

# Commander's Legal Handbook

Misc Pub 27-8

2019

The Judge Advocate General's Legal Center & School

**This Handbook is designed to assist Commanders with legal situations by helping them to recognize and avoid issues, or take immediate actions necessary to preserve the situation when legal issues arise. Commanders should always consult their servicing Judge Advocate to discuss specific cases.**

## **Summary of changes in this edition:**

- All chapters updated for current law.
- Military Justice Act of 2016 fully integrated into all relevant chapters (primarily Chapters 1-13.)
- In addition to the Military Justice chapters, the following chapters were added or had important rewrites because of law or policy changes:
  - Chapter 17: Line of Duty Investigations
  - Chapter 25: Soldier and Family Readiness Groups
  - Chapter 27: Administrative Reprimands
  - Chapter 40: Law of Federal Employment
  - Chapter 41: Labor-Management Relations

**This publication is not meant to replace or supersede the independent legal advice of your servicing Judge Advocate.**

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**June 2019**  
**The Judge Advocate General's  
Legal Center and School**

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# Preface I

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## The Commander's Responsibility to Practice Preventive Law

*"An ounce of prevention is worth a pound of cure."*

-- Benjamin Franklin

### **A. BE PROACTIVE, NOT JUST REACTIVE**

This Handbook is designed to assist you in taking proper immediate action when faced with a variety of legal issues that might arise during your command. The purpose of your actions should be to preserve the legal situation until you can consult with your servicing Judge Advocate. However, like most aspects of your command responsibilities, you can fail if you just wait for things to come to you. You need to be proactive in preventing problems before they occur.

In the legal arena, this means establishing and enforcing high standards, ensuring your Soldiers are fully aware of those standards and properly trained to comply with them. You must also properly train your Soldiers on all Army policies and higher level command standards so that they also understand and comply with them. Soldiers must also be well-versed in the Army Values and be able to apply those values to real-world situations, which will usually keep them well within legal bounds.

All Soldiers have seen issues in the news that can occur when we are not proactive about discipline and standards: Abuse of prisoners, desecration of corpses, hazing, and sexual assault to name recent examples. All of these circumstances present serious legal issues. But, fundamentally, they also represent a breakdown in unit standards, training, and discipline. Your objective as a Commander should be to develop solid systems and a command climate that prevents legal issues, rather than just reacting to them. In sum, it is every bit as important to train your Soldiers to maintain a high level of discipline and compliance with law, policy, and military standards, as it is to train them to perform your Mission Essential Task List (METL). In legal circles, we call this effort to prevent legal problems before they arise by properly training Soldiers, "preventive law." The responsibility to practice preventive law belongs to the Commander.

### **B. PREVENTIVE LAW**

While responsibility for practicing preventive law remains with the Commander, your servicing Judge Advocate stands ready to assist you in meeting this responsibility. One of the most valuable services a Judge Advocate can provide to a Commander is eliminating problems before they ever occur through a robust preventive law program.

While preventive law is often contemplated in the context of the legal assistance program, e.g. a class on avoiding unscrupulous payday lenders or auto dealers using bait and switch

schemes, the concept of preventive law is central to good order and discipline as well. For example, proper training and emphasis on the standards contained in a General Order #1 prior to entering a Theater of Operations can go a long way toward avoiding the types of problems mentioned above. Your Judge Advocate can help you to properly emphasize these standards in a number of ways. For example, they can help you to cover how previous Soldiers have violated this directive and the administrative and punitive actions that followed the offenses without violating due process, privacy, or practicing unlawful command influence. They can also help you to analyze systems and look at weak points and behaviors in your organization that, while not violating the law now, might lead to legal issues. For example, they can help you to craft policies for barracks living arrangements, curbing abuse of alcohol, and providing security while respecting privacy -- all of which can help to prevent sexual assaults.

So, as you read and use this guide, please do not use it as an excuse to avoid your servicing Judge Advocate. We hope that you will reach out to your lawyer, and that they will reach out to you, so that through your relationship with this important member of your personal staff, you can receive the advice and assistance you need to have an exceptional and rewarding command experience.

