but less than $100,000, the first colonel (O6) or supervisory GS-15 in the rating chain is the approval authority.

    c) For final loss or damage $100,000 or greater, or any final loss of a controlled item, the first general officer or senior executive service civilian in the rating chain is the approval authority.

2. The appointing authority is an officer or civilian employee designated by the approving authority with responsibility for appointing financial liability investigation investigating officers. The approving authority may designate, in writing, a Lieutenant Colonel (O5) (or major in a lieutenant colonel billet) or DOD civilian employee in the grade of GS-13 (or a GS-12 in a GS-13 billet) or above as an appointing authority.

3. Regardless of who initiates the financial liability investigation, it is processed through the chain of command of the individual responsible for the property at the time of the incident, provided the individual is subject to AR 735-5. AR 735-5, para. 13-5.

G. FINANCIAL LIABILITY OFFICER QUALIFICATIONS. (Para. 13-27)

1. The financial liability officer will be senior to the person subject to possible financial liability, except when impractical due to military exigencies.

2. The financial liability officer can be an Army commissioned officer; warrant officer; or enlisted Soldier in the rank of Sergeant First Class (E-7), or higher; a civilian employee GS-07 or above; or a Wage Leader (WL) or Wage Supervisor (WS) employee. In joint commands or activities, any DOD commissioned or warrant officer or non-commissioned officer E-7 or above assigned to the activity or command can be the financial liability officer.

H. CONDUCTING THE INVESTIGATION. (Section VI)

1. The financial liability officer's primary duty is the investigation. He/she will receive a briefing prior to beginning the investigation. The regulation does not mandate who provides the briefing. It should be provided by the unit S4 or a judge advocate.

2. Timeline. The financial liability officer must complete the investigation within:

   a) Active Army: 30 calendar days.

   b) Army Reserve and National Guard: 75 calendar days.

3. Financial liability officer must:

   a) Seek out all the facts that surround the LDD and conduct a thorough and impartial investigation.

   b) Physically examine damaged property and release it for turn-in or repair.

   c) Interview and obtain statements from individuals with useful information.

   d) Resolve conflicting statements and confirm self-serving statements.

   e) Organize investigation in accordance with the regulation. Paragraph 13-31.

   f) Determine the cause and value of the LDD of Government property and determine if assessment of financial liability is warranted.

I. ASSESSMENT OF FINANCIAL LIABILITY. (Para. 13-29)

1. Individuals may be held financially liable for the LDD of Government property if they were negligent or have committed willful misconduct, and their negligence or willful misconduct is the proximate cause of that LDD.

2. Loss. Before a person may be held liable, the facts must show that a loss to the Government occurred. The dollar amount of the LDD will be the actual value at the time of the loss, minus any scrap or salvage value.

   a) Types of Loss. There are two types of losses which can result in financial liability:

      (1) Actual loss. Physical loss, damage or destruction of the property.

      (2) Loss of accountability. Due to loss circumstances, it is impossible to determine if there has been actual physical loss, damage, or destruction because it is impossible to account for the property.

b) Fair market value (as determined by a “qualified technician”) is the preferred method of valuing the loss. (App. B, para. B-2a)

(1) Determine the item’s condition item at the time of the loss or damage.

(2) Determine a price value for similar property in similar condition sold in the commercial market within the last 6 months.

c) Depreciation.

(1) Least preferred method of determining the loss to the government. (App. B, para. B-8)

(2) Compute charges depending on the type of equipment according to App. B, para. B-2b.

3. Responsibility. The type of responsibility a person has for property determines the obligations incurred by that person for the property. The type of obligation a person has toward property is relevant when determining whether a person was negligent. There must be a finding of either negligence or willful misconduct before an individual may be held liable.

a) Command Responsibility.

(1) The commander has an obligation to insure proper use, care, custody, and safekeeping of government property within his or her command.

(2) Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at any level.

b) Supervisory Responsibility.

(1) The obligation of a supervisor for the proper use, care, and safekeeping of government property issued to, or used by, subordinates. It is inherent in all supervisory positions and not contingent upon signed receipts or responsibility statements. It arises because of assignment to a specific position and includes:

(2) Providing proper guidance and direction;

(3) Enforcing all security, safety, and accounting requirements; and

(4) Maintaining a supervisory climate that will facilitate and ensure the proper care and use of government property.

c) Direct Responsibility.

(1) The obligation to ensure the proper use, care, custody, and safekeeping of all government property for which the person has receipted.

(2) Direct responsibility is closely related to custodial responsibility (discussed below).

d) Custodial Responsibility.

(1) An individual's obligation regarding property in storage awaiting issue or turn-in to exercise reasonable and prudent actions to properly care for and ensure property custody and safekeeping of the property.

(2) Who has custodial responsibility? A supply sergeant, supply custodian, supply clerk, or warehouse person who is rated by and answerable directly to the accountable officer or the individual having direct responsibility for the property.

(3) Responsibilities include:

(a) Ensuring the security of all property stored within the supply room and storage annexes belonging to the supply room or SSA is adequate.

(b) Observing subordinates to ensure they properly care for and safeguard property.

(c) Enforcing security, safety and accounting requirements.

(d) If unable to enforce any of these, reporting the problems to their immediate supervisor.

e) Personal Responsibility. An individual's obligations to properly use, care, and keep safe government property in their possession, with or without a receipt.

4. Culpability (negligence or willful misconduct). Before a person can be held liable, the facts must show that he or she acted negligently or engaged in willful misconduct.

a) Simple negligence. The absence of due care, by act or omission of a person which lacks that degree of care for the property that a reasonably prudent person would have taken under similar circumstances, to avoid the LDD.

(1) Remember, a reasonably prudent person is an average person, not a perfect person. Also consider:

(2) What could be expected of the person considering their age, experience, and special qualifications?

(3) The type of responsibility involved.

(4) The type and nature of the property. More complex or sensitive property normally requires a greater degree of care.

(5) The nature, complexity, level of danger, or urgency of the activity ongoing at the time of the LDD of the property.

(6) Examples of simple negligence.

(a) Failure to do required maintenance checks.

(b) Leaving personally assigned equipment in the trunk of a personal vehicle.

(c) Driving too fast for road or weather conditions.

(d) Failing to maintain proper hand receipts.

b) Gross negligence—an extreme departure from the course of action expected of a reasonably prudent person, all circumstances being considered, and accompanied by a reckless, deliberate, or wanton disregard for the foreseeable consequences of the act.

(1) Reckless, deliberate, or wanton -

(a) These elements can be express or implied.

(b) Does not include thoughtlessness, inadvertence, or errors in judgment.

(2) Foreseeable consequences.

(a) Does not require actual knowledge of actual results.

(b) Does not need to foresee the particular loss or damage that occurs, but must foresee that some loss or damage of a general nature may occur.

c) Willful misconduct—any intentional wrongful or unlawful act.

(1) Willfulness can be express or implied.

(2) Includes violations of law and regulations such as theft and misappropriation of government property.

(3) A violation of law or regulation is not negligence per se.

(4) Examples of willful misconduct

(a) A violation of law or regulation is not negligence per se.

(b) Soldier throws a tear gas grenade into the mess tent to let the cooks know what he thought about breakfast, and as a result, the tent burns to the ground.

(c) Soldier steals a self-propelled howitzer, but he does not know how to operate it. Accordingly, his joy ride around post results in damage to several buildings.

5. Proximate cause. Before a person can be held liable, the facts must clearly show that a person's conduct was the proximate cause of the LDD. Proximate cause is based upon whether the LDD was foreseeable. If the LDD of property was a reasonably foreseeable consequence of the respondent's misconduct or negligence, and LDD to property actually occurred, then that misconduct or negligence is the proximate cause of the LDD.

a) The cause which, in a natural and continuous sequence, unbroken by a new cause, produces the loss or damage, and without which the loss or damage would not have occurred. It is the primary moving cause, or the predominate cause, from which the LDD followed as a natural, direct, and immediate consequence.

b) Use common sense and good judgment to determine.

c) Examples of proximate cause.

(1) Soldier driving a vehicle fails to stop at a stop sign and strikes another vehicle after failing to look. Proximate cause is the Soldier's failure to stop and look.

(2) Soldier A illegally parks his vehicle in a no parking zone. Soldier B backs into A's vehicle. B did not check for obstructions to the rear of his vehicle. A's misconduct is not the proximate cause of the damage. Instead, B's negligent driving is the proximate cause.

d) Independent intervening cause—an act which interrupts the original flow of events or consequences of the original negligence. It may include an act of God, criminal misconduct, or negligence.

J. CONCLUDING THE INVESTIGATION.

1. Liability not recommended by the financial liability officer. (Para. 13-33) If financial liability is not recommended, the investigation is forwarded through the appointing authority, if any, to the approving authority for action.

a) If the approving authority concurs and does not assess liability, the investigation is complete.

b) If the approving authority does not concur and decides to assess liability, the individual against whom liability will be imposed (respondent) must be given notice and an opportunity to rebut the decision (same procedure as if the financial liability officer initially recommended liability).

2. Liability recommended by the financial liability officer. (Para. 13-34 & 13-35) If financial liability is recommended against an individual, the individual is referred to as the respondent. Respondents have certain rights.

a) The financial liability officer will notify the respondent by memorandum of the proposed recommendation of financial responsibility. The notification includes:

(1) The right to inspect and copy the report of investigation. A copy of the investigation is normally sent with the notification.

(2) The right to obtain free legal advice (military and DA civilians) from the OSJA.

(3) The right to submit a statement and other evidence in rebuttal to the recommendation

(4) Time limits for submitting rebuttal evidence to the financial liability officer are as follows.

(a) 7 calendar days—when investigation is hand delivered to the respondent.

(b) 15 calendar days—when respondent is unavailable but in the same country and the investigation is mailed or emailed with delivery receipt.

(c) 30 calendar days—when respondent is unavailable and in a different country and the investigation is mailed or emailed to AKO.

b) The financial liability officer must consider the respondent's rebuttal, even if received after the submission deadline. Regardless of whether the financial liability officer changes the recommendation, the investigation is forwarded through the appointing authority, if any, to the approving authority for decision.

c) The approving authority is not bound by the recommendation of the financial liability officer. The approving authority may decide not to impose liability or to impose liability.

d) Note: If financial liability officer recommended no liability and therefore did not provide the individual with notice and opportunity to rebut, the approving authority must do so before he can assess liability.

3. Approving authority decides to impose liability.

a) The approval authority must notify the respondent of decision to impose liability and that collection efforts will commence in 30 days (NOTE: ARNG affords 60 days). In the memorandum the approval authority must also notify the respondent of the following rights.

(1) The right to inspect and copy the file.

(2) The right to legal advice from the local legal assistance office.

(3) The right to request reconsideration based on legal error.

(4) The right to a hearing (for DOD civilians only).

(5) The right to request remission of indebtedness UP AR 600-4.

(a) Available for enlisted Soldiers only.

(b) Only to avoid extreme hardship.

(c) Only unpaid portions can be remitted. Suspend collection action long enough for the Soldier to submit his request for remission of the debt.

(d) Must request reconsideration before submitting request for remission of indebtedness.

(6) The right to request extension of collection time.

(7) The right to petition Army Board for the Correction of Military Records (ABCMR) IAW AR 15-185. Based on unjustness. Can only be made after appeal authority acts on request for reconsideration (see below).

(8) Civilian employees may avail themselves of the grievance/arbitration procedures.

b) Request for reconsideration, a hearing, or remission or cancellation of debt stops all collection action pending outcome of request.

4. Mandatory legal review. (Para. 13-39)

a) Before the approving authority approves a recommendation of liability, a judge advocate WILL review the survey for legal sufficiency of the evidence and propriety of the findings and recommendations. The legal reviews should be completed within 10 days (40 days for USAR and ARNG).

b) Although AR 735-5 states that the legal review is conducted after the approving authority makes his or her decision regarding liability, in practice the legal review is normally conducted prior to review by the approving authority.

c) The approving authority cannot assess liability of the legal review determines that the investigation is insufficient.

K. DECISION BY APPROVING AUTHORITY WITHOUT INVESTIGATION (Short FLIPL). (Para. 13-22 & 13-23)

1. When initial information indicates there was no negligence involved in the LDD of Government property, the approving authority may relieve all individuals from liability.

2. When initial information indicates that negligence or willful misconduct was the proximate cause of the LDD of Government property, the approving authority may assess liability by:

a) Notifying the respondent of the intent to hold him/her liable. Notification must include all the facts upon which the decision is based and must include notice of all the respondent rights as outlined above. The respondent has the right to submit a rebuttal.

b) The approving official must consider the rebuttal if submitted and make a determination.

c) The information and rebuttal must receive a legal review.

d) The approving authority makes a final decision and notifies the respondent accordingly.

L. RELIEF FROM LIABILITY.

1. Request for reconsideration & appeal. (Para. 13-43 and 13-44)

a) Must be submitted within 30 days of liability notification.

b) Can only be based on legal error.

c) Submitted to approving authority. If approving authority does not reverse decision, the request becomes an appeal, which is forwarded to the appeal authority by the approving authority.

d) Appeal authority is the next higher commander or DA civilian in the chain of command or supervision. Decision of appeal authority is final.

e) Investigation must receive a legal review by the appeal authority legal advisor prior to appeal authority action.

f) If appeal is unsuccessful, individuals held liable may also appeal to ABCMR (AR 15-185) or apply for remission or cancellation of debt (AR 600-4).

2. Reopening financial liability investigations. (Para. 13-49)

a) Not an appeal.

b) Authority to reopen rests with the approval authority.

c) May occur:

(1) As part of an appeal of the assessment of financial liability.

(2) When a response is submitted to the surveying officer from the person charged subsequent to the approving authority having assessed liability.

(3) When a subordinate headquarters recommends reopening based upon new evidence.

(4) When the property is recovered.

(5) When the approving authority becomes aware that an injustice has occurred.

3. Approval authority may reduce or waive liability, in whole or in part, if such action is deemed warranted "by the nature and circumstances" of the loss, damage, or destruction of property (Para. 13-40.d.(3) and para. 13-41b).

M. LIMITS ON FINANCIAL LIABILITY. (Para. 13-41)

1. General rule is that an individual will normally not be charged more than one month's base pay.

a) Charge is based upon the Soldier's base pay at the time of the loss.

b) For ARNG and USAR personnel, base pay is the amount they would receive if they were on active duty.

c) For civilian employees it is 1/12 of their annual pay.

2. Exceptions to the general rule (para. 13-41.a). The following individuals/entities will be charged the full amount of the government's loss:

a) Accountable officers;

b) Contractors and contract employees:

c) Nonappropriated fund activities;

d) Persons losing public funds;

e) Soldiers losing personal arms or equipment;

f) Persons, who lose, damage, or destroy government quarters, and/or provided furnishings and equipment for use in quarters, through gross negligence or willful misconduct.

3. Collective financial liability: Two or more persons may be held liable for the same loss.

a) There is no comparative negligence.

b) Financial loss is apportioned according to AR 735-5, Table 12-4. Each respondent pays a percentage of the loss in accordance with their percentage of pay when all respondent's pay is totaled.

c) If one of the collective liability respondents is not federally employed, divide the total amount of the loss by the total number of respondents. Each respondent is liable for that amount or their monthly pay, whichever is less.

N. INVOLUNTARY WITHHOLDING OF CURRENT PAY.

1. Members of the armed forces may have charges involuntarily withheld. 37 U.S.C. § 1007.

2. Involuntary withholding for civilian employees. 5 U.S.C. § 5514, AR 37-1, Chapter 15.

O. TOTAL PROCESSING TIME. Total processing time is computed by subtracting the approval date from the initiation date minus time used to notify respondent of rights. Under normal circumstances these time constraints are as follows:

1. The Active Army Component: 75 calendar days.

2. The U.S. Army Reserve and Army NG Components: 240 calendar days.

3. Contracting Officers: 120 calendar days.

IX. INSPECTOR GENERAL INVESTIGATIONS.

A. AR 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES

1. Applicability. Applies to the Active Army, the Army National Guard, and the U.S. Army Reserve. It also applies to Department of the Army civilian employees and nonappropriated fund employees.

2. Purpose. Prescribes policy and mandated procedures concerning the mission and duties of The Inspector General (TIG). Prescribes duties, missions, standards, and requirements for inspectors general (IGs) throughout the Army. Prescribes responsibilities for commanders; State Adjutants General (AGs); and heads of agencies, activities, centers, and installations for the support of IG activities.

3. Function of an AR 20-1 Inspector general Investigation. The four IG functions. IGs serve their commanders and their commands by executing the four IG functions—teaching and training, inspections, assistance, and investigations for the specific purpose of enhancing the command's readiness and warfighting capability.

B. THE INVESTIGATIVE FUNCTION. (Chapter 7) The primary purpose of IG investigations and investigative inquiries is to resolve allegations of impropriety; to preserve confidence in the chain of command; and, if allegations are not substantiated, to protect the good name of the subject or suspect. Standard of proof is preponderance of the evidence.

1. Investigative Inquiry. (most common) Informal fact-finding process to gather information needed to resolve allegations or issues when investigative techniques are appropriate but circumstances do not merit an IG investigation. Inquiries conducted into "improprieties." If inquiry develops evidence to substantiate misconduct, inquiry ends---matter may be referred to CID, or commander may appoint AR 15-6 investigation, or, in rare instances, it may become an IG investigation. Only substantiated inquiries need to have a written legal review.

2. IG Investigation. Fact-finding examination by detailed IG into allegations, issues, or adverse conditions to provide the directing authority a sound basis for decisions and actions. Normally addresses allegations of wrongdoing by an individual. IG must obtain written directive by appointing authority. Written legal review required. Verbal notification required of the commander/supervisor of nature of allegations against the subject/suspect, and verbal notification of the results to commander/supervisor. Should not contain recommendations for adverse action against suspect/subject.

C. ADVANTAGES AND DISADVANTAGES.

1. Advantages. Trained, thorough investigators; keeps matter in-house, at least to start with; useful when there is no skilled, sufficiently senior AR 15-6 IO available.

2. Disadvantages. Restrictions on releasing reports of investigation; cannot use evidence for adverse action without TIG authorization; may be necessary to duplicate IG work with AR 15-6 to obtain usable evidence.

D. JURISDICTION.

1. IGs may investigate or conduct inquiries into:

a) Violations of policy, regulations, or law.

b) Mismanagement, unethical behavior, fraud, or misconduct.

2. IGs will not normally investigate or conduct inquiries into:

a) Allegation that, if true, would amount to criminal misconduct. (NOTE: Many allegations could be construed as dereliction of duty, violation of regulation, or conduct unbecoming. This does not preclude IG inquiry/investigation).

b) Allegation where established means of address already exist to resolve the matter, unless due process violation alleged.

c) Chain of command decides to address the allegations through command investigation/inquiry.

d) Professional misconduct of an Army lawyer, military or civilian, or allegations of mismanagement by a supervisory Army lawyer, military or civilian.

e) Professional misconduct by an Army chaplain referred to supervisory chaplain.

3. Directing Authority.

a) Commanders whose staffs include a detailed IG may direct investigations into activities within their command. Within the Army, this is division level and higher.

b) Only the Secretary of the Army, Under Secretary of the Army, Chief of Staff of the Army (CSA), Vice Chief of Staff of the Army (VCSA), and The Inspector General (TIG) may direct DAIG investigations.

c) Only the Secretary of the Army, Under Secretary of the Army, CSA, VCSA, and TIG may authorize or direct an IG inquiry or investigation into allegations of improprieties or misconduct by general officers, promotable colonels, and civilian employees of SES or equivalent grade or position.

d) A directing authority must approve all allegations substantiated by either an IG investigation or an IG investigative inquiry.

E. IG INVESTIGATION. Formal fact finding that includes:

1. Written directive from directing authority.

2. Written investigative plan.

3. Evidence gathering and sworn or recorded testimony.

4. Written report of investigation (ROI).

5. Written legal review.

6. Directing authority approval of ROI.

7. Notification of results to appropriate commanders, complainants, and subjects.

F. IG INVESTIGATIVE INQUIRY. Less formal inquiry used when full investigation is not warranted. Conducted in the same manner as an IG investigation except:

1. The state or command IG may direct the inquiry.

2. Testimony not required to be sworn or recorded.

3. The state or command IG can approve the report of investigative inquiry (ROII) unless an allegation is substantiated. In that case, the directing authority must approve.