# Preface II

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## Situations Where You Should *Immediately* Consult Your Servicing Judge Advocate

### **A. AFTER RECEIVING A REPORT OF ANY CRIMINAL OFFENSE**

Many offenses have reporting or other policy requirements, such as sexual assault, sexual harassment, hazing, etc. Your servicing JA will ensure that all of these requirements are met and then can advise you on your options to handle the report and/or the offense.

### **B. BEFORE APPOINTING AN INVESTIGATING OFFICER**

If you need to initiate a preliminary inquiry, an informal investigation or a board of officer under AR 15-6 (including EO investigations), or a line of duty or financial liability investigation of property loss, ask your servicing JA for assistance. Your servicing JA can offer advice on the appropriate type of investigation as well as assist in drafting the appointment memorandum that governs the scope of the investigation.

### **C. BEFORE CONDUCTING ANY SEARCH (FOR EXAMPLE: DRUG TEST, BREATH TEST, BARRACKS ROOM)**

Your servicing JA will be able to confirm whether you have sufficient information (or probable cause) to conduct the search, thus enabling you to use the search results in follow-up administrative, non-judicial or courts-martial proceedings.

### **D. WHENEVER YOU ARE CONSIDERING ANY ADVERSE PERSONNEL ACTION AGAINST A SOLDIER**

Your servicing JA will help you to ensure that your action complies with all law and regulation and is feasible before you announce your intention to pursue the action. Adverse actions include, but are not limited to, flagging a soldier, administrative separation, removing the Soldier from certain status positions (such as drill sergeant), relief for cause, and issuing a memorandum of reprimand.

### **E. BEFORE ADMINISTERING NONJUDICIAL PUNISHMENT UNDER UCMJ ARTICLE 15**

Your Servicing JA will help you to ensure that your action complies with the UCMJ and can be supported at Court-martial if the Article 15 is declined.

## **F. AFTER RECEIVING A FAMILY SUPPORT COMPLAINT**

Your servicing JA can identify what type of support is required, identify if an exception exists, identify if “payment in kind” is appropriate, and assist in doing “the math” when formulas must be used in the event of multiple dependent children located in various households. Additionally, they can confirm that the letter you must draft within fourteen days meets the requirements of AR 608-99.

## **G. BEFORE APPROVING ANY FUNDRAISING ACTIVITY**

Fundraising approval authority is subject to state law and current installation policy. Regardless of whether it is for your SFRG or some other entity, you need to discuss this fully with your JA before taking any action.

## **H. BEFORE PROVIDING (OR AGREEING TO PROVIDE) SUPPORT TO ANY PRIVATE ORGANIZATION (PO)**

Support to POs is limited by the Joint Ethics Regulation (JER) and subject to the proper approving authority. All POs must be supported equally with no preferential treatment (that is, if you provide support to one PO, you must be prepared to provide similar support to all similarly situated POs).

## **I. BEFORE COLLECTING MONIES FOR DEPARTURE GIFTS**

Your servicing JA can define a “donating group” and inform you of the limitations for soliciting in the government workplace. Furthermore, he can make suggestions to ensure there is no improper pressure on subordinates or an appearance of impropriety.

## **J. BEFORE PURCHASING CERTAIN ITEMS WITH OFFICIAL FUNDS.**

Certain items that have become traditional in military culture are not allowed to be purchased with official funds, or have very specific rules governing their purchase. These types of items include, but are not limited to, commander’s coins, T-shirts, food items, and bottled water. Your servicing JA can help you to ensure your purchase is proper.



**Military**



**Justice**



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# Introduction to Military Justice

## A. SOURCES OF AUTHORITY

The military justice system derives its authority from three major sources:

### 1. The Uniform Code of Military Justice (UCMJ)

The UCMJ is a federal law and the basis of our military justice system. It determines what conduct is criminal, establishes the various types of courts, and sets forth the procedures to be followed in the administration of military justice. You can find the UCMJ in Appendix 2 of the MCM, United States, 2019 or in 10 United States Code (USC) §§801-940.

### 2. The Manual for Courts- Martial (MCM)

The MCM is an executive order that details the rules for administering military justice. For example, it sets forth the rules of evidence for courts-martial and contains a list of maximum punishments for each offense.

### 3. Army Regulation 27-10

AR 27-10 supplements the MCM and is the basic Army regulation for administering military justice.

## B. ROLE OF COMMANDERS

Commanders are responsible for both enforcing the law, protecting Soldiers' rights, and protecting and caring for victims of crime. Unit discipline and morale may depend on how wisely its commander exercises his or her authority. Commanders are also responsible for providing administrative support to judicial proceedings. In addition to ensuring that accused Soldiers appear at all proceedings, in uniform, commanders may also be required to provide witnesses, vehicles, drivers, escorts, and bailiffs for those proceedings. Commanders should also support the service of their officers on court-martial panels.

## C. RIGHTS OF SOLDIERS

The military justice system provides for certain fundamental rights and safeguards that must be considered in any case involving criminal conduct.

### 1. Presumption of Innocence

Under our legal system, everyone is presumed innocent until a court or commander finds them guilty beyond a reasonable doubt. A court or commander may make a fair and just decision only after hearing all the evidence relating to the guilt or innocence of an accused.

## **2. Legal Counsel and Right to Remain Silent**

Laws prohibit compulsory self-incrimination and provide that anyone suspected of committing a crime has the right to consult with a lawyer. Congress realized that Soldiers may not understand their rights and may be intimidated by the mere presence of a superior. Therefore, under military law no one may question a suspect without first determining that the suspect understands the nature of the offense, the right to remain silent, and the right to counsel. If interrogators violate these rights, the evidence obtained may not be used against the accused. You must protect your unit members' rights and preserve the government's case by ensuring that your subordinate commanders understand and comply with UCMJ, Article 31, and right-to-counsel requirements.

## **3. Search and Seizure**

The United States Constitution protects every citizen from unreasonable searches and seizures; however, the right to privacy is not absolute. Courts have balanced individuals' rights against society's needs and have established rules for determining when a search is reasonable. The evidence obtained from unreasonable searches may not be used in a trial. This discourages indiscriminate invasion of privacy by government officials. Under military law, you may authorize searches if you determine such searches will not violate Soldiers' rights. However, a court-martial may well review your decisions. You should consult your judge advocate before ordering a search or a seizure.

## **4. Prompt Action**

The Sixth Amendment to the Constitution and UCMJ, Article 10, guarantee the right to a speedy trial. The accused Soldier has the right to be advised of the charges against him as early as possible. Normally, the accused must come to trial within 120 days of either arrest or preferal of charges, whichever is earlier. Actions that you take may trigger the speedy trial clock without you knowing it. If you believe you must place restrictions or restraint on a Soldier it is best to talk with your judge advocate before doing so. If you place any restrictions on an accused without first seeking legal counsel, talk to your judge advocate immediately. A speedy trial assists both the government and the accused, decreasing the possibility that fading memories or the availability of evidence will impact ascertaining all the facts.

# **D. THE COURT-MARTIAL SYSTEM**

## **1. Justice Is The Goal Of The Court-Martial System**

Courts-martial are adversarial proceedings. That is, lawyers representing the government and the accused present facts and arguments most favorable to each side. In doing so, they follow the rules of procedure and evidence. The judge decides questions of law. The court-martial members apply the law and decide questions of fact.

## **2. Duties of Counsel**

At a court-martial, a trial counsel represents the government, and a defense counsel represents the accused. Each counsel is duty-bound to do everything possible within the law to represent the interests of his or her client.

## **3. Determination of Criminal Conduct**

A crime is an act for which the law provides a penalty. Violations of Army regulations, state and federal laws, and the orders of superiors may constitute criminal conduct punishable under the UCMJ. You can resolve any question of what constitutes criminal conduct under the UCMJ by calling your staff judge advocate or trial counsel. A Soldier's conduct may be sub-standard or personally offensive without being criminal.

## **4. Types of Courts-Martial**

The court-martial system consists of three types of courts-martial: a summary court-martial, a special court-martial, and a general court-martial.