G. The IG Action Process. IGs use the 7-step IGAP outlined in The Assistance and Investigations Guide to perform both investigations and investigative inquiries.

1. Receive the IG Action Request (IGAR).

2. Conduct IG preliminary analysis.

3. Initiate referrals and make initial notifications.

4. IG factfinding.

5. Make notification of results. Notifications to subjects and commanders.

6. Follow-up. Include any subject's response to unfavorable information.

7. Close the IGAR.

H. UNFAVORABLE INFORMATION.

1. If an ROI or ROII will contain unfavorable information about an individual, the individual must be notified and afforded an opportunity to comment on the unfavorable information before the ROI/ROII is finalized.

2. Inspector general records will not be used as the basis for adverse action against individuals, military or civilian, by directing authorities or commanders except when specifically authorized by the SA, the Under Secretary of the Army, the CSA, the VCSA, or TIG. If they are used as the basis for adverse action, the individual may be entitled to additional due process rights (opportunity to review the report and comment). (Para. 3-3)

3. Individuals under IG investigation will normally not be flagged. Individuals may be flagged, however, once commanders/supervisors follow appropriate procedures to seek adverse action against an individual based upon an IG investigation. (Para 3-3).

I. CONFIDENTIAL INFORMATION. (Para. 1-2). 10 U.S.C. §1034 (and DODD 7050.06 and AR 20-1) require IGs to treat information they receive in official communications as confidential and with the utmost discretion, particularly the identity of complainants and witness who specifically request identity protection. The law provides redress to persons who suffer reprisal as a result of release of their identities. When a person provides information about an impropriety or wrongdoing, the IG may disclose the complainant's identity to another IG; the local, supporting legal advisor; and/or the directing authority without the complainant's consent unless the IG determines that such disclosure is unnecessary or prohibited during the course of an investigative inquiry or investigation. The IG must not disclose further the complainant's identity without the complainant's consent unless the IG determines that such disclosure is unavoidable or mandated by a higher authority during the course of an investigative inquiry or investigation.

J. RIGHTS AND EVIDENTIARY CONSIDERATIONS

1. Soldiers retain their Article 31 rights and civilians their 5th amendment rights. DA Civilians retain their Weingarten rights (5 U.S.C. 7114(a)(2)(B)) of labor union representation.

2. IG investigators may not consider privileged communications, as recognized in MRE 502, 503, and 504 (lawyer-client, clergy, and husband-wife).

K. CONCLUDING THE INVESTIGATION/INQUIRY.

1. IG Review. The command/state IG will review and approve the ROI/ROII.

2. Legal review. Legal reviews are required for all ROIs, ROIIs, or hotline completion reports in memorandum/letter format with substantiated findings or resolution of complaints involving statutory whistleblower reprisal or improper mental health referral.

3. The command/state IG will approve or disapprove ROII in part or in the entirety and provide the commander with appropriate recommendations. Additionally, all substantiated allegations must be reviewed/approved by the commander. The command/state IG will forward all ROIs to the directing authority for approval.

4. The directing authority can approve or disapprove the ROI/ROII in part or in its entirety. The directing authority must also take appropriate action. ROI/ROIIs that require a higher commander to implement corrective action will be forwarded.

L. RELEASE OF IG RECORDS. (Chapter 3)

1. An IG record includes, but is not limited to, correspondence or documents received from a witness or a person requesting assistance, IG reports, IGNET data, or other computer automatic data processing files or data, to include IG notes and working papers. Non-IG records are documents contained within an IG file created by other Army or Federal agencies or documents from outside the Federal Government.

2. IG records are privileged documents and contain sensitive information and advice. Unauthorized use or release of IG records can seriously compromise IG effectiveness as a trusted adviser to the commander and may breach IG confidentiality.

3. Individuals, commands, or agencies within DA having a need for IG records in the official performance of their duties may obtain a copy as an FOUO release.

4. TIG is the initial denial authority under the Freedom of Information Act, and the access and amendment refusal authority under the Privacy Act.

M. WHISTLEBLOWER REPRISAL ALLEGATIONS. DODD 7050.06, MILITARY WHISTLEBLOWER PROTECTION; 10 U.S.C. 1034

1. Allegations of reprisal against Soldiers for making a protected communications require reporting to the DOD IG and DA IG within two working days (DODD 7050.06 requires reporting within 10 days, but AR 20-1 reduces that timeframe to two days). The DOD IG will evaluate the allegation to determine if it meets statutory requirements (10 U.S.C. 1034).

2. Whistleblower Reprisal. Defined as taking (or threatening to take) an unfavorable personnel action or withholding (or threatening to withhold) a favorable personnel action with respect to a member of the armed forces for making or preparing to make a (lawful) protected communication. Lawful communications are those communications made to an IG; Member of Congress (MC); member of a DOD audit, inspection, or investigation organization; law enforcement organization; or any other person or organization (including any person or organization in the chain of command starting at the immediate supervisor level) designated under regulations or other established administrative procedures (such as the equal opportunity advisor or safety officer) to receive such communications.

3. No investigation is required when a member of the Armed Forces submits a complaint of reprisal to an authorized IG more than 60 days after the date that the member became aware of the personnel action that is the subject of the allegation. An authorized IG receiving a complaint of reprisal submitted more than 60 days after the member became aware of the personnel action at issue may, nevertheless, consider the complaint based on compelling reasons for the delay in submission or the strength of the evidence submitted.

X. CONSCIENTIOUS OBJECTION

A. DODI 1300.06, CONSCIENTIOUS OBJECTORS; AR 600-43, CONSCIENTIOUS OBJECTION

1. Applicability. DODI 1300.06 – the Military Services; AR 600-43 – the Active Army, the Army National Guard/Army National Guard of the United, and the U.S. Army Reserve.

2. Purpose. Sets forth policy, criteria, responsibilities, and procedures to classify and dispose of military personnel who claim conscientious objection to participation in war in any form or to the bearing of arms.

3. Function of Investigation. Ensure the application contains all required information to allow decision authority to make an appropriate decision regarding the validity of applicant's claim of conscientious objection.

B. BACKGROUND. Conscientious objector program was first required by the selective service system, but has been retained by DoD for all-volunteer military. 50 USC App. 456(j) "Nothing contained in this title [Military Selective Service Act] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

C. DEFINITIONS.

1. Conscientious objection: A firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and/or belief. Includes both 1–O and 1–A–O conscientious objectors.

a) Class 1–O conscientious objector: A member who, by reason of conscientious objection, sincerely objects to participation of any kind in war in any form.

b) Class 1–A–O conscientious objector: A member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions are such as to permit military service in a noncombatant status.

2. War in any form: A person who desires to choose the war in which he or she will participate is not a conscientious objector under the regulation. His of her objection must be to all wars rather than a specific war.

3. Religious training and belief: Belief in an external power or "being" or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being. The external power or "being" need not be one that has found expression in either religious or societal traditions. However, it should sincerely occupy a place of equal or greater value in the life of its possessor. Deeply held moral or ethical beliefs should be valued with the strength and devotion of traditional religious conviction. The term "religious training and/or belief" may include solely moral or ethical beliefs even though the applicant may not characterize these beliefs as "'religious" in the traditional sense, or may expressly characterize them as not religious. The term "religious training and/or belief" does not include a belief that rests solely upon considerations of policy, pragmatism, expediency, or political views.

D. PROCESS.

1. Application. Applicant initiates process by requesting CO status. Burden is on the applicant to prove by **clear and convincing** evidence that nature of claim comes within definition of CO and that their beliefs are sincere (Army applicants submit application on DA Form 4187 (Personnel Action) to company commander). Application requires detailed information such as (not exhaustive - see specific Service regulation for exhaustive list of requirements):

a) General information. Name; SSN; name and address of schools attended; list of employers with addresses; former home addresses; parent’s names and addresses; parents religious denomination; information regarding previous applications.

b) Training and belief. Express statement whether applicant applying for 1-0 or 1-A-0 status; description of belief that requires the applicant to seek separation or assignment to noncombatant duties; explanation as to how nature of belief changed or developed; explanation as to when these beliefs became incompatible with military service and why; explanation as to how applicants daily lifestyle has changed as a result and what future actions applicant plans to continue to support his or her beliefs.

c) Participation in organizations. Prior military service; membership in religious sect or organization (name, location of governing body, dates of membership, extent of participation, name/address of pastor or leader, sects creed or official statements relating to applicants participation in war); description of applicant's activities in all organizations, other than military, political, or labor.

2. Counseling. Upon receipt of the application, the company commander must expeditiously process the application and ensure the applicant is properly counseled in writing regarding the following:

a) Privacy Act provisions (5 USC § 552a).

b) Department of Veterans' Affairs (DVA) benefits (38 USC § 3103). Service members who refuse to perform military service or wear uniform who are granted CO status will lose DVA benefits for the period of Service from which they are discharged/dismissed.

c) Applicants' reclassified as a noncombatant (1-A-0) will be barred from reenlistment.

3. Interviews. The company commander must arrange for the applicant to be interviewed by a military chaplain and psychiatrist.

a) Military chaplain.

(1) Interview is not privileged and must not be conducted by a chaplain who has an existing confidential relationship with the applicant.

(2) Chaplain provides detailed report of interview to commander which includes: Nature and basis for applicant's claim; opinions on source of beliefs; **sincerity and depth of conviction**; appropriate comments as to applicant's demeanor and lifestyle; specific reasons for chaplain's conclusions; explanation of circumstances if applicant refuses to be interviewed.

(3) Chaplain does not make recommendation for approval or disapproval of application.

b) Psychiatrist (or other medical officer if not available).

(1) Psychiatrist provides mental status examination report indicating presence or absence of disorder that warrants treatment or disposition through medical channels.

(2) Psychiatrist does not make recommendation for approval or disapproval of application.

4. Investigation. The initial application, counseling statements, and interview reports become the application packet and are forwarded through the chain of command. The commander exercising special court-martial convening authority over the applicant must then convene an investigation.

a) Investigating Officer (IO). Must be a Chief Warrant Officer in the grade of WO-3 or higher or an officer in the grade of O-3 or higher (AR 600-43 limits IOs to officers O-3 or higher), senior to applicant. Cannot be in applicant's chain of command. Should not be from the same company but can be from the same battalion.

b) Review and Legal advice. IO will review the application packet and obtain legal advice "as necessary prior to submitting a written report."

c) The Hearing. The IO is required to hold a hearing on the application though the applicant may waive appearance.

(1) Purpose of the hearing is to give applicant opportunity to present evidence, enable IO to assemble all relevant facts, and create comprehensive record upon which an informed decision can be made.

(2) Applicant must acknowledge in writing applicant's understanding of the nature of the hearing. Hearing is informal and is not adversarial. Military Rules of Evidence do not apply. Any relevant material may be considered. All statements will be sworn. Applicant may present evidence and cross examine witnesses. Applicant may be represented by counsel at no expense to the Government. Verbatim record is not required. Witness testimony will be summarized by the IO. IO must authenticate the record.

5. The Report. At the end of the investigation, the IO must prepare a report. Report includes all documents considered; summaries of witness testimony; statement of IO conclusions, and recommendations for disposition of the case.

a) Conclusions include the underlying basis of applicant's professed CO; time period the belief became fixed; whether belief constitutes CO (1-O or 1-A-O); applicant's sincerity.

b) Recommendations include whether to deny CO status, or to grant classification. In 1-O application cases, the IO will not recommend classification as 1-A-O unless applicant has expressed willingness to remain on active duty in a noncombatant role (AR 600-43).

6. Rebuttal rights. A copy of the case record is provided to the applicant as the record is forwarded to the appointing authority (SPCMCA). Applicant has 10 days to submit rebuttal (AR 600-43).

7. Case review. The entire file, with rebuttal, is forwarded through the chain of command, to the general court-martial convening authority (AR 600-43). Each commander provides a recommendation as to disposition.

8. Legal review. (AR 600-43) Prior to the GCMCA making a determination, the entire record will be reviewed by the GCMCA's SJA. The SJA must make a recommendation for disposition **with reasons**. A "legally sufficient" opinion does not satisfy the requirement. The SJA must be specific.

9. Decision authority. (AR 600-43) Army GCMCAs may approve applications for 1-A-0 status (noncombatant CO). The DA Conscientious Objector review Board (DACORB) will make final determinations on all applications requesting 1-0 status (discharge) and those 1-A-0 applications not approved by the GCMCA.

10. Time Limitations. (AR 600-43) Under normal circumstances active duty and reserve component applications will be processed and forwarded to HQDA within 90 days and 180 days, respectively. GCMCAs will annotate reasons for any days.

E. USE, ASSIGNMENT, AND TRAINING.

1. To the extent practicable, applicants will be retained in their unit and assigned duties providing minimum practicable conflict with their asserted beliefs pending final disposition of an application; reassignment orders received after application submitted will be delayed until final determination; trainees will not be required to train with weapons.

2. Soldiers scheduled for deployment may be ordered to deploy. If an application has been forwarded to the DACORB, the GCMCA may excuse the Soldier from the deployment, pending decision.

XI. BOARD OF INQUIRY TO DETERMINE STATUS OF PERSONNEL MISSING AS A RESULT OF HOSTILE ACTION.

A. DODI 2310.05, ACCOUNTING FOR MISSING PERSONS—BOARDS OF INQUIRY; AR 600-8-1, ARMY CASUALTY PROGRAM.

1. Applicability. DODI 2310 – the Military Services; AR 600-8-1 – the Active Army, the Army National Guard, and the U.S. Army Reserve.

2. Purpose. Prescribes the policies and mandated operating tasks, responsibilities, and procedures for casualty operations functions of the military personnel system.

3. Function of an AR 600-8-1 Board of Inquiry. To inquire into and determine the whereabouts and status of personnel presumed to be missing as a result of hostile action. Inquiry required pursuant to the Missing Persons Act. Implements requirements of DODI 2310.5.

B. BACKGROUND.

1. The Missing Persons Act. Congress first enacted the Missing Persons Act in 1942 (current version codified at 37 U.S.C. §§ 551-59 and 5 U.S.C. 5561-69). The Act provided for payment of pay and allowances to missing service members, and it was not intended to be a law to account for missing persons.

2. DOD Personnel Missing as a Result of Hostile Action. In 1996, Congress passed legislation to account for persons missing as a result of hostile action (current version codified at 10 U.S.C. §§ 1501-1513). Among other provisions, the law and subsequent DOD instruction provide certain family members with due process rights.

C. APPLICABILITY OF THE MISSING PERSONS ACT. The statutory provisions on accounting for personnel missing as a result of hostile action apply to the following.

1. Members of the armed forces on active duty, or in the Reserve component performing official duties:

a) Who become involuntarily absent as a result of a hostile action or under circumstances suggesting that the involuntary absence is a result of a hostile action; and

b) Whose status is undetermined or who is unaccounted for.

2. Any other person who is a citizen of the U.S. and a civilian officer or employee of the DOD or an employee of a contractor of the DoD, as determined by the Undersecretary of Defense for Policy:

a) Who serves in direct support of, or accompanies, the armed forces in the field under orders and becomes involuntarily absent as a result of a hostile action or under circumstances suggesting that the involuntary absence is a result of a hostile action; and

b) Whose status is undetermined or who is unaccounted for.

D. DEFINITIONS.

1. Missing Status. The status of a missing person who is determined to be absent in any of the following categories.

a) Missing. Status of a person who is not present at his or her duty location due to apparent involuntary reasons and whose location may or may not be known.

b) Missing in Action. Status of a person who is not present at his or her duty location due to apparent involuntary reasons under hostile circumstances and whose location is unknown.

c) Interned. A person definitely known to have been taken into custody of a nonbelligerent foreign power as the result of and for reasons arising out of any armed conflict in which the Armed Forces of the U.S. are engaged.

d) Captured. A person is captured if he or she has been seized as the result of action of an unfriendly military or paramilitary force in a foreign country.

e) Casualty. A person who is lost to the organization by reason of having been declared beleaguered, besieged, captured, dead, diseased, detained, DUSTWUN, injured, ill, interned, missing, missing in action, or wounded.

f) Beleaguered. A person is beleaguered if a member of an organized element that has been surrounded by a hostile force to prevent escape of its members.

g) Besieged. A person is besieged if a member of an organized element that has been surrounded by a hostile force for the purpose of compelling it to surrender.

h) Detained. A person who is prevented from proceeding or is restrained in custody for alleged violation of international law or other reason claimed by the government or group under which the person is being held.

2. Accounted For. With respect to a person in a missing status:

a) The person is returned to U.S. control alive;

b) The person's remains are recovered and, if not identifiable through visual means, are identified as those of the missing person by a practitioner of an appropriate forensic science; or

c) Credible evidence exists to support another determination of the person's status (such as when a person's remains have been destroyed and are, thus, unrecoverable).

E. PROCEDURES REGARDING MISSING PERSONS.

1. Preliminary Assessment (Para. 13-3; 10 U.S.C. § 1502; DODI 2310.05, Encl. 3)

a) When an individual is unaccounted for, the immediate commander must conduct a basic inquiry to determine the individual's whereabouts. If after 24 hours, the individual's whereabouts are still unknown, and it appears that the absence is involuntary, the commander must make a preliminary assessment of the circumstances via an informal AR 15-6 investigation.

b) The commander must also contact the Casualty Assistance Center (CAC) which will coordinate with the Casualty and Mortuary Affairs Operation Center (CMAOC) to place the person in an interim status called "Duty Status-Whereabouts Unknown" or "DUSTWUN." If an involuntary absence cannot be determined by the facts, the individual should be listed as AWOL rather than DUSTWUN.

c) The preliminary assessment must be concluded within 10 days of the incident. If the commander concludes that the person is missing, the commander must recommend that the person be placed in a missing status and forward the investigation through the CAC to the CMAOC.

d) Upon receiving the commander's initial assessment and recommendation, the Secretary of the Army or his designee may appoint an initial board of inquiry.

2. Initial Board of Inquiry. (Para. 13-6; 10 U.S.C. § 1503; DODI 2310.05, Encl. 4)

a) Secretary must review the preliminary assessment and, not later than 10 calendar days after receipt, appoint a board to conduct an inquiry into the whereabouts and status of the person.

b) An initial board of inquiry is not always required. For example, if the evidence regarding a covered person may be received through news coverage or discovered through diplomatic channels, it may be sufficient to enable the Secretary to make a status determination. Receipt of additional evidence could require the Secretary to appoint an initial board, such as cessation of hostilities without the return of the person.

c) The Secretary may appoint a single board to inquire into the whereabouts and status of two or more persons where it appears that their absence is factually related.

d) Composition of the Board.

(1) The board must consist of at least one person who has experience with, and understanding of, military operations or activities similar to the operation or activity in which the person disappeared. The person must be:

(a) A military officer, in the case of an inquiry regarding a service member;

(b) A civilian, in the case of an inquiry regarding a civilian employee of the DOD or a DOD contractor; or

(c) At least one military officer and a civilian, in the case of an inquiry regarding one or more service members and one or more civilian DOD employees or DOD contractors. The ratio of service members to civilians should be roughly proportional to the ratio of number of service members and civilians subject to the board of inquiry.

(2) Legal Advisor.

(a) The Secretary must assign a judge advocate to the Board, or appoint an attorney, who has expertise in the law relating to missing persons, the determination of death of such persons, and the rights of family members and dependents of such persons.

(b) Duties of the legal advisor include advising the Board on questions of law or procedure pertaining to the Board, instructing the Board on governing statutes and directives, and monitoring (observing) the deliberations of the Board.

e) Duties of the Board. The Board's duties include:

(1) Collecting, developing, and investigating all facts and evidence relating to disappearance or whereabouts and status of the person;

(2) Analyzing facts and evidence, making findings that are supported by a preponderance of the evidence based on that analysis, and drawing conclusions as to the current whereabouts and status of the person; and

(3) Recommending to the Service Secretary that:

(a) The person be placed in a missing status;

(b) The person be declared deserted, absent without leave, or dead; or

(c) The person is accounted for, such as when credible evidence exists to support a determination that a person's remains have been destroyed and are unrecoverable.

f) Board Proceedings. The board must:

(1) Collect, record, and safeguard all facts, documents, statements, photographs, tapes, messages, maps, sketches, reports, and other information relating to the whereabouts and status of the person(s);

(2) Gather information relating to actions taken to find the person(s);

(3) Arrive at its findings and recommendations by majority vote and ensure that its findings are supported by a preponderance of the evidence;

(4) Maintain a record of its proceedings; and

(5) Close the proceedings to the public, including the PNOK, other immediate family members, and any previously designated person of the missing person (i.e., a person designated by the missing person to receive information on the whereabouts and status of the missing person).

g) Counsel for Missing Person. Each person named in the inquiry is entitled to a counsel. If the absence or missing status of two or more persons may be factually related, one counsel may represent all such persons, unless a conflict results.