### ***a. Summary Court-Martial***

A summary court-martial (SCM) is a court composed of one officer who may or may not be a lawyer. The SCM handles minor crimes of enlisted Soldiers only, and has simple procedures. The maximum punishment, which depends upon the rank of the accused, is limited to confinement for one month (for E4s and below), forfeiture of two-thirds pay for one month, and reduction in grade. An SCM may not try an accused against his will. If he objects, you may consider trial by a higher court-martial. The accused does not have the right to military counsel at an SCM, although he or she will see a trial defense attorney before the court-martial.

### ***b. Special Court-Martial***

A special court-martial (SPCM) can try all Soldiers and consists of a military judge, and four members (unless the accused chooses to be tried by a military judge alone), a trial counsel, and a defense counsel. The maximum sentence is a bad conduct discharge (BCD), confinement for twelve months, forfeiture of two-thirds pay per month for twelve months, and reduction to the lowest enlisted grade. (See MCM, R.C.M. 201(f)(2)(B).) If a BCD is adjudged, the accused has a right to an automatic appeal to the Army Court of Criminal Appeals. Under the Military Justice Act (MJA) of 2016 which took effect on 1 January 2019, a Convening Authority may send a Soldier to a new SPCM. This SPCM under Art 16(c)(2)(A) has certain limitations. No punitive discharge is authorized, confinement cannot exceed six months, and there cannot be a forfeiture of pay to exceed six months.

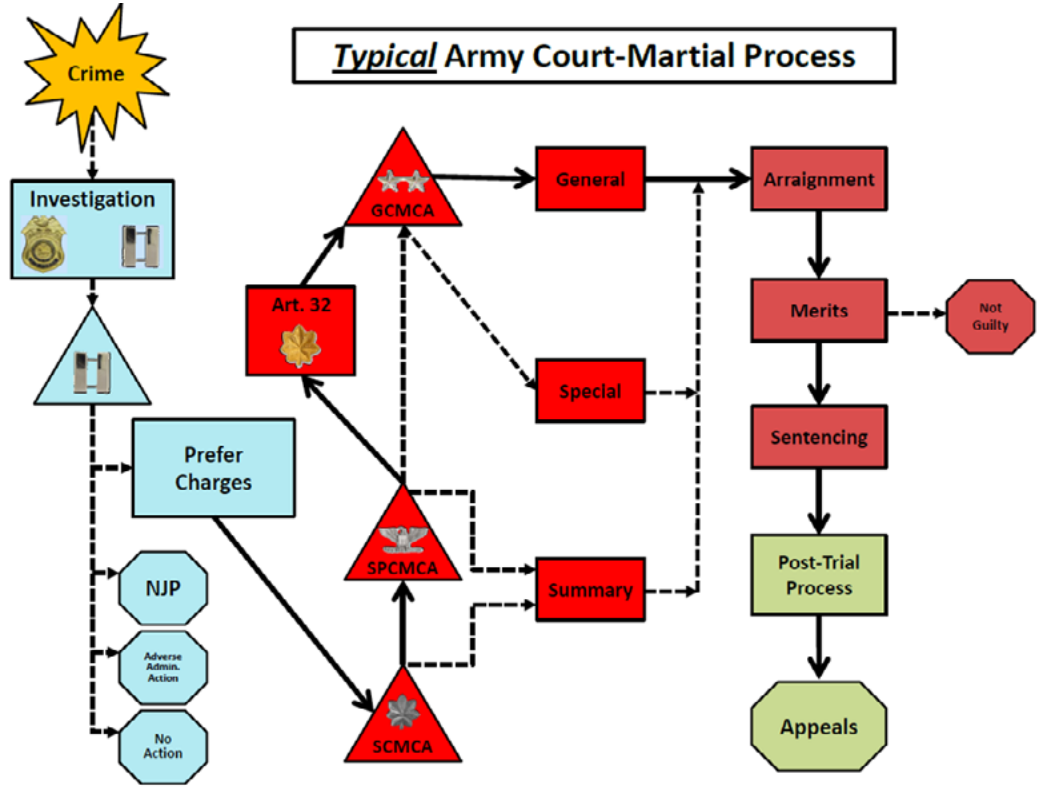
### ***c. General Court-Martial***

A general court-martial (GCM) tries cases over all Soldiers for the most serious offenses. It consists of a military judge, eight members (unless the accused elects to be tried by a military judge alone), a trial counsel, and a defense counsel. Unless waived by the accused, a formal preliminary hearing (an "Article 32" hearing) must occur before a general court-martial may

try the case. The GCM may adjudge the most severe sentences authorized by law, including the death penalty.