(1) The missing person's counsel represents the interests of the missing person and not those of any member of the person's family or other interested parties.

(2) The missing person's counsel must have access to all facts and evidence the Board considers;

(3) Observe all official activities of the Board during the proceedings; and

(4) Monitor (observe) the Board deliberations.

(5) Independent Review. The missing person's counsel must conduct an independent review of the Board's report. This review is made an official part of the Board's record and accompanies the report to the Secretary for final decision.

h) Board Report.

(1) The Board must submit a report to the SA within 30 calendar days of its appointment. The report must include:

(a) A discussion of the facts and evidence the Board considered and the recommendation with respect to each person the report covers;

(b) Recommendation with respect to each person the report covers;

(c) Disclosure of whether the Board reviewed classified documents and information or used them otherwise in forming its recommendation;

(d) The missing person's counsel's independent review of the Board's report; and

(e) Legal review of the Board's report

(2) An initial Board of inquiry may not recommend that a person be declared dead unless:

(a) Credible evidence exists to suggest that the person is dead;

(b) The U.S. possesses no credible evidence that suggests that the person is alive; and

(c) Representatives of the U.S.:

(i) Have completely searched the area where the person was last seen (unless, after making a good faith effort to obtain access to the area, the representatives are not granted access); and

(ii) Have examined the records of the Government or entity having control over the area where the person was last seen (unless, after making a good faith effort to obtain access to the records, the representatives are not granted access).

(3) If the Board recommends that a missing person be declared dead, the Board must include in their report: a detailed description of the location where the death occurred; a statement of the date on which the death occurred; a description of the location of the body, if recovered; and if the body was recovered and is not identifiable through visual means, a certification by a forensic pathologist that the body is that of the missing person.

(4) Disclosure of Report. The report may not be made public, except to PNOK, other members of the immediate family, and any other previously designated person, until one year after the date on which the report is submitted. Classified portions may not be made available to the public or the NOK.

3. Secretary Determination.

a) The Secretary must review the report within 30 calendar days of receipt and determine whether the report is complete and free of error. If incomplete, the Secretary may return the report to the Board for further action.

b) If the Secretary determines the report is complete and free of administrative error, he or she will determine the status of the missing person(s), including whether the person(s) shall be declared:

(1) Missing;

(2) Deserted;

(3) Absent without leave; or

(4) Dead.

4. Report to Family Members and Other Interested Persons. No later than 30 calendar days after the date the Secretary determines status; the Secretary must provide the PNOK, immediate family, and other previously designated person:

a) An unclassified summary of the unit commander's preliminary assessment and recommendation and the Board report (including the names of the members);

b) Notice that the U.S. will conduct a subsequent inquiry into the whereabouts and status of the missing person(s) upon the earlier of:

(1) On or about one year after the date of the first official notice of the disappearance; or

(2) Information becomes available that may result in a change in status.

5. Subsequent Boards of Inquiry. (Para. 13-7; 10 U.S.C. § 1504; DODI 2310.05, Encl. 5.)

a) Requirement to Conduct Subsequent Boards of Inquiry.

(1) If, during the year following the date of the transmission of a commander's initial report credible information becomes available that may result in a change of the person's status the Secretary must appoint a subsequent board of inquiry to inquire into the information.

(2) In the absence of such information, the Secretary must appoint a subsequent Board of inquiry to inquire into the whereabouts and status of a missing person on or about one year after the date of the transmission of a commander's initial report on the person. One board may be appointed for two or more persons if their absence or missing status appears to be factually related.

b) Duties of the Board.

(1) The Board must review the commander's preliminary assessment and recommendation and the report of the initial Board of inquiry.

(2) The Board must also collect and evaluate any document, fact, or other evidence with respect to the whereabouts and status of the person that has become available since the determination of the status of the person during the initial Board process. Considering the evidence, the Board must determine, by a preponderance of the evidence:

(a) Whether the status of the person should be continued or changed; or

(b) If appropriate, whether the person is accounted for (such as when credible evidence exists to support a determination that the person's remains have been destroyed and are unrecoverable).

c) Report. The Board must submit a report to the Secretary describing their findings and conclusions, together with a recommendation for determination by the Secretary.

d) Counsel for Missing Person.

(1) Counsel must be appointed to represent each person the subsequent Board of inquiry covers. When circumstances permit, counsel should be the same individual who represented the missing person during the initial Board. The qualifications, rights, and duties of the counsel are the same as those for the initial Board.

(2) The missing person's PNOK and other previously designated person shall have the right to submit information to the missing person's counsel relative to the disappearance and status of the missing person.

(3) The missing person's counsel must submit a written review of the Board's report, which becomes part of the official record.

e) Attendance of Family Members and Certain Other Interested Persons at Proceedings.

(1) The missing person's PNOK, other immediate family members, and any other previously designated person must be given notice not less than 60 calendar days before the first meeting of the Board that they may attend the proceedings. The person must then notify the Secretary of their intent, if any, to attend the proceedings not later than 21 calendar days after the date on which they received notice.

(2) Persons attending the proceedings of the Board may:

(a) If PNOK or designated person, attend with private counsel;

(b) Have access to the case resolution file and unclassified reports relating to the case;

(c) Be afforded the opportunity to present information at the proceedings that such individual considered relevant; and

(d) Have the opportunity to submit in writing an objection to any recommendation of the Board regarding the status of the missing person, provided:

f) Board Recommendation. The Board must make a recommendation as to the current whereabouts and status of each missing person, based on the findings that are supported by a preponderance of the evidence. The prerequisites for recommending that a person be declared dead are the same as those for the initial Board of inquiry.

g) Board Report. The Board must submit a report to the Secretary concerned. Board report requirements are the same as those for an initial Board of inquiry.

h) Action by the Secretary. No later than 30 days after receipt of the Board report, the Secretary must review the report, along with the report of the missing person's counsel and objections, if any, to the report submitted to the president by the PNOK, other family members, and any previously designated person. If the Secretary determines the report is complete and free of administrative error, the Secretary must determine the status of each person the report covers.

i) Report to Family Members and Other Interested Persons.

(1) No later than 60 days after the date the Secretary determines the missing person's status, the Secretary must provide the report (without classified portions) to the PNOK, other immediate family members, and any designated person.

(2) These individuals are also informed that the U.S. will conduct a further review board into the whereabouts and status of the person if the U.S. Government receives information in the future that may change the status of the person.

6. Further review boards. (Para. 13-14; 10 U.S.C. § 1505, DODI 2310.05, Encl. 6)

a) When the Director, Defense Prisoner of War/Missing in Action Office (DPMO) receives information from a U.S. intelligence agency or other Federal Government element relating to a missing person, the Director must:

(1) Ensure that the information is added to the missing person's case resolution file; and

(2) Notify the following of the information:

(a) The missing person's counsel;

(b) The PNOK and any previously designated person;

(c) The appropriate Service Casualty/Mortuary Affairs Office;

(d) The Secretary concerned or his designee.

(3) The Director, with the advice of the missing person's counsel, must decide whether the information is significant enough to require a review by a further review board.

(4) If the Director decides to appoint a review board, he or she notifies the Secretary concern, who must appoint the Board.

b) The procedures for further review boards are identical to those of the subsequent board of inquiry.

F. Judicial review. (10 U.S.C. § 1508)

1. The law provides that the PNOK or other previously designated person of a missing person who is declared dead by an initial, subsequent, or further Board may obtain judicial review in a U.S. district court of that finding.

2. Judicial review may be obtained only on the basis of a claim that there is information that could affect the status of the missing person's case that was not adequately considered during the administrative review process.

G. Release of information. (DODI 2310.05.)

1. The Secretary must, upon request, release the contents of a missing person's case resolution file to the PNOK, other immediate family members, and any other previously designated person.

2. Classified information, debriefing reports, or information protected by the Privacy Act or by other applicable laws and regulations may be made available, for official use only, to personnel within the DOD possessing the appropriate security clearance and having a valid need to know.

XII. MISCELLANEOUS INVESTIGATORY REQUIREMENTS.

A. INTELLIGENCE INTERROGATION INCIDENT.

1. References. DoDD 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, 11 October 2012.

2. Requirement. It is DoD policy that: All captured or detained personnel shall be treated humanely, and all intelligence interrogations, debriefings, or tactical questioning to gain intelligence from captured or detained personnel shall be conducted humanely, in accordance with applicable law and policy. Acts of physical or mental torture are prohibited. All **reportable incidents**, allegedly committed by any DoD personnel or DoD contractors, shall be: Promptly reported, thoroughly investigated by proper authorities, and remedied by disciplinary or administrative action, when appropriate.

3. Definitions. Reportable Incident. Any suspected or alleged violation of DoD policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings or tactical questioning, for which there is credible information.

B. QUESTIONABLE INTELLIGENCE ACTIVITY.

1. References. DoD 5240.1-R, Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons, December 1982; AR 381-10, US Army Intelligence Activities, 3 May 2007.

2. Requirement. Applicable only to questionable activities that are completed as part of Military Intelligence duties or mission.

a) DoD military, civilian, and contractor personnel **will report** questionable intelligence activity upon discovery through their chain of command or supervision to the CJCS, the USD(I), the GC, DoD, the Director, DIA, the DOD IG and the Assistant SECDEF for Intelligence Oversight (ATSD(IO). Employees are encouraged to report questionable intelligence activity through command or inspector general channels to TIG, or may report directly to TIG. Regardless of which reporting channel used, the report must reach TIG (SAIG–IO) no later than five days from discovery with update every 30 days until the investigation is complete.

b) Each report of a questionable activity **shall be investigated** to the extent necessary to determine the facts and assess whether the activity is legal and is consistent with applicable policy.

c) **Procedure 15 Inquiries**. (Described in Chapters 15 of both DoD 5240.1-R and AR 381-10).

(1) A command may conduct an inquiry under the provisions of AR 15–6 or through an appropriate IG. Inquiries into allegations not referred to a counterintelligence or criminal investigative agency will be completed within 60 days of the initial report, unless extraordinary circumstances dictate a longer period.

(2) The results will be reported to TIG (with updates to TIG every 30 days until complete).

3. Definitions. Questionable intelligence activity: (DoD 5240.1-R) any conduct that constitutes, or is related to, an intelligence activity that may violate the law, any Executive order or Presidential directive, including E.O. 12333 or applicable DoD policy. (AR 381-10) Conduct during or related to an intelligence activity that may violate law, Executive Order or Presidential Directive, or applicable DOD or Army policy. Includes: Improper collection, retention, or dissemination of U.S. person information; misrepresentation (using one's status as an MI member to gain access for non-MI purposes); questionable intelligence activity constituting a crime; misconduct in the performance of intelligence duties.

C. ACTUAL OR POTENTIAL COMPROMISE OF CLASSIFIED INFORMATION

1. References. DoDM 5200.01 Vol 3, DoD Information Security Program: Protection of Classified Information, 24 February 2012 (w/change 2, 19 March 2013); AR 380-5, Department of the Army Information Security Program, 29 September 2000.

2. Requirement.

a) Preliminary Inquiry. When an actual or potential compromise of classified information occurs, the head of the activity or activity security manager having security cognizance shall promptly initiate and complete an inquiry into the incident within 10 days. If information obtained as a result of the preliminary inquiry is sufficient to answer the questions below, then such information shall be sufficient to resolve the incident to include institution of administrative sanctions.

(1) When, where, and how did the incident occur? What persons, situations, or conditions caused or contributed to the incident?

(2) Was classified information was compromised?

(3) If a compromise occurred, what specific classified information and/or material was involved? What is the classification level of the information disclosed?

(4) If classified information is alleged to have been lost, what steps were taken to locate the material?

(5) Was the information properly classified?

(6) Was the information officially released?

(7) In cases of compromise of classified information to the public media, the inquiry should determine: In what specific medial article or program did the classified information appear? To what extent was the compromised information disseminated or circulated? Would further inquiry increase the damage caused by the compromise? (AR 380-5 requires additional questions)

(8) Are there any leads to be investigated that might lead to identifying the person(s) responsible for the compromise?

(9) If no compromise and the incident was unintentional/inadvertent, was there a failure to comply with established practices/procedures and/or weakness that could lead to a compromise if uncorrected? What corrective action is required?

(10) AR 380-5 requires the preliminary inquiry to conclude with one of the 4 alternatives:

(a) Compromise of classified information did not occur;

(b) Compromise of classified information may have occurred;

(c) Compromise of classified information did occur, but there is no reasonable possibility of damage to national security; or

(d) Compromise of classified information did occur and damage to national security may result.

b) Investigation. If the circumstances of an incident are as such that a more detailed investigations is necessary, then an individual will be appointed to conduct that investigation. This individual must have an appropriate security clearance, have the ability to conduct an effective investigation, and must NOT be someone likely to have been involved, directly or indirectly, in the incident. Except in unusual circumstances, the activity security manager should not be appointed to conduct the investigation.

3. Definitions. Compromise: unauthorized disclosure of classified information.

D. LAW OF WAR VIOLATIONS (DETAINEE ABUSE).

1. References. DoDD 2311.01E, DoD Law of War Program, 9 May 2006 (w/change 1, 15 November 2010); Army Regulation 190–8, OPNAVINST 3461.6, AFJI 31-304, MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, 1 October 1997.

2. Requirement. All reportable incidents committed by or against U.S. or enemy persons must be promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

a) Any act or allegation of inhumane treatment will be investigated and, if substantiated, reported to HQDA as a Serious Incident Report (SIR) per AR 190-40.

b) Allegations of criminal acts or war crimes committed by or against EPW/RP must be reported to the supporting element of the U.S. Army Criminal Investigation Command (USACIDC). Death resulting from other than natural causes will be investigated by USACIDC.

c) Confinement facility commanders will appoint an officer to investigate and report: (a) Each death or serious injury caused by guards or suspected to have been caused by guards or sentries, another detainee, or any other person. (b) Each suicide or death resulting from unnatural or unknown causes.

3. Definitions.

a) Reportable Incident: A possible, suspected, or alleged violation of the law of war, for which there is a credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.

b) Law of war: That part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

E. COUNTERINTELLIGENCE INVESTIGATIONS.

1. References. AR 381–20, The Army Counterintelligence Program, 15 November 1993.

2. Requirement. Counterintelligence (CI) issues will be investigated by CI units alone or jointly with other agencies (FBI, CID, etc.) Units identifying a CI issue must report it immediately.

3. Definitions. Examples of CI Issues: (1) Treason. (2) Espionage and spying. (3) Subversion. (4) Sedition. (5) Foreign intelligence service-directed sabotage. (6) CI aspects of terrorist activities directed against the Army. (7) CI aspects of assassination or incapacitation of Army personnel by terrorists or by agents of a foreign power. (8) Investigation of the circumstances surrounding the defection of military personnel, and DA civilians overseas, and debriefing of the individual upon return to U.S. control. (9) Investigation of the circumstances surrounding the detention of DA personnel by a government or hostile force with interests inimical to those of the United States. (10) Investigation of the circumstances surrounding military members, and DA civilians overseas, declared absent without leave (AWOL), missing or deserters, who had access within the last year to TOP SECRET national defense information or sensitive compartmented information (special category absentees) (SCA); who were in a special mission unit (SMU); who had access to one or more special access programs; or were in the DA Cryptographic Access Program (DACAP); and debriefing of these personnel upon return to U.S. control. (11) CI aspects of security violations; known or suspected acts of unauthorized disclosure of classified information or material; unauthorized access to DA computer systems; and COMSEC insecurities. These CI investigations may occur simultaneously with the command's own responsibilities under AR 380–5. (12) CI aspects of incidents in which DA personnel with a SECRET or higher security clearance,

access to a SAP or sensitive compartmented information, or in the DACAP or an SMU, commit or attempt to commit suicide. (13) CI aspects of unofficial travel to designated countries, or contacts with foreign diplomatic facilities or official representatives, by military personnel or by DA civilians overseas. (14) CI investigations of CI scope polygraph examinations and refusals as specified in appendix E (of AR 381-20).

F. INFORMATION SYSTEM SECURITY INCIDENTS.

1. References. AR 25-1, Army Knowledge Management and Information Technology, 4 December 2008.

2. Requirement. All information system security incidents will be investigated to determine their causes and the cost-effective actions to be taken to prevent recurrence.

CHAPTER I

RESERVE COMPONENT ENLISTED ADMINISTRATIVE SEPARATIONS

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I. REFERENCES.

A. Department of Defense Instruction 1332.29, Eligibility of Regular and Reserve Personnel for Separation Pay

B. Army Regulation (AR) 15-6, Procedures for Investigating Officers and Boards of Officers

C. AR 135-178, Separation of Enlisted Personnel

D. AR 380-67, The Department of the Army Personnel Security Program

E. AR 600-9, The Army Weight Control Program

F. AR 600-20, Army Command Policy

G. AR 600-43, Conscientious Objection

H. AR 635-200, Active Duty Enlisted Administrative Separations

I. National Guard Regulation (NGR) 600-200, Enlisted Personnel Management (interim policy)

II. INTRODUCTION.

A. The topic of enlisted administrative separations covers both favorable and unfavorable separations. Examples of favorable separations include retirement and honorable discharges upon the expiration of a Soldier's service obligation. Examples of unfavorable separations include misconduct and unsatisfactory performance. Enlisted administrative separations may also be voluntary (initiated by the Soldier) or involuntary (initiated by a commander).

B. When analyzing an enlisted administrative separation action, consider:

1. What is the reason for the separation action? Is the basis for separation a voluntary or involuntary action? Generally, AR 135-178 and NGR 600-200 contain the bases for separating an enlisted Soldier in the United States Army Reserve (USAR) and Army National Guard (ARNG). AR 635-200 contains the bases for separating an enlisted Soldier who is on active duty. Each regulation proscribes the bases and procedures for separation under various chapter headings; hence, separation actions are often called "chapters."

2. Who has the authority to order separation? Only certain commanders may direct or approve the various types of administrative separation.

3. What kind of discharge can and should the Soldier receive? Different administrative discharges exist and often the type of discharge is contingent upon the reason for separation and the separation authority's determination as to the creditable service of the Soldier.

4. What procedural due process is required to separate the Soldier? The amount of due process afforded a Soldier will depend upon such factors as the reason for separation, type of discharge, and length of service.

III. ADMINISTRATIVE SEPARATION AUTHORITY.

A. Generally, AR 135-178, Ch. 1, Sec. II, contains the administrative separation authorities for enlisted USAR/ARNG Soldiers. The Secretary of the Army has the authority to separate all Soldiers from the Reserve of the Army.

B. For USAR enlisted Soldiers, the Commander, Human Resources Command-St. Louis (HRC) is the administrative separation authority for Individual Ready Reserve (IRR), Individual Military Augmentees (IMA), Standby Reserve, and Retired Reserve Soldiers. Area Commanders have administrative separation authority for Soldiers attached or assigned to troop program units (TPUs) of the Selected Reserve.

1. Area Commanders may delegate the authority to order administrative separations and convene administrative separation boards to subordinate general officer (GO) commanders that have a staff judge advocate (SJA) or legal advisor. *See* Appendix A.

2. The following commanders may also exercise administrative separation authority over Soldiers within their respective programs or commands. *See* AR 135-178, paras. 1-10b(3)-(6).

a. Unit commanders when authorized by the State Adjutant General, HRC, or an area commander as described in paragraphs B and B.1 above.

b. Commander, ROTC Cadet Command.

c. Commander, U.S. Army Human Resources Command (AHRC-OPD-R).

d. Commander, U.S. Army Aviation Center and Fort Rucker.

e. Commander, U.S. Army Reserve Readiness Training Center.

f. Commanding General, U.S. Army Recruiting Command.

C. For ARNG enlisted Soldiers, the administrative separation authority is the State Adjutant General. The Deputy Director of the Army National Guard has authority to separate Soldiers in Title 10 status.

D. The administrative separation authority for all USAR/ARNG enlisted Soldiers who have completed 18 but fewer than 20 years of qualifying service for retired pay is the Secretary of the Army.

E. Generally, the separation authority should consider the following when taking action regarding an administrative separation:

1. Is there sufficient evidence to support the basis for separation? The Government bears the burden of proof, and the standard is a preponderance of evidence.

2. Retain or separate the Soldier? A commander may consider the following when deciding the matter:

a. Seriousness of the circumstances and effect of retention on military discipline, good order, and morale;

b. Likelihood of continuation or recurrence of the circumstances;

c. Likelihood that the Soldier will be disruptive or undesirable influence;

d. Ability of the Soldier to perform dues effectively in the present and future;

e. Rehabilitative potential;

f. Military record, including assignments, awards, decorations, evaluations, letters of commendation, reprimands, counseling, nonjudicial punishment, courts-martial, and civilian authority records, and

g. Any other matter deemed relevant.

h. Adverse information from a prior enlistment may only be considered when the information would have a direct and strong probative value in determining whether separation is appropriate.

3. If separation, what characterization of service or type of discharge?

IV. CHARACTERIZATION OF SERVICE/TYPE OF DISCHARGE.

A. The characterization of service at separation "will be based upon the quality of the Soldier's service . . . . The quality of service will be determined in accordance with the standards of acceptable personal conduct and performance of duty for military personnel as found in the UCMJ, Army regulations, and the time-honored customs and traditions of the Army." AR 135-178, para. 2-8b.

1. The separation authority will determine the characterization of service based solely on the Soldier's military record during the current period of enlistment service.

2. The characterization of service is important to a Soldier because it may affect eligibility for veteran's benefits, reentry into military service, and civilian employment.

B. Types of Characterization of Service.

1. Honorable. An honorable characterization may be awarded when the Soldier's service has generally "met the standards of acceptable conduct and performance of duty for Army personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate." AR 135-178, para. 2-9a.

2. General (under honorable conditions). A general characterization may be issued when a Soldier's military record is "satisfactory, but not sufficiently meritorious to warrant an honorable discharge." AR 135-178, para. 2-9b.

    a. Conditions meriting a general discharge also include honest and faithful service, but "significant negative aspects of the Soldier's conduct or performance of duty outweigh the positive aspects of the Soldier's military record." AR 135-178, para. 2-9b.

    b. A general characterization may only be issued "when the reason for separation specifically allows for such characterization[,]" and may not be issued upon expiration of a service obligation. AR 135-178, para. 2-9b(2).

3. Under other than honorable conditions (OTH). An OTH characterization may be issued for behavior that "constitutes a significant departure from the conduct expected of Soldiers." AR 135-178, para. 2-9c(1). Such behavior includes misconduct, fraud, unsatisfactory participation, and security reasons.

    a. Only a GO in command who has a judge advocate (JA) advisor, or higher authority, may direct an OTH characterization.

    b. All Soldiers have the right to present their case to an administrative separation board prior to being discharged with an OTH characterization, unless waived.

    c. The reason for separation must specifically authorize an OTH characterization.

    d. Under a circumstance where a Soldier offers to waive the right to a board hearing authorized to recommend an OTH discharge in exchange for a more favorable discharge, the separation authority remains the GO in command with a legal advisor or higher (despite a subordinate authority's authorization to approve a discharge under the relevant chapter).

4. Entry Level Status (uncharacterized) (ELS). A Soldier will receive an uncharacterized separation if separation is initiated during the entry level status of a Soldier. ELS covers:

   a. The first 180 days of continuous active military service;

   b. The first 180 days of continuous active service after a break in service of more than 92 days, or

   c. The first 180 days upon enlistment in a Reserve component, including:

      (1) The first 180 days after beginning training if the Soldier is ordered to active duty training (ADT) or any continuous 180 day period, or

      (2) The first 90 days after the beginning of the second period of ADT if training under a program that splits training into two or more separate periods.

   d. ELS may affect a Soldier's eligibility for veteran's benefits because many programs require at least 180 days of service to qualify.

5. Release from Custody and Control of the Army. Soldiers will not receive a discharge, characterization, or uncharacterized separation when an enlistment is void. A void enlistment may result in release from custody and control of the Army and occur when:

   a. Enlistment effected without voluntary consent (e.g. intoxication or insanity);

   b. Person is under age 17, or

   c. Person is a deserter from another military service.

6. Dropped from Rolls (DFR). A Soldier who is dropped from the Army rolls does not receive any characterization or description of service. A Soldier may be dropped from Army rolls pursuant to AR 135-178, Ch. 15, Sec. III. Generally, DFR may be used when a Soldier is sentenced to confinement in a Federal or State correctional institution and the sentence is final.

V. BASES FOR ADMINISTRATIVE SEPARATION.

A. Soldier-initiated (voluntary) Administrative Separations.

1. Procedure.

a. Soldier initiates the action by memorandum or submission of a DA Form 4187 with supporting documentation.

b. The command forwards the action through the chain of command (COC) to the separation authority.

c. Voluntary separation actions provide limited due process to the Soldier.

2. Reasons for Separation.

a. Expiration of Service Obligation. AR 135-178 (future chapter and paragraph references will be to AR 135-178 unless otherwise noted), Ch. 4. The period of military service for a Soldier will rest either with a statutory military service obligation (MSO) or a contractual MSO. A Soldier will be discharged from military service upon expiration of the Soldier's MSO, unless the Soldier reenlists, is retained pending required health care processing, or is subject to court-martial action.

b. Selected Changes in Service Obligations, Ch. 5. Noting limited JA involvement in the following types of administrative separations, the following separation bases are listed only for information purposes (referenced paragraphs refer to AR 135-178):

1. Reduction in authorized strength, para. 5-2.

2. Discharge for immediate reenlistment, para. 5-3.

3. Discharge on enlistment in another component of the U.S. Armed Forces, para. 5-4.

4. Discharge on appointment as a commissioned or warrant officer, para. 5-5.

5. Separation of cadets on disenrollment from ROTC.

6. ROTC cadet early release.

7. Discharge of a potential ROTC/Simultaneous Membership Program (SMP) participant.

c. Convenience of the Government, Dependency or Hardship, para. 6-2. Dependency exists when a Soldier's family members become dependent upon him/her for support or care because of death or disability and continued service would result in undue hardship. Hardship exists when separation from the service would materially affect the Soldier's ability to care for or support family members by alleviating undue hardship in cases not involving death or disability. Hardship may include situations arising due to parenthood.

(1) The situation may not be temporary, and the situation must have arisen before or worsened since entry into the Army.

(2) The Soldier must have made every reasonable effort to remedy the situation, and no reasonable options remain available.

(3) Separation must alleviate the situation.

(4) The Soldier must submit evidence substantiating the situation.

d. Convenience of the Government, Pregnancy, para. 6-3. An enlisted Soldier may request discharge from military service when becoming pregnant after being processed for enlistment as long as she has not entered on initial active duty for training (IADT) or completed initial entry training (IET), and has not incurred an active duty service obligation (ADSO).

e. Convenience of the Government, Surviving Sons or Daughters, para. 6-4. A Soldier may request separation when his/her father, mother, or one or more of the sons or daughters of the family have been killed while serving in the U.S. Armed Forces, captured or missing in action, or have a permanent 100% disability.

f. Convenience of the Government, Parenthood, para. 6-5. A Soldier may be separated when he/she cannot satisfactorily perform duties due to parenthood, or is unavailable for worldwide assignment or deployment.

g. Convenience of the Government, Not Medically Qualified Under Procurement Medical Fitness Standards, para. 6-6. A Soldier will be discharged when a determination is made that the Soldier was not medically qualified under procurement standards or who becomes medically unqualified before entering IADT.

h. Convenience of the Government, Other Designated Physical or Mental Conditions, para. 6-7. A Soldier may be separated for a condition that does not amount to a disability, but interferes with performance of military duties or assignments. Examples include personality disorder, dyslexia, and other disturbances of perception, thinking, emotional control or behavior.

(1) While the following policy is directed toward AR 635-200 and Soldiers on active duty, the same procedures will apply to the RC regarding separation of Soldiers with a diagnosis of personality disorder or other designated physical and mental conditions.

(2) Psychiatrist or doctoral-level clinical psychologist must make diagnosis. Personality disorder separation actions will undergo a clinical review and corroboration by the Chief of Behavioral Health/ciences of the local medical treatment facility, and be reviewed and endorsed by the Surgeon General of the Army.

(3) A Soldier who has served in a hostile fire zone may only be separated for a personality disorder if the Soldier has less than 24 months of AD service (length of AD service is calculated as of the date of initiation of separation action). A Soldier who has 24 months or more of AD service and has served in a hostile fire zone may be separated other designated physical and mental conditions.

(4) All personality disorder diagnoses must address post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), or other mental illness comorbidity (the presence of one or more disorders in addition to the primary personality disorder), which may significantly contribute to the diagnosis. If PTSD, TBI, or other comorbid mental illness is a significant factor in the diagnosis, the Soldier will be evaluated under the physical disability system under AR 635-40, and will not be separated under either AR 635-200 or AR 175-178.

(5) While it is likely that the Soldier will be on AD during the evaluation process, the separation authority will be a general courts-martial convening authority for any Soldier diagnosed with a personality disorder.

i. Defective Enlistment, Ch. 7.

(1) Minority Enlistment, para. 7-1. A person under age 17 is barred from entering into a valid enlistment and such an enlistment will be voided if a person cannot present satisfactory evidence of a date of birth.

(a) A Soldier who is 17 years old will be separated unless he/she has the written consent of his/her parent or guardian and the parent or guardian has submitted an application for separation.

(b) The Soldier will be released from the custody and control of the Army without characterization of service.

(2) Erroneous Enlistment, para. 7-2. An enlistment is erroneous when the enlistment would not have occurred had the Government known the relevant facts and there was no fraudulent conduct on the part of the Soldier. The Soldier will receive an honorable discharge, ELS, or release from custody and control of the Army.

(3) Defective Enlistment, para. 7-3. A defective enlistment occurs when a Soldier enlists involuntarily; the Soldier reasonably relied a material misrepresentation by recruiting or retention personnel, or the Soldier was induced to enlist with a commitment for which the Soldier is unqualified or the Army cannot fulfill.

(a) The Soldier must not have participated in creating the conditions of the defective enlistment and must bring the matter to the attention of an appropriate authority within 30 days of discovery or when the defect reasonably should have been discovered.

(b) The Soldier will receive an honorable discharge, ELS, or release from custody and control of the Army.

(4) Fraudulent Enlistment, para. 7-4. A fraudulent enlistment may occur when a Soldier deliberately misrepresents, omits, or conceals information that may have otherwise resulted in rejection.

(a) A commander will apply two tests: whether the previously concealed information is in fact disqualifying, and verify the existence and true nature of the information.

(b) All characterizations of service, including OTH, are authorized for separation under this paragraph.

j. Entry Level Performance and Conduct, Ch. 8. While in an entry level status, a Soldier may be separated upon a determination that the Soldier is “unqualified for further military service by reason of unsatisfactory performance or conduct, as evidenced by inability, lack of reasonable effort, failure to adapt to the military environment or minor disciplinary infractions.” AR 135-178, para. 8-1a.

(1) The Soldier must be counseled prior to initiating the separation.

(2) The Soldier will be separated with uncharacterized service.

k. Unsatisfactory Performance, Ch. 9. A commander may determine that a Soldier is unqualified for further military service due to unsatisfactory performance upon deciding that the Soldier will not develop sufficiently, or retention of the Soldier would have an adverse effect impact on military discipline, good order, and morale. It should also be established that:

(1) The Soldier is likely to be a disruptive influence;

(2) The Soldier's conduct or problems are likely to continue or recur;

(3) The Soldier is unlikely to be able to perform duties effectively in the future, including advancement and leadership, and

(4) The Soldier meets medical retention standards.

(5) The Soldier must be counseled and given the opportunity to rehabilitate before initiating separation.

(6) An honorable or general characterization is authorized.

l. Substance Abuse Rehabilitation Failure, Ch. 11. A commander must initiate administrative separation when a Soldier who has been referred to a substance abuse rehabilitation program fails through inability or refusal to successfully complete the program when the Soldier has a lack of potential for continued service or long-term care in a civilian facility is required. A commander may initiate administrative separation when after consulting with an Army Substance Abuse Program (ASAP) official, the commander determines that further rehabilitation is not practical and discharge is in the best interests of the Army.

(1) Honorable, general, and ELS characterizations of service are authorized.

(2) A Soldier must receive an honorable characterization if limited use evidence is introduced in separation proceedings. *See* AR 600-85 regarding limited use evidence.

(3) A Soldier's voluntary submission to a rehabilitation program and other voluntary evidence regarding personal abuse of substances may not be considered in determining a characterization of discharge.

(4) Several changes to AR 600-85 occurred during 2009 to include moving the authority to administer the unit urinalysis program to the battalion commander level. Units will randomly test 10% of its members per month or 25% of its members per quarter. Each Soldier will be tested at least once per year. Battalion commanders are limited to authorizing unit sweeps up to 50% of the unit's annual end strength per year. Soldiers who miss a test or whose sample is returned as untestable must be tested at the next opportunity.

(5) Army Directive 2012-07 established a one year probationary period for a Soldier who has completed or left the ASAP program for any reason. If the Soldier is involved in an alcohol or drug related incident within one year of leaving the ASAP program, the Soldier is deemed an ASAP failure, and the command will initiate separation.

m. Misconduct, Ch. 12. A Soldier may be discharged for misconduct involving minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, abuse of illegal drugs, or civil conviction.

(1) A pattern of misconduct consists of "discreditable involvement with civil or military authorities or conduct prejudicial to good order and discipline . . . , [including] conduct that violates the accepted

standards of personal conduct found in the UCMJ, Army regulations, civil law, and time-honored customs and traditions of the Army." AR 135-178, para. 12-1b.

(2) A serious offense can be either a military or civilian offense, and generally would warrant a punitive discharge for the same or closely related offense under the UCMJ. Abuse of illegal drugs is serious misconduct.

(3) If a Soldier has abused illegal drugs and will not be subject to court-martial proceedings or Ch. 11 separation, then a commander must initiate and process administrative separation under Ch. 12. Voluntary or self-referral to ASAP or other program does not require initiation of administrative separation.

(4) A Soldier may be separated when convicted by civil authorities or action is taken tantamount to a finding of guilty, when a punitive discharge would be authorized for the same offense under the UCMJ or the sentence includes 6 months or more confinement, or when other circumstances warrant discharge.

(a) If the Soldier appeals the conviction or an appeal is pending, the separation action may proceed but separation will not be executed until final action is taken in the case, the time for appeals has expired, or the Soldier indicates in writing that he/she will not appeal.

(b) If circumstances dictate that the Soldier presents a threat to the safety and welfare of other members of the unit, a request may be forwarded to Headquarters, Department of the Army (HQDA) for separation prior to final appellate action.

(5) Counseling is required prior to initiating separation actions for minor disciplinary infractions and a pattern of misconduct.

(6) OTH is generally an appropriate characterization of service when separation is processed under Ch. 12. General characterizations are authorized. An honorable characterization will not be granted unless the Soldier's record is so meritorious that any other characterization would be clearly inappropriate, or when an administrative board recommends an honorable discharge or the sole evidence of misconduct is command-directed urinalysis results. ELS is also authorized when an OTH would not be warranted.

(7) A Soldier does not have to be in a Title 10 status at the time of the misconduct to be subject to administrative separation for the act.

n. Unsatisfactory Participation in the Ready Reserve, Ch. 13. A commander may determine that a Soldier is unqualified for further military service due to unsatisfactory participation when:

(1) The Soldier refuses to comply with orders or correspondence;

(2) A notice sent by certified mail was refused, unclaimed, or otherwise undeliverable;

(3) The Soldier failed to notify the command of a change of address and reasonable attempts to contact the Soldier have failed;

(4) Other bases dependent upon status, which include:

(a) IRR Soldiers.

(i) Failure to complete AT.

(ii) Failure to comply with second muster request.

(iii) Failure to report change of address to Commander, HRC-St. Louis within 45 days of change.

(iv) Failure to complete and return official military correspondence within 45 days of second notice to comply.

(b) IMA Soldiers.

(i) Failure to complete AT.

(ii) Nine or more unexcused absences in a 1-year period.

(iii) Failure to report change of address to IMA organization leader and Commander, HRC-St. Louis within 45 days of change.

(iv) Failure to complete and return official military correspondence within 45 days of second notice to comply.

(5) General, ELS, and OTH characterizations are authorized. An honorable characterization may only be issued when the Soldier's record is so meritorious that any other characterization would clearly be inappropriate.

o. Secretarial Plenary Authority, Ch. 14. The Secretary of the Army maintains the prerogative to direct separation under this authority, but it is used sparingly, generally when no other provision for separation applies and separation is in the best interests of the Army. Initiation may be voluntary or involuntary and all cases shall be submitted to HQDA.

(1) Examples of Ch. 14 usage include refusal to submit to medical care, Human Immunodeficiency Virus (HIV) infection, and when religious practices cannot be accommodated.

(2) Characterization of service will generally be honorable or general unless ELS is warranted.

p. Separation for Other Reasons, Ch. 15. Separation under Ch. 15 may be voluntary or involuntary, and honorable, general, and ELS characterizations are authorized. The following are other reasons for separation:

(1) Noncitizens will be discharged when the Soldier fails to give a permanent mailing address within the United States or its territories, or the Soldier visits his/her national country for a period of 6 continuous months or more.

(2) "A Soldier will be discharged, upon request, when he/she is a regular or ordained minister of religion, or upon entering full-time training to become or to engage in full-time employment as a regular or duly ordained minister of religion." AR 135-178, para. 15-1b.

(3) Soldiers who attain the maximum allowable age will be discharged unless granted a waiver, or will be transferred to the Retired Reserve.

(4) A Soldier will be discharged when exempt from reporting for involuntary call to active duty.

(5) USAR dual status technicians will be discharged upon request when he/she fails to be employed as a technician or is separated from employment as a technician.

(6) A Soldier may be voluntarily discharged before an expiration of the term of service obligation when a local bar to reenlistment has been imposed and the obligation is not statutory.

(7) A Soldier in the Standby Reserve will be discharged when 12 months after mobilization the Soldier remains unavailable for duty.

(8) A Soldier may be separated for security reasons IAW AR 380-67.

(9) A Soldier may be discharged, upon request, from the Retired Reserve upon completion of 30 years active and inactive service.

(10) A Soldier with a second confirmed Western Blot test as infected with HIV may request discharge.

(11) A Soldier may be discharged when a Soldier is no longer qualified for retention by reason of medical unfitness.

(12) Conscientious objectors will be processed for separation IAW AR 600-43.

(13) A Soldier in the Delayed Entry Program must be processed for separation if the Soldier enlists in the Regular Army or upon discovery of a defective enlistment. Separation processing may be initiated if the Soldier is ineligible for enlistment in the Regular Army or the Soldier declines enlistment in the Regular Army and is not being ordered to active duty.

q. Failure to Meet Army Body Composition Standards, Ch. 16. A Soldier is subject to administrative separation upon failing to meet the Army body composition standards IAW AR 600-9.

(1) Applies to Soldiers who have not completed IET and have not been awarded a military occupation specialty (MOS), as well as those Soldiers who have completed IET and have been awarded an MOS but are not within 3 months of the expiration of service obligation.

(2) The Soldier must not be diagnosed with a medical condition that precludes participation in the Army weight control program.

(3) A soldier must be processed for separation if he/she does not make satisfactory progress in the Army Body Composition Program (ABCP) after 6 months, unless a local bar to reenlistment is imposed. Separation processing is also required if

a Soldier fails to maintain the standards during a 12-month period following removal from the ABCP.

(4) Counseling is required prior to initiating separation under Ch. 16.

(5) Characterization of separation shall be honorable.

VI. PROCEDURAL REQUIREMENTS.

A. Counseling and Rehabilitation. Commanders must make reasonable efforts to identify Soldiers who may be subject to early separation and perform counseling, retraining, and rehabilitation before initiating separation to improve the chances that the Soldier will remain in service.

1. Counseling and rehabilitative measures are required prior to initiating separation under the following provisions:

a. Parenthood, para. 6-5;

b. Other Physical or Mental Conditions, para. 6-7;

c. Entry Level Performance and Conduct, Ch. 8;

d. Unsatisfactory Performance, Ch. 9;

e. Minor Disciplinary Infractions and Pattern of Misconduct, paras. 12-1a and b, and

f. Failure to Meet army Body Composition Standards, Ch. 16.

2. Counseling will be recorded in writing (DA Form 4856) and will include the reason for counseling, the fact that continued behavior of a similar nature or additional misconduct may result in separation, and the characterization of service that may be issued and the effect of each type.

3. When practical, the following rehabilitative measures will be taken:

a. ARNG and USAR TPU Soldiers will be reassigned at least once if within commuting distance with a minimum of 2 months in each unit.

b. If case reassignment is restricted (e.g. small or isolated units) or the Soldier is a member of the IRR or Standby Reserve, the commander will ensure that proper alternate measures will be taken, if feasible.

4. A separation authority may waive the requirement for rehabilitative reassignment. The following factors should be considered for waiver: feasibility regarding units and commuting distance; further duty would create disciplinary problems, a hazard, or jeopardize readiness, and rehabilitation would be inappropriate because any attempt would not produce a quality Soldier.

B. Medical and Mental Examinations.

1. Medical examinations are required to process a Soldier for separation for:

a. Pregnancy, para. 6-3;

b. Not Medically Qualified Under Procurement Medical Fitness Standards, para. 6-6, and

c. Other Designated Physical or Mental Conditions, para. 6-7.

2. Mental status evaluations are required to process a Soldier for separation for other Designated Physical or Mental Conditions, personality disorder, para. 6-7b, and

C. Notification Procedure. When notification is required under the reason for separation, a commander will notify the Soldier in writing. Service by personal contact with written acknowledgement is preferred; however, registered or certified mail may also be used.

1. Notification must include:

a. Basis for proposed separation with specific allegations and reference to appropriate provision of the regulation;

b. Whether separation could result in discharge from the Army, transfer from the ARNG to USAR, or release from the custody and control of the Army;

c. Least favorable characterization authorized;

d. Soldier's right to obtain copies of documents submitted to the separation authority;

e. Soldier's right to submit statements;

f. Soldier's right to consult counsel, including civilian counsel at no expense to the Government;

g. If the Soldier has 6 or more years of military service, separation under Ch. 10, or is subject to an OTH characterization, then the Soldier has a right to request an administrative board, and

h. Soldier's right to waive the rights above after a reasonable opportunity to consult counsel, and that failure to respond within 30 days constitutes a waiver.

2. If separation is being processed for more than one reason, the Soldier must be notified of each reason

3. A Soldier will be provided a reasonable period of time to respond, not fewer than 30 days.

4. If an intermediate commander considers additional information beyond the proposed action, the commander must give written notice to the Soldier and afford the opportunity to rebut. An intermediate commander may also disapprove the recommendation to separate a Soldier and reassign the Soldier or dispose of the matter by alternative means.

D. Administrative Board Procedure. The board procedure is required in all cases where a Soldier has more than 6 years of military service, or is subject to an OTH discharge. Service by personal contact with written acknowledgement is preferred; however, registered or certified mail may also be used. AR 15-6 shall be used as a guide in conducting board hearings.

1. The Soldier will be notified in writing and the notification will include:

a. The basis for proposed separation including the circumstances and reference to the applicable provision of the regulation;

b. Whether separation could result in discharge from the Army, transfer from ARNG to USAR, or release from the custody and control of the Army;

c. Least favorable characterization of service;

d. Soldier's right to consult counsel, including civilian counsel at no expense to the Government;

e. Soldier's right to obtain copies of documents considered by the separation authority;

f. Soldier's right to request a board hearing;

g. Soldier right to present written statements instead of board proceedings;

h. Soldier's right to representation at the board proceeding by military counsel, or civilian counsel at no expense to the Government;

i. A nonlawyer counsel may not represent the Soldier unless the Soldier expressly declines appointment of counsel and requests a specific nonlawyer counsel, or the separation authority assigns a nonlawyer as assistant counsel;

j. Soldier's right to submit a conditional waiver;

k. Soldier's right to waive rights after a reasonable opportunity to consult counsel (except in cases of Soldiers with more than 18 but less than 20 years of service), and

l. Soldier right to be present at the board hearing will be waived if the Soldier fails to appear without good cause.

2. If separation is being processed for more than one reason, the Soldier must be notified of each reason

3. A Soldier will be provided a reasonable period of time to respond, not fewer than 30 days.

4. If an intermediate commander considers additional information beyond the proposed action, the commander must give written notice to the Soldier and afford the opportunity to rebut. An intermediate commander may also disapprove the recommendation to separate a Soldier and reassign the Soldier or dispose of the matter by alternative means.

5. Board Composition. The separation authority must appoint a board of at least 3 experienced commissioned, warrant, or noncommissioned officers, all senior to the respondent.

    a. At least 1 member must be a major or above.

    b. A majority of the board must be commissioned or warrant officers.

    c. At least 1 commissioned officer must be USAR if the respondent is USAR, and at least 1 commissioned officer must be ARNG if the respondent is ARNG.

    d. Noncommissioned officers must be sergeant first class or above.

    e. Noncommissioned officers may not serve on the board when an OTH discharge could result.

    f. An opportunity to serve on the board must be given to women and minorities; however, absence of either a woman or minority member is not a basis for challenging the proceeding.

    g. The senior member shall be the President.

    h. A nonvoting recorder (representing the Government) and legal advisor may be appointed to the board.

    i. The respondent may challenge voting board members or the legal advisor for cause.

    j. Standing board appointment orders, with alternate members, are suggested for administrative convenience and board member training.

6. Board President Duties.

   a. The Board President will rule on all matters of procedure and evidence, unless overruled by a majority of the Board.

   b. If a legal advisor has been appointed, the legal advisor will rule finally on all matters of evidence and challenges except a challenge to the legal advisor.

7. Witnesses.

   a. The Government must notify the respondent of the names and addresses of the witnesses expected to be called at the board hearing.

   b. The recorder, upon written request of the respondent, endeavor to arrange for the appearance of the respondent's available witnesses.

      (1) The respondent may request temporary duty or invitational travel orders for witnesses.

      (2) The convening authority may authorize expenditure of funds for witnesses if the presiding officer (after consulting a JA) or the legal advisor determines:

         (a) The testimony is not cumulative;

         (b) Personal appearance is essential to a fair determination of issues;

         (c) Telephonic, written, or recorded testimony will not adequately accomplish the same objective;

         (d) The need for live testimony is substantial, material, and necessary, and

         (e) The significance of personal appearance when balanced against the practical difficulties favors production.

c. Military members and Federal employees may be ordered to appear before a board, but the board possesses no subpoena power to require appearance of a civilian.

8. Evidence. Formal rules, such as the Military Rules of Evidence, do not apply. The standard for admission is relevant and competent.

a. Limited privileges are preserved, such as spousal, attorney, and clergy privileges.

b. Coerced statements are excluded, as are bad faith unlawful searches executed by military members.

c. Polygraph results are admitted only by agreement by all parties.

9. Respondent Rights. The respondent may testify, and the provisions of Article 31, UCMJ apply. The respondent may also submit written matters to be considered, as well as calling witnesses. The respondent can question any witness and present argument before the board.

10. Findings and Recommendations. The board will make findings and recommendations in closed session with only voting members present.

a. The board will determine whether each allegation is supported by a preponderance of the evidence.

b. The board will determine whether the findings warrant separation, and will make a separate determination for each reason.

c. The board will make recommendations on the following:

(1) Retention or separation. If the board recommends retention, the recommendation must provide for the Soldier to be retained in the component and status as currently serving.

(2) If the board recommends separation, it will recommend a characterization of service as authorized.

(3) If the board recommends separation, it may recommend suspending the separation up to 12 months.

d. The board will complete a report of proceedings, with verbatim findings and recommendations. A worksheet is recommended to complete the findings and recommendations. The board proceeding will be recorded in summarized form as accurately as possible.

11. All board proceedings will be reviewed by a qualified officer fully cognizant of applicable regulations and policies (not necessarily a JA). If the separation involves an OTH, limited use evidence, or specific legal issues raised by the respondent, the proceedings will be reviewed by a JA.

E. Separation Authority Action.

1. Upon receipt of a separation action in which a board proceeding is not required, the separation authority will determine whether a sufficient basis exists to support the separation using the preponderance of the evidence standard.

a. If there is insufficient basis, disapprove the recommendation and return the case to the originating command with the reasons for disapproval.

b. If there is sufficient basis for separation but under a different provision or reason, disapprove the recommendation and return to the originating command to initiate new separation action.

b. If there is sufficient basis for separation, the separation authority will consider whether to retain or separate the Soldier.

c. The separation authority may then:

(1) Direct retention;

(2) Direct separation, with characterization of service, or

(3) Direct separation, with characterization of service, but suspend the action for up to 12 months.

2. Upon receipt of a separation action requiring an administrative board, the separation authority will determine whether a sufficient basis to separate the Soldier exists.

   a. If there is insufficient evidence, disapprove the recommendation and return the case to the originating command with the reasons for disapproval.

   b. If there is sufficient basis for separation but under a different provision or reason, disapprove the recommendation and return to the originating command to initiate new separation action.

   c. If there is a sufficient basis for separation and the Soldier has waived the right to a board hearing, approve separation and direct the characterization with execution or suspension up to 12 months.

   d. If there is sufficient evidence and the right to a board has not been waived, convene a boar hearing.

   e. Direct the case through medical channels, when appropriate.

3. Upon receipt of a separation action with board findings and recommendations, the separation authority will take one of the following actions.

   a. When the board recommends retention:

      (1) Approve the recommendation and direct retention, or

      (2) Request that the Secretary of the Army discharge the Soldier, with a recommended characterization of service.

   b. When the board recommends separation:

      (1) Approve the recommendation and direct separation for any reason set forth in the notification and established by the evidence, and characterize the Soldier’s separation with a no less favorable characterization than that recommended by the board;

(2) Disapprove the recommendation and direct retention;

(3) Approve the recommendation for separation, direct a characterization of service no less favorable than that recommended by the board, and suspend the execution of the discharge for a period up to 12 months.

c. The separation authority cannot direct separation if the board recommends retention, and the separation authority cannot give a less favorable characterization of discharge than that recommended by the board.

d. If there are errors in the board proceeding:

(1) The separation authority can determine that the errors were harmless and take final action accordingly.

(2) If the errors are substantial, the separation authority may:

(a) Direct retention;

(b) Return the case to the board to comply with the procedural requirements, or to make findings and regulations required by the regulation, or

(c) Set aside the proceeding and direct a new board.

F. Limitations on Separations.

1. Soldiers will not be separated on the basis of conduct that has been the subject of judicial proceedings resulting in acquittal or similar action, unless:

a. The judicial determination does not address guilt or innocence;

b. The judicial determination was by a State or foreign court and the separation is approved by HQDA, or

c. The acquittal is based upon a finding of not guilty only by reason of lack of mental responsibility.

d. *See Cooney v. Dalton*, 877 F. Supp. 508 (D. Hawaii 1995) (court granted a temporary restraining order prohibiting administrative discharge for misconduct (wrongful drug use) when servicemember had been acquitted at a special court-martial).

2. Soldiers will not be separated on the basis of conduct that has been the subject of a prior administrative separation board in which the board entered an approved finding that the evidence did not sustain the factual allegations, unless rehearing is ordered due to fraud or collusion.

3. Soldiers will not be separated on the basis of conduct that was the subject of a prior administrative separation proceeding that resulted in a separation authority's determination that the Soldier should be retained, unless:

a. There is subsequent conduct or performance that forms the basis for a new proceeding;

b. There is new evidence that was not reasonably available at the time of the prior proceeding, or

c. Fraud or collusion was involved in the previous proceeding.

VII. MISCELLANEOUS TOPICS.

A. Recoupment. Soldiers who receive a bonus or similar benefit and whose receipt of the bonus or similar benefit is subject to the condition that the member continue to satisfy certain eligibility requirements must repay to the United States an amount equal to the unearned portion of the bonus or similar benefit if the member fails to satisfy the requirements. *See* 37 U.S.C. § 303, as well as 10 U.S.C. § 2005 and the FY06 National Defense Authorization Act for specified guidance pertaining to the program for which the pay was authorized.

a. Pro rata reimbursement of bonuses is generally sought when a Soldier either voluntarily separates or is separated due to misconduct prior to the end of the agreed service obligation.

b. If recoupment may be appropriate, separation boards should make specific findings on the issue, and if a board hearing is waived, the separation authority should make a specific finding on the matter.

B. Separation Pay. *See* DoDI 1332.29.

1. Soldiers who are involuntarily separated or denied reenlistment or continuation may be eligible for separation pay.

2. Soldiers who request separation, are separated during their first term of enlistment, and separations resulting from unsatisfactory performance, misconduct, being dropped from rolls, court-martial sentence, and who receive an OTH discharge are not eligible for separation pay.

3. Generally, Soldiers must be on active duty or full-time ARNG duty, or have been on active duty or full-time ARNG duty on 5 November 1990, along with having 6 or more years, but less than 20 years, of service, to qualify. Consult the DoDI to determine eligibility.

C. Judge Advocate as Legal Advisor/Reviewer.

1. Legal Advisor. The appointment of a legal advisor to the board is optional; however, it is recommended whenever possible. Reserve military judges may serve as legal advisors; however, they must understand that evidentiary rules are relaxed, and they should not require counsel to submit written briefs on evidentiary questions or dismiss the board members when hearing argument on evidentiary matters.

2. Legal Reviewer.

a. No pre-board legal review is required at any stage; however, it is strongly recommended that prior to referral of an action to a separation board that a JA review the action to ensure the adequacy of the notice and that there is sufficient factual basis to warrant separation, and so inform the appointing authority in writing.

b. Post hearing legal review is only required in those cases in which the board has recommended an OTH, limited use evidence is introduced, or where the respondent

identifies specific legal issue for consideration by the separation authority.

D. Recurring Problems.

1. Inadequate notice to the Soldier.

2. Failure to state the factual basis for the separation action in the notification.

3. Failure to state the type of discharge recommended in the notification.

4. Notification not signed by the “commander.”

5. Improper signature in the consulting counsel portion of the notification form.

a. Commanders signed as consulting counsel. If an individual refuses to consult with counsel, the commander should annotate the form indicating that the Soldier declined to consult with counsel.

b. Other staff officers signed as consulting counsel.

6. Inadequate evidence to support the separation action.

7. Recorder fails to rebut evidence presented by the respondent. Potential rebuttal includes *United States v. Timoney*, 34 M.J. 1108 (ACMR 1992). Held: Command urinalysis results may be admissible in a courts-martial despite the government’s failure to fully comply with AR 600-85 command urinalysis SOP, as to observation of soldier urination, proper urine bottle labeling, key control, and illegible social security numbers on specimen bottle.

8. Failure to submit supporting evidence in the record and connecting the evidence to the respondent.

9. Failure to provide counsel or the respondent with all the documentation and evidence that will be presented to the board.

10. Inadequate record of the proceeding.

a. The DA Form 1574 is not in the record. AR 15-6 requires that the record reflect the admission of exhibits or documentary evidence.

b. Testimony of witnesses must be a part of the record, summarized as fairly and accurately as possible.

c. Failure to record action by the legal advisor or president on challenges to board members.

d. Failure to show disposition of motions or admissions of items of evidence. Any legal issue raised during the board must be reviewed by a JA.

11. Failure to make findings and recommendations in accordance with the regulation.

a. The board cannot make a finding that denies the board's jurisdiction to hear the case.

b. The recommendation of retention cannot be conditioned upon some future action, i.e., completion of a drug rehab program or passing an APFT. If a board wishes to ensure proper performance, they can recommend discharge but recommend suspension of the execution of the discharge for up to 12 months.

12. Improper Delegation of Separation Authority.

a. Separation authorities may not delegate their authority to direct separation, appoint boards, direct retention, or disapprove and return an action to subordinate command, and approve the findings and recommendations of a board, unless expressly authorized by Army regulation or HQDA. The separation authority must personally take these actions.

b. The "For the Commander" authority line will not be used except when the separation authority has personally approved the action but does not sign the document.

13. Completing Separation Action IAW NGR 600-200, but not AR 135-178.

a. ARNG Soldiers who are discharged from the ARNG per NGR 600-200 become members of the IRR, unless they are concurrently discharged from the Reserve of the Army under the procedures set forth in AR 135-178.

b. ARNG units should use the procedures in AR 135-178 when separating ARNG Soldiers, unless their intent is for the soldiers to become members of the IRR or other element of the Standby Reserve.

14. Simultaneous Medical Processing. Medical separation processing, such as a Medical Evaluation Board (MEB) or Physical Evaluation Board (PEB), generally takes precedence over other administrative separation processing.

a. If a Soldier is being processed for separation due to defective enlistment, or misconduct, and a medical official determines that the Soldier requires an MEB, final action on the administrative separation is suspended until completion of the MEB.

b. If a PEB is recommended for a Soldier, a GCMCA must determine whether to process the PEB or the administrative separation.

VIII. CONCLUSION.

APPENDIX A

DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY RESERVE COMMAND
1401 DESHLER STREET SW
FORT MCPHERSON, GA 30330-2000

REPLY TO
ATTENTION OF

ARRC-PRP-E

14 October 2008

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Delegation of Involuntary Separation Authority Under AR 135-178

1. References:

a. Memorandum, HQ USARC, AFRC-PRP-E, 12 Aug 08, subject: New Delegation of Involuntary Separation Authority Under AR 135-178.

b. AR 135-178, Enlisted Administrative Separations, 13 Mar 07.

2. This memorandum supersedes the memorandum at reference 1a.

3. The purpose of this memorandum is to delegate involuntary separation authority for Army Reserve Troop Program Unit enlisted Soldiers under the provisions of reference 1b to those USARC General Officer Commands with full-time Judge Advocate support available.

4. Effective immediately, you are delegated the authority to take final action on enlisted involuntary separations under the provisions of reference 1c with the exception of Soldiers having more than 18 but less than 20 qualifying years of service for retired pay as indicated in paragraph 5 below.

5. As the separation authority, you must personally appoint boards of officers, approve changes of voting members of the boards, refer Soldiers to those boards, and approve the findings and recommendations, except as indicated below. This authority may not be further delegated, except as stated in paragraph 8 below.

6. I retain the authority to take final action listed in paragraph 1-10b(2) of reference 1c, on the approved board for Soldiers with more than 18 but less than 20 qualifying years of service for retired pay. This authority includes directing retention, suspending the discharge, or forwarding the board action to Headquarters, Department of the Army for Secretarial authority for discharge approval, in accordance with paragraphs 1-11 and 1-12 of reference 1c.

7. All completed administrative separation boards pertaining to the Soldiers outlined in paragraph 6, will be forwarded to this Headquarters (ARRC-PRP-E) via memorandum, and will include a recommendation by the general officer commander as to the Soldier's disposition.

8. In accordance with AR 15-6, Procedures for Investigating Officers and Boards of Officers, paragraph 5-2a, you may delegate to your Staff Judge Advocate the authority to excuse individual administrative board members before the first session of the board.

9. For additional information, contact Mr. Tony Cavalier, Deputy Chief of Staff, G-1 Enlisted Personnel Management Branch, at (404) 464-8928 or tony.cavalier@usar.army.mil.

JACK C. STULTZ
Lieutenant General, US Army
Commanding

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353d CAC
1st Bde (BCTB), 75th Div (BCTD)
2d Bde (BCTB), 75th Div (BCTD)

CHAPTER J

RESERVE COMPONENT OFFICER PERSONNEL LAW

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January 2015

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D. DoDI 1332.40, Separation Procedures for Regular and Reserve Commissioned Officers

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II. INTRODUCTION.

A. Purposes of Officer Transfers and Discharges.

1. Provide a way to terminate service prior to the terms of the original contract.

2. Provide authority to transfer officers from one component to another.

3. Provide authority to discharge officers from all military obligations.

4. Support the Service's personnel life-cycle function of transition.

B. Privilege of Service. "An individual is *permitted* to serve as a commissioned officer in the Military Services because of the special trust and confidence the President and the United States have placed in his or her patriotism, valor, fidelity, and competence." DoDD 1332.30, para. 4.1 (emphasis added).

C. Separation. Broadly defined to include any actions designed to result in a commissioned officer's discharge, retirement, or resignation.

D. Regular Army (RA) v. Other Than Regular Army (OTRA).

1. RA Officer: an officer who holds a grade and office under a commission signed by the President, and who is appointed as an officer in the standing Army.

2. OTRA Officer: an officer who holds a grade and office under a commission signed by the President, and who is appointed as an officer in a Reserve Component of the Army.

3. The laws for RA appointments and the transfer of officers between RA and OTRA were amended in the Fiscal Year 2005 National Defense Authorization Act (FY05 NDAA). Specifically, Section 501 rescinded 10 U.S.C. § 532(e), which stated that no person will receive an original appointment as a commissioned officer in the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps until completion of 1 year of active duty service as a commissioned officer of a reserve component.

a. The Department of Defense (DoD) policy is to transition to an all-Regular Active Duty List (ADL).

(1) As of 1 May 2005, all new officers commissioned to the ADL receive regular appointments regardless of method or source of commission.

(2) All reserve commissioned officers on the ADL were to have transitioned to regular officer status NLT 1 May 2006, provided the officer meets the following requirements UP 10 U.S.C. § 532:

(a) is a citizen of the United States;

(b) is able to complete 20 years of active commissioned service before 62 years of age;

(c) is of good moral character;

(d) is physically qualified for active service, and

(e) has such other special qualifications as the Secretary of the military department concerned may prescribe by regulation.

b. Reserve commissioned officers on the ADL who do not meet the requirements for appointment as a regular officer UP 10 U.S.C. § 532 may continue to serve with a reserve appointment until 28 October 2009, or completion of any mandatory active duty service obligation (ADSO) existing on 1 May 2005, whichever is later. After 28 October 2009, all commissioned officers on the ADL must hold a regular appointment, be completing an ADSO incurred before 1 May 2005, or have a wavier from the Secretary of Defense. The officer may also be transferred to the Reserve Active Status List (RASL).

E. Active Duty List (ADL) v. Reserve Active Status List (RASL).

1. ADL: a single list for the Army, Air Force, Navy, or Marine Corps that contains the names of all officers who are serving on active duty (AD) (other than those outlined in 10 U.S.C. § 641; e.g., reserve officers on AD for training or on full-time National Guard duty, warrant officers, and retired officers on AD).

2. RASL: a single list which contains the names of all officers (including commissioned warrant officers) who are in an active status in a Reserve Component and are not on the ADL.

F. Probationary v. Nonprobationary Status.

1. Probationary Officer.

a. A commissioned officer (RA or OTRA) with less than 5 years of active commissioned or commissioned service.

b. All newly commissioned officers are probationary for 5 years.

c. This category could change to 6 years given the authorization to do so by the 2008 NDAA and DoDI 1332.30, which both identify probationary officers as those having less than 6 years of commissioned service.

2. Nonprobationary Officer: an officer other than a probationary commissioned officer. Receives significant due process in transfer and discharge actions.

G. Show-Cause Authority. Specifically determined by the Secretary of the military department concerned. Includes:

1. The Secretary of the department or officers designated by the Secretary to determine, based upon a record review, that an officer should show cause for retention, and

2. Commanders exercising general court-martial authority and all general or flag officers in command who have a judge advocate (JA) or legal advisor available, also referred to as the general officer show-cause authority (GOSCA).

H. Promotion Policies. *See* AR 135-155.

III. OFFICER SEPARATION AUTHORITY.

A. Secretary of the Army possesses the authority to separate any officer.

B. Headquarters, Department of the Army (HQDA) will act upon all recommendations of officer separation boards and resignations.

C. The Chief, National Guard Bureau (CNGB) will act upon boards convened by area commanders to determine whether or not Federal recognition of Army National Guard (ARNG) officers should be withdrawn because of inefficiency or physical unfitness.

1. The termination of an officer's appointment in the ARNG is a function of the State.

2. Withdrawal of Federal recognition is a function of the CNGB, acting for the Secretary of the Army.

D. The following may recommend separation of officers:

1. A commander in the officer's chain of command.

2. A proper agency of HQDA.

3. A duly constituted selection board.

4. A Professor of Military Science at an institution where the officer is pursuing a degree.

E. Separation Considerations. Authorities may consider an officer's current period of service, records of nonjudicial punishment, and any other material and relevant factors when determining whether to separate an officer. Nonjudicial punishment consideration is limited to circumstances of a particular case where it has a direct and strong probative value, and the case involves a pattern of conduct or behavior.

IV. VOLUNTARY OFFICER SEPARATIONS.

A. Conditional Resignations.

1. Officers may submit a conditional resignation when applying:

a. For appointment in another Armed Force;

b. For appointment in the Regular or Reserve Component (RC) of the U.S. Public Health Service;

c. For an appointment in the Environmental Science Services Administration, or

d. For enlistment in another Armed Force.

2. A conditional resignation from a nonobligated officer must be accepted.

3. Obligated officer resignations may be accepted if they have performed their required period of active duty or active duty training (ADT) and apply for a position listed in paragraphs A1a through c above. If an obligated officer has not completed his/her period of active duty or ADT, a resignation will only be accepted under very exceptional circumstances involving national health, safety, or interest.

4. Area commanders and the Commander, HRC-St. Louis are authorized to accept conditional resignations.

B. Unqualified Resignations.

1. Nonobligated officer resignations may be accepted unless:

a. The officer is under investigation, being considered for involuntary separation, in the custody of civil authorities, or in default with respect to public property or public funds;

b. In time of war or national emergency, or

c. When HQDA restricts acceptance of resignations.

2. Obligated officers will not be permitted to resign until completion of the service requirement unless:

   a. HQDA approves the resignation recognizing extreme compassionate circumstances or in the best interest of the Army, or

   b. The officer is a chaplain who becomes a regular or duly ordained minister and must be separated for the purpose of obtaining ordination to take final vows in a religious order.

3. HQDA possesses the authority to take final action on unqualified resignations submitted by obligated officers unless the officer is a chaplain or is resigning due to religious reasons.

4. Area commanders and the Commander, HRC-St. Louis possess the authority to accept unqualified resignations by nonobligated officers, obligated chaplains, and obligated officers resigning due to religious reasons.

C. Resignation in Lieu of Involuntary Separation.

1. An officer notified of consideration for involuntary separation may submit a resignation at any time prior to final action on the board proceedings. Submission of the resignation will suspend the involuntary separation proceeding.

2. HQDA is the final action authority for resignations in lieu of involuntary separation.

D. Resignation of Personnel Who Do Not Meet the Medical Fitness Standards at Time of Appointment.

1. Reserve component commissioned and warrant officers (WO) with less than 3 years of commissioned service who did not meet the medical fitness standards at the time of appointment but met the standards for retention, are eligible to submit a resignation.

2. A medical board must find that the officer has a medical condition that would have permanently disqualified the officer from entering military service, does not qualify the officer for retention, and was not service-aggravated.

3. The Commander, HRC-St. Louis is the separation authority and will issue an Honorable Discharge Certificate.

E. Voluntary Release from Active Duty (REFRAD). Applies to OTRA officers only. A REFRAD is the transfer of an OTRA officer from AD status rather than discharge, and it can be voluntary or involuntary. *See* AR 600-8-24, Ch. 2. Examples of Voluntary REFRAD not listed below include: expiration of AD commitment; essential to national interest; entry of a WO on AD as a Reserve commissioned officer, and release from a medical holding detachment.

1. Personal Reasons. OTRA officers may submit applications NET 12 months and NLT 6 months prior to the desired release date. UP AR 600-8-24, paras. 2-5 and 2-6, the officer must:

   a. Complete the period of service required by law or minimum program required by the program that placed the officer on AD (ADSO);

   b. Complete at least 1 year of current AD commitment;

   c. Complete current prescribed tour if stationed outside the continental United States (OCONUS);

   d. Complete utilization tour or other tour specified by AR 350-100, and

   e. Serve 1 year at permanent change of station (PCS) duty location.

2. Hardship. Exists when in circumstances involving death or disability of a member of a Soldier's (or spouse's) immediate family, separation will materially affect the care or support of the family by alleviating undue and genuine hardship. UP AR 600-8-24, paras. 2-9 and 2-10, the officer must clearly establish:

   a. The hardship is permanent and did not exist prior to entry on AD; or

   b. If the hardship existed prior to entry on AD, the condition has since intensified and can only be alleviated by separating from AD, and

   c. Upon REFRAD, the officer will be able to eliminate or materially alleviate the condition.

3. Pregnancy. A commander with separation approval authority (SAA) may release a RC officer who requests REFRAD because of pregnancy. UP AR 600-8-24, paras. 2-13 and 2-14:

   a. The officer's immediate commander will counsel the officer to provide information concerning the officer's rights, entitlements, and responsibilities with respect to continued AD or separation.

b. Officers commissioned through funded programs will not be released until completion of their ADSO. When extenuating circumstances exist, officers may request a hardship separation.

c. If a medical officer determines that the pregnancy has terminated for any reason before the REFRAD, the authority for separation no longer exists.

4. School. An officer who is serving the initial tour of AD and who is not mission essential may request REFRAD to attend a recognized institution of higher learning. UP AR 600-8-24, paras. 2-15 and 2-16:

a. Officers commissioned through funded programs will not be released until completion of their service obligations.

b. Officer's school reporting date must be in the last 3 months of the officer's remaining active service.

5. Approval authority varies with type of REFRAD. The following officers may exercise SAA and grant voluntary REFRADs:

a. Commanders of units and installations having general court-martial authority;

b. General officers in command of Army medical centers, and

c. Commanders of:

(1) Personnel centers;

(2) Training centers;

(3) OCONUS replacement depots;

(4) All active Army installations authorized 4,000 or more AD military personnel, and

(5) HRC-St. Louis.

d. There is no denial authority at the installation level. A GOSCA may generally approve voluntary REFRADs but has no authority to disapprove a voluntary request. Recommendations for disapproval must be forwarded to HRC.

V. INVOLUNTARY OFFICER SEPARATIONS.

A. Applicability.

1. Applies to all USAR officer involuntary separations.

2. Applies to all ARNG officer involuntary separations when:

a. CNGB approves recommendations submitted by an efficiency or physical fitness board convened for withdrawal of Federal recognition;

b. Action directed by HQDA based on derogatory suitability information, and

c. Officers separated for not meeting the medical fitness standards at the time of appointment.

B. Bases for Involuntary Separation.

1. Substandard Performance of Duty. Officers separated for substandard performance of duty will be issued an Honorable Discharge Certificate. Substandard performance of duty is defined as:

a. A downward trend in overall performance resulting in an unacceptable record of efficiency indicating the officer has reached the peak of potential;

b. Failure to keep pace with contemporaries;

c. Failure to exercise necessary leadership or command;

d. Failure to perform with required technical proficiency;

e. Failure to meet standards in service school course due to academic or leadership deficiencies;

f. Failure to discharge assignments commensurate with grade and experience;

g. Apathy, defective attitude, or other character disorder;

h. Failure of a dual component member to be recommended for promotion in enlisted status, or to be selected for retention under the Active component Qualitative Retention Program, or

i. Failure to achieve satisfactory progress in an Army Weight Control Program (AWCP).

2. Moral or Professional Dereliction. An officer separated for moral or professional dereliction may receive an honorable, general, or other than honorable conditions (OTH) discharge. Moral or professional dereliction is defined as:

a. Discreditable, intentional failure to meet personal financial obligations;

b. Mismanagement of personal affairs to the discredit of the service or detrimentally affecting the performance of duties;

c. Intentional omission or misstatement of facts in official statements or records;

d. Acts of personal misconduct (e.g. driving while intoxicated);

e. Intentional neglect or failure to:

(1) Perform assigned duties;

(2) Participate satisfactorily in Ready Reserve training;

(3) Comply with directives regarding furnishing current address of record, maintaining a permanent residence, medical examinations, or replying to official correspondence.

f Felony conviction in a civil court;

g. Foreign court conviction resulting in confinement or other restriction that significantly diminishes the officer's usefulness to the Army;

h. Military service of a foreign government;

i. A special derogatory evaluation report;

j. Failure to meet standards of a service school course due to disciplinary reasons, or

k. Conduct unbecoming an officer.

3. Does Not Meet the Medical Fitness Standards at the Time of Appointment. An officer who fails to resign under the conditions of paragraph IV.D above, may be involuntarily separated for failing to meet the medical fitness standards at the time of appointment.

4. National Security. Officers whose acts or behavior are not consistent with the interests of national security may be involuntarily separated.

5. Involuntary REFRAD (AR 600-8-24, paras. 2-21 to 2-38). Involuntary REFRADs may be divided into two groups: actions based upon the Soldier's status and actions based upon the Soldier's conduct.

a. Status-based involuntary REFRADs include: reaching maximum age; maximum service; failure of selection for Reserve promotion, and nonselection for Active Guard Reserve (AGR) continuation.

(1) Maximum Age or Service (AR 600-8-24, paras 2-21 to 2-24 and fiscal year 2008 (FY08) National Defense Authorization Act (NDAA)).

(a) Age. An officer will be released from AD (unless he or she requests voluntary retirement) on the last day of the month in which he or she attains the following maximum age:

(i) Age 62, for major general (MG) or brigadier general (BG) promotable.

(ii) Age 60, for any other commissioned officer. If the officer is within 2 years of active federal service (AFS) retirement eligibility, he or she may be retained on AD until eligible for retirement.

(iii) Age 62, for warrant officers (WO) who cannot qualify for (non-regular service) retired pay UP 10 U.S.C. §§ 12731-12740.

(iv) Age 60, for WO who qualify for (non-regular service) retired pay UP 10 U.S.C. §§ 12731-12740.

(v) Age 67, for certain medical officers; however, the service may not retain the officer to this age without the officer's consent.

(b) Service. Generally, Reserve commissioned officers will be released from AD after completing 20 years of active service. There are several exceptions:

(i) Staff College Level School or Senior Service College members will be retained on AD until completing 2 years of AD following graduation.

(ii) Officers named by command selection boards will be retained on AD up to 90 calendar days after completing assignment to the designated command position.

(iii) Lieutenant Colonels (LTC) may be retained until 28 years service.

(iv) Colonels (COL) may be retained until they reach 30 years service.

(v) BG may be retained until they have 5 years in grade or reach 30 years service, whichever is later.

(vi) MG may be retained until they have 5 years in grade or reach 35 years service, whichever is later.

(vii) Lieutenant generals (LTG) and above may serve 38 years.

(2) Nonselect for AGR Continuation. (*See* AR 600-8-24, paras. 2-25 and 2-26.)

(a) An AGR officer on initial period of duty will be separated from active duty 90 days after notification of nonselection.

(b) AGR officers on AD and within 2 years of retirement eligibility will ordinarily not face involuntary REFRAD until eligible for retirement.

b. Conduct-based involuntary REFRADs include: board-directed actions for poor performance or misconduct; civil criminal conviction; release pending appellate review, and failure of branch orientation, familiarization course, or Warrant Officer Basic Course.

(1) REFRAD by the Department of the Army Active Duty Board (DAADB) (AR 600-8-24, paras. 2-27 and 2-28).

(a) IAW 10 U.S.C. § 14902, Service Secretaries shall prescribe, by regulation, procedures for the review at any time of the record of any Reserve officer to determine whether that officer should be required, because of substandard performance, misconduct, moral or professional dereliction, or national security concerns, to show cause for retention in an active status.

(b) The DAADB is the Army's tool for ensuring that only RC officers who consistently maintain high standards of efficiency, morality, performance, and professionalism are permitted to serve on AD.

(i) Referral of a case to the DAADB may be initiated locally or at HQDA.

(ii) Bases for REFRAD are similar to bases for administrative elimination: substandard performance, misconduct, moral or professional dereliction, and national security reasons.

(iii) These cases involve minimal due process. The officer is notified and given an opportunity to respond/rebut. The board reviews the record and officer's response/rebuttal, and then recommends either retention or release.

(iv) The initiating commander can close the case and stop the REFRAD action upon considering the officer's response/rebuttal.

(2) Civil Criminal Conviction. UP AR 600-8-24, paras. 2-29 and 2-30, the Secretary of the Army, or designee, or the GCMCA may REFRAD an officer when the offense:

(a) Results in conviction and sentence for more than 1 year by Federal or State court; or

(b) Results in conviction and sentence for a crime of moral turpitude (regardless of the sentence), including, but not limited to, child abuse, incest, indecent exposure, soliciting prostitution, embezzlement, check fraud, and any felony or other offense against the customs of society.

(c) These cases involve minimal due process. The officer's case is not referred to a board. The officer is only notified and allowed an opportunity to respond.

(3) Branch Orientation/Familiarization/OBC Failure. RC officers with less than 5 years commissioned service will be released from AD and discharged from their Reserve commission when the officer fails to meet service school standards.

(a) UP AR 600-8-24, paras. 2-33 and 2-34, the failure and resulting release and discharge must be based upon:

(i) Misconduct;

(ii) Moral or professional dereliction;

(iii) Academic or leadership deficiencies, or

(iv) Resignation from the course.

(b) Enhanced due process is warranted since action may involve more than a loss of AD status. Officers are entitled to a faculty board because they can also lose their commission. However, officers may waive the board and accept the decision of the approval authority with respect to their release/discharge.

c. The SAA for involuntary REFRAD actions is generally reserved to the Commander, HRC or HQDA level. In any involuntary REFRAD case, reviewing JAs must consult AR 600-8-24.

C. Notification Procedure.

1. When an area commander or other authority determines that a sufficient basis exists to involuntarily separate an officer, the authority will notify the officer of the requirement to show cause for retention. The notice will:

a. State the reason for separation;

b. Notify the officer of the right to submit a resignation in lieu of involuntary separation;

c. Advise the officer that he/she must acknowledge receipt within 15 days and indicate his/her election of options;

d. Be sent by certified mail, return receipt requested, as necessary.

e. Inform the officer of his/her right to:

(1) Copies of the records submitted to the board and other pertinent and releasable documents;

(2) Consult with counsel;

(3) Present the case to a board of officers;

(4) Representation by appointed military counsel or civilian counsel at own expense;

(5) Submit statements on his/her behalf;

(6) Waive rights except with respect to copies of information and consulting counsel, and

(7) Withdraw waiver of rights any time prior to the date that the convening authority directs the case be presented to the board.

2. All officers are entitled to a separation board hearing unless:

a. The officer submits a resignation in lieu of separation; the command forwards the resignation to HQDA, and the resignation is accepted by HQDA;

b. The officer has less than 3 years of commissioned service and the separation is due to failing to meet the standards of a service school or disciplinary reasons;

c. The officer is being separated for failure to meet the medical fitness standards at the time of appointment;

d. The officer received a bad conduct or dishonorable discharge, or

e. The officer is discharged by the Secretary of the Army after a Federal or State court conviction or finding of guilty regarding a crime involving moral turpitude.

3. Officers with 20 or more years of qualifying Federal service for retired pay may elect to transfer to the Retired Reserve in lieu of involuntary separation, unless Federal recognition has been withdrawn based on the approved recommendations of a board. The election should be forwarded to HQDA.

D. Board Proceedings. A board will determine if officers should be retained in the Army, and ensure that all hearings are fair and impartial. Boards follow the procedures in AR 15-6. The Government must establish by a preponderance of the evidence that officers have failed to maintain established standards and should be separated for the matters at issue.

1. Board Composition.

a. The board will contain at least 3 commissioned officers, all senior in rank to the officer being separated (respondent), at least 1 colonel (COL) (O-6) or above, and the remainder being at least lieutenant colonel (LTC) (O-5) or above. *See* DoDI 1332.30 and ASA (M&RA) Memorandum dated 11 August 2009.

b. One officer will be RA, if available, and if not available, a Reserve officer on active duty may be appointed. Remaining officers will be Reserve officers on AD or in an active status.

c. If the board is considering an ARNG officer for unsuitability, one board member shall be ARNG.

d. One member of the board must be of the same sex as the respondent, and if reasonably available, of the same branch of service.

e. If requested by a minority respondent and reasonably available, a minority board member should be appointed to the board. Respondent has 15 days from board notice to request.

f. The respondent may challenge any member of the board, including the legal advisor, for cause.

g. Legal Advisor. The appointing authority may appoint a legal advisor to the board. The legal advisor does not take part in presenting the case, but rather advises on admissibility of evidence, arguments, motions, or other legal procedures as required by the President of the Board, and may rule on challenges to the board members. The legal advisor may be present during the proceedings. In the absence of a legal advisor, the Board President shall rule on all matters before the Board.

h. Recorder. A commissioned or warrant officer, generally a JA, will be appointed as recorder. The recorder is responsible for notifying the respondent in writing of the time and place of the hearing and must be received by the respondent not less than 10 days before the hearing is scheduled. The recorder also ensures that copies of all documents are given to the members and permits access to them by the respondent or provides copies as necessary. The recorder will also present the Government's case to the board.

i. Commanders should consider using standing boards for efficiency and training.

2. Witnesses and Evidence.

a. The respondent may question all witnesses and request the appearance of witnesses pertinent to the case on a voluntary basis and at no expense to the Government. Depositions or affidavits may be accepted when personal appearance is not possible. The recorder will endeavor to arrange for the presence of respondent's available witnesses.

b. The respondent must be notified of the names and addresses of witnesses expected to be called during the board proceeding.

c. Board members, the recorder, and respondent's counsel may question witnesses.

(1) The respondent may testify or elect to remain silent. If the respondent testifies, the officer may not be ordered to testify in contravention of Article 31, UCMJ and is entitled to an explanation of his/her rights.

(2) A witness may not be required to answer a question that may incriminate himself/herself. The witness must state that they are seeking the protection of the 5th Amendment or Article 31, UCMJ.

(3) Involuntary admissions will not be considered by the board, except that a failure to warn an individual of their rights prior to making the admission does not prevent admission.

(4) Unlawful searches will not be considered by the board, unless the board finds that the evidence would have inevitably been discovered.

c. The Military Rules of Evidence or other formal rules of evidence do not apply to board proceedings. The standard for admission by the board is relevant and material. Exceptions to this standard are:

(1) A witness or respondent may not be required to reveal privileged communications.

(2) The board will not consider the results, taking, or refusal of a polygraph test.

(3) “Off the record” statements shall neither be made nor considered.

(4) A witness or respondent may not be forced to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury.

3. Findings and Recommendations.

a. The board must make findings with respect to each allegation whether the respondent should be retained in the Army, including a brief statement of the reasons for each finding. A finding on a more serious allegation does not relieve the board of an obligation to make findings on lesser allegations.

b. The board, if it finds the allegation is supported by a preponderance of the evidence, must determine whether the finding warrants separation.

c. The board must make recommendations warranted by the findings, and are limited to retention or separation. If the board recommends separation, it will also recommend the type of discharge. A finding that an allegation has been proven does not require a finding that the conduct warrants separation. The board is free to find separation is not warranted. However, upon such a finding, a board cannot make a recommendation as to the type of separation; the two are mutually exclusive.

e. The board should specify the assignment it recommends for a Soldier that they have determined should be retained.

f. The board may recommend suspension of separation up to 12 months.

g. The board may not condition separation or retention recommendations based upon some future act.

h. No verbatim record of the proceeding is required. Only the findings and recommendations must be verbatim. The proceedings must be summarized as fairly and accurately as possible.

4. If the officer elects appearance at a board hearing or elects board proceedings but waives appearance, the commander shall take steps necessary to appoint a board.

a. If the officer's whereabouts are unknown or he/she refuses to accept or respond to the notification, the commander will appoint a board of officers, and the separation action will proceed without the involvement of the officer except that counsel will represent him/her before the board.

b. If new information is received by the area commander before the board commences, the matters will be forwarded for consideration by the board. If the case has been heard by the board and recommended favorably to the officer, the area commander may take action to initiate new proceedings, as necessary.

E. Show Cause Authority Action.

1. When a board recommends retention, the area commander will forward the case to HQDA, and HQDA will approve the recommendation, close the case, and notify the officer and command.

2. If the area commander notes a substantial defect in the board's proceedings, the commander may take the following action:

a. If the board failed to make findings and recommendations required by the regulation, the commander will return the case to the board for compliance.

b. If the record contains an error or omission that may be corrected without reconsideration of the findings and recommendations, the commander will return the case to the board for corrective action.

c. If the board committed an error that materially prejudiced a substantial right of the officer, the commander may close the case favorably to the respondent by directing retention, or convene a new board. The new board may not make less favorable recommendations than the initial board unless new allegations are considered. No more than 1 rehearing may be directed without HQDA approval.

3. When a board recommends separation, the commander shall forward the case to HQDA, who will:

a. Approve the recommendations and advise the commander to take action to separate the officer;

b. Disapprove the recommendations, close the case, notify the officer and, if appropriate, the headquarters that recommended separation.

F. Limitations on Officer Separations.

1. No officer will be considered for separation based on conduct that was subject to a judicial proceeding resulting in an acquittal on the merits.

2. No officer will be considered for separation if the conduct was subject to a prior administrative separation board resulting in a final determination that the member should be retained.

3. The limitations above do not apply when substantial evidence is discovered, subsequent conduct warrants separation proceedings, or HQDA grants an exemption.

4. Administrative separation of an officer who has been punished under the provisions of the UCMJ does not constitute double jeopardy.

G. Appeals. An officer can appeal an unfavorable action within 15 days of receipt of the action to the authority who issued the action for reconsideration. If the action authority does not grant the appeal, then it shall be forwarded as follows:

1. If the original action authority was an area commander, forward to HRC-St. Louis.

2. If the original action authority was HRC-St. Louis, forward to Chief, Army Reserve.

3. Appeals are not permitted if the officer had an opportunity to present his/her case before a board, or if the officer waived such a board, or if the officer was separated for: substandard performance, moral or professional dereliction, medical unfitness, or national security interests.

VI. DISCHARGE OF RESERVE OFFICERS.

A. When officers are discharged from the Reserve of the Army, it also terminates their membership in the USAR. When Federal recognition of ARNG officers is withdrawn, they are discharged from the USAR unless they are qualified and apply for transfer to the Retired Reserve.

1. USAR officers with at least 3 years of service may not be discharged without consent, unless otherwise approved by competent authority.

2. Area commanders and the Commander, HRC-St. Louis may approve discharges where it's not necessary to obtain consent and instances where the officer consents when a board proceeding would otherwise be required. When consent is required and not given, area commanders are authorized to take final action after board proceedings.

B. Members of the Army Reserve will be removed from active status regardless of consent and length of service, and transferred to the Retired Reserve, if eligible, or the Control Group (Inactive) under the following conditions:

1. Medical unfitness;

2. Maximum age;

3. Length of service;

4. Failure to qualify for promotion from W-1 to W-2;

5. Nonselection for promotion after second consideration;

6. General officers ceasing to occupy commensurate positions;

7. Selection for removal from active status (by a selection board);

8. Exemption from involuntary AD;

9. Lack of required qualifications for retention in the ARNG;

10. Withdrawal of Federal recognition for failure to retire technical waiver;

11. Nonavailability of Standby Reserve officer;

12. Failure to complete a basic branch course;

13. Nonacceptance of assignment by nonobligated officer;

14. Failure to apply for transfer to the Retired Reserve on removal from active status;

15. Failure or refusal to provide mailing address, or

16. Failure of Judge Advocate General's Corps officers to become educationally qualified within specified time limits.

C. Officers will be discharged without consent if they have less than 3 years of commissioned service, or with consent under the following conditions:

1. Loss of ecclesiastical endorsement;

2. Chaplain candidates, appointed and assigned to staff specialist branch;

3. Loss of license or disbarment from professional practice;

4. Employment with a foreign government;

5. Administrative separation;

6. Failure to complete eligibility requirements for appointment, or

7. Failure to receive a favorable background investigation and/or national agency check.

D. An officer who fails to qualify for promotion to first lieutenant and who has completed the required statutory military service obligation will be discharged on or before the officer completes 3 years of service.

E. Female officers who are pregnant or have given birth during their present appointment will not be involuntarily released unless another basis for separation exists. The officer may request discharge or transfer to the Retired Reserve, if eligible, unless she has an active duty obligation under a Federally subsidized program.

VII. DROPPED FROM THE ROLLS OF THE ARMY.

A. Area commanders or Commander, HRC-St. Louis may drop an officer from the rolls (DFR) when:

1. Absent without authority for at least 3 months (although officers who can be located will be processed for involuntary separation rather than DFR);

2. Sentenced to confinement in a Federal or State penitentiary, provided the sentence is final.

B. No board proceedings are required, and no discharge certificate will be issued.

C. If the officer has 20 years or more of service, HQDA is the DFR authority.

VIII. ACTIVE GUARD RESERVE SEPARATIONS.

A. Officers in the AGR should be processed for separation similar to AD members IAW AR 600-8-24. Commands may process separation actions through reserve command channels, e.g. RC GOSCA for officer misconduct.

B. Commanders may also consider referring an AGR officer through the GOSCA to the DAADB rather than elimination action. *See* AR 600-8-24, para. 2-27.

1. The Secretary of the Army is the approval authority for DAADB boards and the Secretary's decision is final. No AGR soldier will be processed before a DAADB board if they have more than 18 years of active Federal Service, without the approval of the Secretary.

2. The bases for DAADB referral are similar to those under AR 135-175. A case may be initiated by any commanding officer; Commander, HRC; Commander, HRC-St. Louis; Chief, Army Reserve; Director, Army National Guard; The Judge Advocate General, or Department of Army Chief of Chaplains.

3. The DAADB procedure has been successfully attacked in federal court as unfair to AGR officers, where the DAADB recommends a general or OTH discharge. *See Gonzalez v United States*, 44 Fed. Cl. 764 (1999).

IX. RECURRING PROBLEMS IN OFFICER SEPARATIONS.

A. Inadequate notice to the officer.

B. Failure to state the factual basis for the separation action in the notification.

C. Failure to state the type of discharge recommended in the notification.

D. Notification not signed by the "commander".

E. Inadequate evidence to support the separation action.

F. Recorder fails to rebut evidence presented by the respondent. Potential rebuttal includes *United States v. Timoney*, 34 M.J. 1108 (ACMR 1992). Held: Command urinalysis results may be admissible in a courts-martial despite the government's failure to fully comply with AR 600-85 command urinalysis SOP, as to observation of soldier urination, proper urine bottle labeling, key control, and illegible identification number on specimen bottle.

G. Failure to submit supporting evidence in the record and connecting the evidence to the respondent.

H. Failure to provide counsel or the respondent with all the documentation and evidence that will be presented to the board.

I. Inadequate record of the proceeding.

1. The DA Form 1574 is not in the record. AR 15-6 requires that the record reflect the admission of exhibits or documentary evidence.

2. Testimony of witnesses must be a part of the record, summarized as fairly and accurately as possible.

3. Failure to record action by the legal advisor or president on challenges to board members.

4. Failure to show disposition of motions or admissions of items of evidence. Any legal issue raised during the board must be reviewed by a JA.

J. Failure to make findings and recommendations in accordance with the regulation.

1. The board cannot make a finding that denies the board's jurisdiction to hear the case.

2. The recommendation of retention cannot be conditioned upon some future action, i.e., completion of a drug rehab program or passing an APFT. If a board wishes to ensure proper performance, they can recommend discharge but recommend suspension of the execution of the discharge for up to 12 months.

K. Improper Delegation of Separation Authority.

1. Separation authorities may not delegate their authority to direct separation, appoint boards, direct retention, or disapprove and return an action to subordinate command, and approve the findings and recommendations of a board, unless expressly authorized by Army regulation or HQDA. The separation authority must personally take these actions.

2. The "For the Commander" authority line will not be used except when the separation authority has personally approved the action but does not sign the document.

X. CONCLUSION.

CHAPTER K

MORALE, WELFARE, AND RECREATION & NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFIs)

TABLE OF CONTENTS

2. Navy Morale, Welfare, and Recreation (http://www.navymwr.org).

3. Air Force Services Agency (http://www.afsv.af.mil/).

4. Marine Corps Community Services (MCCS) (http://www.usmc-mccs.org/).

5. Coast Guard (http://www.uscg.mil/mwr).

B. Purpose of MWR Programs.

1. DoD components shall establish MWR programs to maintain individual. Family, and mission readiness during peacetime and in time of declared war and other contingencies. Military MWR programs are an integral part of the military and benefits package, which are designed to build healthy Families and communities and provide consistently high quality support services that are commonly furnished by other employers or State and local governments. MWR programs are also designed to encourage positive individual values, aid in recruitment and retention of personnel, promote esprit de corps and provide for the physical, cultural, and social needs; general well-being; quality of life (QOL); and hometown community support of Servicemembers. DoDI 1015.10, para. 4.

2. Supports combat readiness and effectiveness; recruitment and retention of quality personnel; provides leisure time activities, which support a quality of life commensurate with generally accepted American values; promotes and maintains the mental and physical well-being of authorized personnel; fosters community pride, Soldier morale, and family wellness and promotes unit esprit de corps; eases the impact of unique aspects of military life, such as frequent relocations and deployment. AR 215-1, paras. 1-10

III. BACKGROUND/HISTORY

A. Morale, welfare, and recreation programs did not exist from the founding of the Army in 1775 until the start of the 20th century. During that time span there were unofficial and informal forms of troop support such as the tradesmen who provided meals, clothing, laundering, and the trading posts which provided goods for purchasing. There was some limited Congressional oversight established in 1876 over "Post Traders." The establishment of the Army "PX" or Post Exchange, by Headquarters, Department of the Army (HQDA) followed in 1895, with oversight performed by the garrison commander's office and all profits were used to support recreational activities for the troops.

B. The 20th century saw many advances in the development of MWR programs. In 1903, Congress authorized the Army to build, operate, and maintain PXs, libraries, schools, recreation centers, and gyms for the troops. The Army Morale Division was established in 1918, the Army Motion Picture Service in 1920 and the Library Service in 1923. The establishment of these organizations led to the creation in 1941 of "Special Services." Special Services, with its own director, was the new name for the Army Morale Division. By 1943, Special Services encompassed all of Army Recreation Services, the Army Exchange (the precursor to the Army and Air Force Exchange [AAFES]), and the Army Soldier Show. By the end of World War II, Special Services had established the first Armed Forces Recreation Center (AFRC) in Bavaria (currently there are five AFRCs around the world) and, by 1950, an HQDA reorganization placed Special Services under the Army Adjutant General's Office.

C. While the Morale, Welfare, and Recreation services for the troops were constant and continually reviewed, services for their Families were much slower in development. Army Community Services was not created until 1965; in 1968 a Youth Activities Program was established and, in 1971, an Outdoor Recreation Program. Schools were generally available, as was garrison housing, but throughout this time the mentality of "if the Army had wanted you to have a Family, it would have issued you one" still held. This thinking began to change with the establishment in 1981 of the first Family Advocacy Program, which was followed by the first Army Family Symposium in 1981.

D. The publication in 1983 of Army Chief of Staff General John A. Wickham Jr's White Paper, *The Army Family*, began to change how the Army provided for Soldiers and their families. General Wickham's initiative marked the first systematic effort to design programs and policies comprehensive enough to address Army family concerns as a whole. With the creation of the U.S. Army Community and Family Support Center (CFSC) on 23 November 1984 the Army shifted the focus of its MWR programs from a primarily Soldier orientation to one which now included their families, shifting how MWR operates on the garrisons and what services it provides.

E. On 24 October 2006, Installation Management Command (IMCOM) was activated. With the activation of IMCOM, CFSC became the Family and Morale, Welfare and Recreation Command (FMWRC). However, on 3 June 2011, the Family and MWR Command was deactivated, and Army Family and Morale, Welfare and Recreation services became the G-9 within the Installation Management Command (IMCOM).

IV. NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFIs) -- OPERATIONS AND FUNDING

A. NAFIs are DoD organizations which perform an essential government function. A NAFI provides morale, welfare, and recreational programs for military personnel and civilians and, as a fiscal entity, it maintains custody and control over nonappropriated funds. It is not incorporated under the laws of any state and enjoys the legal status of an instrumentality of the United States.

B. Congressional Interest in NAFIs. Initially, Congressional reaction was to business and private concerns over PX, BX, and MWR activities. There are two congressional committees dealing with NAFI matters. The primary committee is the MWR Panel of the Readiness Subcommittee of the House Armed Services Committee. The Senate Armed Services Committee's Subcommittee on Personnel is also responsible for MWR oversight.

C. Command Responsibilities for NAFI Operations. AR 215-1, chapter 2.

1. Secretary of the Army has overall responsibility. AR 215-1, para. 2.

2. Assistant Chief of Staff for Installation Management (ACSIM) is proponent and focal point for all MWRs and NAFIs. AR 215-1, para 2-1c. The Chief, Naval Operations (CNO) and Commandant of the Marine Corps perform coordination and information functions for MWR activities in the Navy and Marine Corps, respectively.

3. Army Family and Morale Welfare and Recreation. AR 215-1, para. 2-5.

a. Develops program guidance, standards, and procedures to implement approved Army policies.

b. Establishes best business practices and develops strategies. Provides management and technical assistance to IMCOM.

c. Reviews and approves request for establishment of all Army NAFIs.

d. Develops financial management practices for the management of MWR and NAF resources.

e. Administers Armed Forces Recreation Centers (AFRCs) and the Army Recreation Machine Program (ARMP), NAF Major Construction program, and NAF employee benefit programs.

4. Installation Management Command. AR 215-1, para. 2-3.

a. Provide oversight and ensure APF and NAF funds are properly used.

b. Review and approve APF budgets and promote equitable distribution of resources.

c. Conducts formerly MACOM-level responsible MWR events.

5. Garrison Commanders. Operate MWR programs, the GMWROE, and local NAFIs. AR 215-1, para. 2-4.

D. Funding of NAFIs.

1. APF support for MWR personnel, operations, supplies, and other expenses. See DODI 1015.10, encl. 6; AR 215-1, ch. 5 & App. D.

2. Non-appropriated funds--those generated by NAFI activities.

a. Cash and other assets received from sources other than monies appropriated by Congress. They are U.S. Government funds. They are used for the collective benefit of the authorized patrons who generate them.

b. Sources include:

(1) AAFES Dividend. By far the largest source of NAFs for the Army and Air Force. AAFES also makes payments to Navy and MWR and MCCS for sales through on-line sources;

(2) NEXCOM and Marine Corps Exchange;

(3) Receipts generated by patrons of MWR activities; and

(4) Fundraising activities conducted by installation MWR Activities.

3. Construction funding. AR 215-1, ch. 15 (Sec. II) and App. E.

a. Army Morale, Welfare, and Recreation Fund (AMWRF) for NAF construction. AR 215-1, para. 15-5.

(1) Funded by AAFES revenues, monthly capital reinvestment assessment of all NAFI income, and interest. AR 215-1, para. 16-8.

(2) Pays most of major construction costs.

(3) AMWRF will pay total project costs (includes construction, design, furniture, fixtures, and equipment), Garrisons will pay opening costs (supplies, expendables, and related opening costs), and all environmental costs. AR 215-1, para. 15-8.

b. The Marine Corps' "Central Construction Fund" is funded by an assessment of revenue generating activities. The rate of assessment is determined by the MCCS BOD. MCO 1700.27B, paras 9203-04.

c. Public-Private Ventures. DODI 1015.13, Department of Defense Procedures for Implementing Public-Private Ventures (PPVs) for Morale, Welfare, and Recreation (MWR) Category C Revenue-Generating Activities (Mar 11, 2004); AR 215-1, para. 15-12; MCO 1700.27B, para 2005.

(1) In order to meet MWR requirements, installations may identify morale enhancing activities that are unavailable through normal funding sources and that may be met by the private sector. The Army leases the land for a facility, and the contractor builds the activity and operates it, with the Garrison Morale, Welfare, and Recreation Operating Entity receiving a percentage of profits.

(2) IMCOM is the sole Army agency authorized to negotiate PPV projects. Congressional notification required.

(3) Request requires approval/coordination with IMCOM and an extensive local survey prior to approval by OASA (M&RA).

4. Organization of MWR Activities. AR 215-1, Chapter 3, Section II.

a. Category A: Mission-Sustaining Activities. DODI 1015.10, Encl 6; AR 215-1, paras. 3-7, 16-4a.

(1) Programs considered most essential to sustaining readiness and have little or no capacity to generate non-appropriated funds (NAF) income.

(2) Supported with appropriated funds (APF)--up to 100%; DoD minimum is 85%.

(3) NAF funding only allowed for:

(a) Specific expenses for which APFs are not authorized, or

(b) When use is not otherwise prohibited and it is certified in writing that APFs are not available.

(4) Category A activities include:

- Armed Forces Professional Entertainment Program Overseas.
- Gymnasium/Physical Fitness/Aquatic Training.
- Libraries.
- Parks and Picnic Areas.
- Recreation Centers/Rooms.
- Shipboard/Isolated/Deployed/Free Admission Motion Pictures.
- Sports/Athletics (Self-Directed, Unit Level, Intramural).
- Unit Level Programs and Activities.

b. Category B: Community Support Activities.

(1) These programs are closely related to Category A activities, in terms of supporting the military mission. They satisfy the basic physiological and psychological needs of Service Members and their families. MWR programs make installations temporary home towns. Different than Category A because of their ability to generate some income. AR 215-1, para. 3-8.

(2) Requires substantial APF support. DoD standard is at least 65% APF. DODI 1015.10, Encl 6; AR 215-1, paras. 3-8, 16-4b. MCO 1700.27B, para. 1304.2.

(3) Category B activities include:

- Arts and Crafts Skill Development.
- Bowling Centers (less than 13 lanes).
- Automotive Crafts Skill Development.
- Child Care and Youth Programs.
- Entertainment (Music and Theater).
- Information, Ticketing, and Registration Services.
- Outdoor Recreation.
- Recreational Swimming Pools.
- Sports Programs (above the intramural level).
- Stars and Stripes.

c. Category C: Revenue-Generating Activities. DODI 1015.10, Encl. 6; AR 215-1, para. 3-9 and Appendix D.

(1) Activities in this group have the business capability of generating enough income to cover most of their operating expense, but they lack the ability to sustain themselves based purely on their business activity.

(2) Category C activities have less impact on readiness and provide recreational opportunities to authorized patrons.

(3) Category C have the ability to generate income to cover most operating expenses. Only indirect APF support.

(4) At remote sites (see AR 215-1, Appendix D, for listings), Category C programs may receive APF on the same basis as Category B.

(5) Examples include:

- Aero Clubs (note: While the services all have authority for Aero Clubs (e.g., see AR 215-1, App. J), the Air Force currently operates the only truly active program. See AFI 34-217, Air Force Aero Club Program (1 February 1997).
- Amusement Machine Locations and Centers.
- Armed Services Exchange and Related Activities.
- Armed Forces Recreation Centers.
- Audio/Photo and Retail Sales (Overseas).
- Bingo.
- Bowling Centers (over 12 lanes).
- Food, Beverage, and Entertainment Operations.
- Golf Courses.
- Military Clubs.
- Others.

(6) Army Theme Restaurants

d. Supplemental Missions. AR 215-1, para. 5-10. Not formally part of the Army MWR Program.

(1) Established to support a mission activity of the Army. These monies are NAFs, but are not MWR NAFs.

(2) Income and funding maintained at a level to "break even."

(3) Examples include:

- Army Community Services
- Veterinary Services.
- Supplemental Field Ration Dining Facility Funds.
- Army Lodging.
- Fisher House Funds.
- Military Historical Museums.
- Vehicle Registration Fund.
- Disciplinary Barracks Funds.

e. Supplemental mission NAFs provide quality of life services as adjunct to the mission activity which generated those monies. They may not be used for activities which are authorized APF support (AR 215-1, para. 5-10). For example, Army Community Services supplemental mission NAFs may be used to support volunteer recognition dinners (AR 608-1).

5. Garrison Morale, Welfare, and Recreation Operating Entity (GMWROE) (formerly "Installation Morale Welfare and Recreation Fund" (IMWRF)) AR 215-1, para. 5-9. Referred to in the Marine Corps as the "Single NAFI," the legal and NAF fiscal entity of MCCS activities. MCO 1700.27B, para. 1305.

a. Goals.

(1) Designed to make NAFIs operate in a more businesslike fashion.

(2) Designed to help NAFIs better meet the needs of the military community.

b. Uniform Funding and Management (UFM). This process is authorized under the provisions of the Section 323 of the Bob Stump National Defense Authorization Act for FY 2003 and is implemented by DoDI 1015.15. UFM is the merging of appropriated funds (APF) with nonappropriated funds (NAF) for the purpose of providing MWR services using NAF rules and procedures. The practice of UFM does not result in an increase or decrease to the MWR funding. UFM involves:

(1) Preparation of a MOA between the APF resource manager and MWR manager outlining APF authorized MWR services, the amount of APF funding, and the up-front payment schedule.

(2) The MOA serves as the basis for creating an APF obligation and forwarding funds to a NAFI. Applies only to MWR activities listed in AR 215-1, figure 3-1.

(3) MWR managers utilize NAF rules and procedures to execute MWR services authorized APF. APF utilized in this manner are considered NAF for all purposes and remain available until expended (no one year limit).

(4) MWR APF expenditures that are paid IAW UFM are recorded in a specially coded department on the NAF financial statements.

(5) With the exception of the United States Military Academy cadet activities, Army Supplemental mission NAFIs may not use UFM.

(6) Under UFM, all APF employment positions will be converted to NAF positions.

c. MWR Utilization, Support, and Accountability (MWR USA) (AR 215-1, para. 5-2). The MWR USA funding practice is applicable to MWR entities not participating in UFM.

(1) Designed to foster flexibility and efficiency in the use of appropriated and nonappropriated funds.

(2) MWR USA funding practice can be used to finance personnel services, supplies, furniture, fixtures and equipment, routine maintenance, and other operating expenses for those programs identified in AR 215-1, para. 5-2b. MWR USA may not be used for construction.

(3) Allows the use of NAF contracting and personnel procedures to meet an APF MWR need. APF must then reimburse the GMWROE for the expenses.

(4) Must have a Memorandum of Agreement in place.

d. Unit Funds. Each service has specific policies.

(1) Army. AR 215-1, chapter 6, clarifies proper expenditures of unit funds.

(2) Funds must be used for the collective benefit of all unit members for off-duty recreational purposes authorized by AR 215-1.

(a) All members must have the opportunity to participate.

(b) Activities must relate to the morale, welfare, and recreation needs of the unit members. Family members and guests may attend at the discretion of unit members.

6. Solicited and Unsolicited Commercial Sponsorship. DODI 1015.10, encl. 11; AR 215-1, chapter 11. Allowed for MWR activities, Army Family Team Building, and Army Family Action Plan only.

a. Advertising, publicity, or other promotional consideration must be commensurate with the level of sponsorship offered.

b. Solicitation must be competitive and sponsorship award must be based upon the best value received and the appropriateness of the sponsor. No favored treatment allowed for sponsors and no penalties for nonsponsors.

c. All agreements must receive legal review (personnel involved in APF contracting may not be directly or indirectly involved in the solicitation).

d. All public recognition of sponsors must have disclaimers, i.e., "sponsorship does not imply endorsement."

e. Contents of all proposed public recognition must be reviewed to ensure compliance with DoD Directives.

f. May not solicit alcohol or tobacco manufacturers, but may accept unsolicited offers.

g. Sponsorship agreement must be in writing and for one year or less (extensions OK, but period covered by original agreement and renewals may not exceed five years). Also must include certification that no sponsorship costs will be charged to the Federal Government.

h. Open house programs are public affairs office events (not MWR). PAO must approve MWR events during open houses.

i. Professional development training required for MWR employees authorized to work with the Commercial Sponsorship Program.

7. Gifts.

a. NAF employees are DoD employees . The limitations on gifts in the JER apply to all NAF employees. There are no special exceptions to the JER for NAF employees.

b. Gifts to MWR. NAFIs can accept conditional or unconditional gifts from individuals or private organizations. AR 215-1, para. 13-14. For gifts to the government see AR 1-100. For Marine Corps see MCO 1700.27B, Appendix G.

(1) Acceptance of the gift must be in the Army's best interest.

(2) Gifts may not be requested, and donors receive no preferential treatment.

(3) MWR director may accept gifts of up to $15,000 when delegated authority by garrison commander.

(4) Garrison commanders may accept gifts of up to $50,000.

(5) IMCOM Region Directors may accept gifts up to $100,000 in value.

(6) IMCOM may accept gifts valued up to $250,000.

(7) Secretary of the Army may accept gifts valued over $250,000.

G. Patronage. AR 215-1, chapter 7; AFI 43-262, Table A2.1; MCO 1700.27B, paras. 1200-01.

1. MWR programs are established primarily for active duty personnel. Uniformed members of the Coast Guard, Public Health Service, and National Oceanic and Atmospheric Administration on active duty have equal access. DoDI 1015.10, Table 1.

2. Equal access for reservists for Category C activities. AR 215-1, para. 7-1 (implementing 10 U.S.C. § 1063).

a. Gives Ready and Selected Reserve members same priority as active duty members for Category C activities.

b. Gives Gray area retirees (retired reservists under 60) same priority as regular Army retirees for Category C activities.

c. Changes not applicable to Category A and B activities.

d. Family members have same priority as their sponsor.

3. State and local government use. AR 215-1, ch. 7.

a. May use Category A or B activities when the facilities have excess capacity; use is mutually beneficial to the installation and local activity; and when the use is at no additional cost to the Army unless the local/state agency subsidizes additional costs.

b. Must establish a Memorandum of Understanding.

4. Allows Secretary of the Army a delegate to approve a waiver to allow the general public to patronize Category C activities when the facility is under-utilized and the local community agrees (except bingo)(AR 215-1, Table 7-1).

5. DoDI 1015.10 provides DoD and Coast Guard civilian employees access to military MWR facilities and programs when stationed outside the United States.

6. If MWR facilities cannot accommodate all authorized patrons, the garrison commander will determine specific use priorities, based on priorities establish in table 7–1 of AR 215-1.

H. Prohibited Uses of NAFIs. AR 215-1, para. 5-14; AFI 34-262, para. 2.4.2.

1. Use must withstand public scrutiny test.

2. Financial support to private organizations.

3. Charitable contributions or assistance in collection of charitable donations.

4. Non-MWR events, such as change of command, retirement ceremonies, funerals, or other personal-type events for selected individuals.

5. Items authorized to be funded with APFs.

a. Under some circumstances, NAFs may be used for MWR activities if APFs are not available.

b. Requires written authorization that authorized APFs cannot satisfy the requirements.

c. Consider fiscal limitations set out in Congressional appropriations and authorizations.

6. Food and beverages, except as specifically authorized in regulation.

7. Spending must be connected to command morale and welfare.

8. Routine use of MWR activities by members of on-post private organizations is prohibited unless the member otherwise qualifies. AR 215-1, para. 5-14.

I. APF Contracting with NAF Activities. 10 U.S.C. § 2492 authorizes a NAFI to enter into an agreement with a Federal agency or instrumentality to provide or obtain goods and services beneficial to the efficient management and operation of the MWR system. AR 215-1, para. 13-12.

1. Authorizes APF activities to contract with a NAFI, noncompetitively, for purchases up to $2,500 using micropurchase procedures (rotating sources) with the GSA Smart Pay Purchase Card.

2. Authorizes APF activities to contract with a NAFI for purchases exceeding $2,500 when justified as a sole-source contract using APF procedures.

3. Must be for goods or services “integral to the ongoing functions performed by the NAFI in support of the NAFI mission.”

4. Overseas, APF activities may contract with the PX for purchases up to $100,000 (implements 10 U.S.C. § 2424).

V. LIABILITY OF NAFIs

A. NAFIs as Federal Instrumentalities (Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942)); AR 215-1, para. 4-1.

B. Tax Liability. AR 215-1, Chapter 4, Section III.

1. Federal. Alcohol wholesale & retail dealer taxes are paid annually (overseas operations are exempt).

2. State and local. Congress has waiver its immunity from state and local taxes regarding the sale of motor fuel. 4 U.S.C. § 104.

C. Tort Liability. AR 215-1, para. 19-13.

1. Suits by NAFI employees. Exclusive remedy is under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901.

2. Suits by third parties. Federal Torts Claims Act. AR 215-1, Chapter 19; see also AR 27-20, Chapter 12.

D. Contract Liability. AR 215-4.

1. NAFIs have sovereign immunity from suit, but administrative remedies exist. Borden v. United States, 116 F. Supp. 873 (Ct. Cl. 1953).

2. Waiver of sovereign immunity for suit against the Exchange Service. Tucker Act, 28 U.S.C. § 1346.

E. Concessionaire status. They are private businesses and not instrumentalities of the United States. They are not entitled to any of the privileges and immunities of the Federal Government. AR 215-1, para. 4-18

VI. NAFI EMPLOYEES.

A. References.

1. DoD 1401.1-M, Personnel Policy Manual for Nonappropriated Fund Instrumentalities (Dec. 1988)(incorporating through change 13, 29 January 2010); DoD 1401.1-M-1, Job Grading System Manual for Nonappropriated Fund Instrumentalities (Oct. 1981).

2. AR 215-3, (29 August 2003).

3. AFI 34-262, para 2.3.4. and AFI 65-106, Chapter 4.

B. Military employees.

1. Commander approval required.

2. Enlisted Soldiers may be employed if off duty and if no interference with duty. AR 215-3, para. 2-20a.

3. Officers may provide off-duty service pursuant to a personal services contract. AR 215-3, para. 2-20b.

C. NAFI employment must comply with the applicable federal labor laws, but NAFI employees do not fall under OPM or the Federal Employment Compensation Act. 5 USC § 2105.

VII. MILITARY CLUBS. AR 215-1, Ch. 8.

A. Membership.

1. Voluntary membership. AR 215-1, para. 8-24b; AR 600-20, para. 4-11.

a. Cannot require reasons for ending or declining club membership.

b. Cannot engage in any practice that involves or implies coercion, influence, or reprisal in the conduct of membership campaigns.

(1) No repeated orientations, meetings, or similar counseling of persons who have chosen not to join.

(2) No use of membership statistics in support of supervisory influence.

c. Encouraging membership.

(1) Sponsoring membership drives.

(2) Giving information to potential members, i.e., when they in-process.

(3) Structuring and running club activities based on the desires and support of patrons.

(4) Letter from commander encouraging club membership—must not use improper pressure.

2. Nonmember use of the club. AR 215-1, para. 8-24b(7).

a. Personnel in a transient or TDY status for less than 30 days.

b. To attend special functions.

c. Bona fide guest of a member.

d. Others.

e. Nonmembers may be charged a different price than members.

VIII. UNAUTHORIZED/RESTRICTED ACTIVITIES. DODI 1015.10, Encl. 3, para. 13; AR 215-1, para. 8-31; AFI 34-262, para 1.8; MCO 1700.27A, paras. 1402, 1405.

A. Lotteries or sale of lottery tickets.

B. Pull-tab bingo.

C. Sale of chit books related to the sale of alcohol.

D. Topless or nude dancing.

E. Awarding alcohol as a prize.

F. Pornography Sales.

1. 10 U.S.C. § 2495b, implemented by DoDI 4105.70, Sale or Rental of Sexually Explicit Material on DoD Property (June 29, 1998) (incorporating change 1, 17 September 2008). Prohibits sale or rental of sexually explicit material on "property under the jurisdiction of DoD" (DoD resale activities).

a. Includes Commissaries, facilities operated by the Army and Air Force Exchange Service, the Navy Exchange Service Command, the Navy Resale and Services Support Office, Marine Corps Exchanges, and ship stores.

b. Does not include entities that are not instrumentalities of the U.S.

c. Other MWR activities covered? Not by the letter of the law.

d. Covers audio and video recordings and periodicals with visual depictions produced in any medium.

e. Multiple lawsuits were brought challenging the constitutionality of the Act. The Act, and DoD's application, were found constitutional (See e.g., General Media Communications, Inc. v. Cohen, 131 F.3d 273 (2d Cir. 1997). Court held that the Act was constitutional and within Congress' authority. The U.S. Supreme Court denied certiorari (See GMC v. Cohen, 524 U.S. 951 (1998)).

G. Gambling is generally prohibited. See DoD Directive 5500.7-R, Joint Ethics Regulation § 2-302.

1. Monte Carlo or Las Vegas Events. DODI 1015.10, Encl. 3, para. 14.4; AR 215-1, para. 8-14.

a. Must comply with state and local law unless on an exclusive Federal jurisdiction installation. Overseas, international agreements apply.

b. Must use chits or play money. Can use winnings to buy resale items, food, beverages. Cannot pay club dues, nor exchange for cash.

c. MWR--four per year (overseas may be more); PO--one per year.

d. CONUS use of slot machines or roulette wheels is prohibited.

e. Cannot advertise via U.S. Postal Service.

2. "Gray Area Gambling Devices." Defined at AR 215-1, para 8-31. Implements 15 U.S.C. § 1171. If skill alone determines whether the player wins, the game is most likely legal. If skill plays no part in whether the player wins, it is most likely illegal.

3. Bingo. DODI 1015.10, Encl. 3, para. 14.4; AR 215-1, para. 8-26.

a. Must comply with state and local law unless on an exclusive Federal jurisdiction installation. Overseas, international agreements apply.

b. On exclusive jurisdiction areas, the NAFI need not pay state or local fees or taxes, or obtain a bingo permit. Concurrent jurisdiction: state may regulate and charge for permits.

c. Cannot advertise via U.S. Postal Service.

d. Participation limited to authorized patrons and bona fide guests. Bingo may not be open to the general public, even if otherwise authorized for other MWR events.

e. Bingo activities must receive a legal review in advance.

3. Raffles. DODI 1015.10, Encl. 3, para. 14.4; AR 215-1, para. 8-12.

a. Lotteries are prohibited.

b. Raffles may be conducted to raise funds for MWR activities.

(1) Raffle proposal must receive a legal review in advance;

(2) The Installation Commander must give his written approval of the raffle in advance;

(3) The raffle tickets must specify the maximum number of tickets that may be sold; and

(4) The GMWROE's total annual prizes may not exceed a retail value of $20,000. $15,000 is maximum retail value for any one prize. (IMCOM region may grant exception.)

(5) Raffles must comply with state and local law unless on an exclusive Federal jurisdiction installation. Overseas, international agreements apply.

(6) Cannot advertise raffles via U.S. Postal Service.

IX. MWR ACTIVITIES AND ALCOHOL. DODI 1015.10, Encl. 9; AR 215-1, Ch. 10.

A. Age Restrictions on Sale of Alcohol.

1. At locations outside U.S., 18 years is minimum age for the purchase of alcohol products in the overseas Military Retail System. Look at treaties and local situation as determined by the garrison commander for higher minimum age.

2. In U.S., no one under 21 will be employed to dispense, sell, or handle alcohol unless permitted by the state.

B. In U.S., drinking age will be the same as the state where the installation is located. The garrison/mission commander may request an exception to State minimum drinking age, if such commander determines that the exception is justified by special circumstances. Approval of exceptions must be requested through command channels to the ACSIM who will coordinate exceptions with the Deputy Chief of Staff, G-1 (DAPE-HR-PR). Special circumstances may include the following:

1. At remote installations where POVs are not available, all alcoholic beverages may be sold.

2. If installation is located within 50 miles or 1-hour driving time from a state or international border with a lower drinking age. Sole consideration is the motor vehicle safety of the community.

3. Special occasions under controlled conditions in order to foster camaraderie and friendship in a military environment such as those infrequent, non-routine military occasions such as the conclusion of arduous duty or anniversary of the establishment of a military service or organization. This exception may be approved by the garrison/mission commander for a one-time special event to be held on the installation with appropriate controls put in place for the safety of the Soldiers and surrounding community.

4. Exceptions only apply to Soldiers.

5. State law does not affect “nonalcoholic” drinks (containing less than one-half of one percent alcohol), even if the state classifies them as alcoholic.

C. Off -Post. MWR programs may not provide alcohol for off-post catered functions. Outside U.S., IMCOM regions will determine.

D. Purchase of Alcohol by MWR Programs.

1. In U.S., distilled spirits may be purchased from any source. Malt beverage and wine must be purchased in state. Exception: In Alaska and Hawaii, all alcohol purchases must be made within the state.

2. Outside U.S., IMCOM regions decide policy consistent with treaties and agreements.

3. As instrumentalities of the United States, NAFs are exempt from state and local taxes. But they must pay federal wholesaler or retailer taxes.