*d. Typical Army Court-Martial Process*

The following is a diagram of a typical court-martial process. The process for some courts-martial may differ in some respects from the diagram, but ordinarily a court-martial follows the process below. Note that while all three types of courts-martial are depicted on the diagram, an accused Soldier will only be tried by the one type of court convened in his case.



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# Misconduct: Options and Duties of the Commander

This chapter provides an OVERVIEW of the considerations and decisions that need to be made by the Commander from the time he/she learns of misconduct through a decision on how the situation will be resolved. Many of the areas are discussed in more detail in later chapters of the Guide. Cross-references are provided in that instance. Your servicing Judge Advocate is always available to talk through these options with you. You should consult with them early and often as you think through these options.

## A. OVERALL RESPONSIBILITIES

### 1. A Commander's System

The disciplinary system in the military is a commander owned and operated system. Commanders must act responsibly and in support of the goals of the system in order to protect their prerogatives.

### 2. Goals of the System

There are dual goals in our system that often must be balanced in the commander's judgment. First is the discipline of the unit, that is, maintaining good order and discipline. The second goal is justice which requires a disciplinary system that is fair and which appears to be fair by the Soldiers in your unit. Both goals are equally important and intertwined with each other.

### 3. The Commander's Role

The commander plays a quasi-judicial role in the system, making decisions that in the civilian sector would be made by professional prosecutors or judges. Commanders must remain neutral and detached from the circumstances and make the best decision for the unit, the Soldier, and the interest of justice. Each case must be individually considered in the context of a consistent disciplinary philosophy.

## B. INVESTIGATE

The Commander's primary obligation at this stage is to expeditiously, fairly, and impartially gather all of the facts surrounding the situation. There are several options for investigating depending on the circumstances. *See* Army Regulation 195-2, Appendix B. Your servicing Judge Advocate can discuss these options with you and help you to determine the best course of action. For serious crimes, like drug offenses, sexual offenses, etc., you need to report the offense to CID immediately. For less serious crimes that involve property or people, you need to report the offense to the military police. Contact your Judge Advocate to ensure you are complying with your reporting requirements. These law enforcement organizations generally

will conduct the investigation. For crimes that affect discipline without also affecting property or people, you may be the owner of the investigation; talk to your legal advisor.

### **1. Preliminary (informal) investigation (aka “Commander’s Inquiry”)**

“Upon receipt of information that a member of the command is accused or suspected of committing an offense . . . triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.” Rule for Courts-Martial (R.C.M.) 303. This can be a very informal investigation. No appointment letter is required.

### **2. AR 15-6 Investigation (See Chapters 14 & 15)**

You may conduct (or direct) an AR 15-6 investigation, especially if you are not sure whether a criminal offense has been committed. Often, these investigations involve formal appointments. If you want to conduct an AR 15-6 investigation, contact your trial counsel or administrative law attorney.

### **3. Article 32, UCMJ Preliminary Hearing**

“[A] preliminary hearing shall be held before referral of charges and specifications for trial by general court-martial.” Article 32(a). For cases that are being considered for a general court-martial, your battalion commander (the summary court-martial convening authority) or brigade commander (the special court-martial convening authority) may appoint an Article 32 preliminary hearing. The Article 32 preliminary hearing will generally require the appointment of a judge advocate officer to conduct the preliminary hearing and will take a week or two to complete. The preliminary hearing must take priority over all other duties for the hearing officer, who will be provided an independent legal advisor to assist them. No case can go to a general court-martial without having first been heard at an Article 32. At the Article 32, the accused and his or her counsel will be present.

## **C. CONSIDER ALTERNATIVES TO DISPOSE OF THE MATTER**

### **1. No action/dismissal. Sometimes the appropriate action is no action or dismissal.**

### **2. Nonpunitive/Adverse Administrative Action**

- Flag (See Chapter 27).
- Letter of reprimand (Local or AMHRR Filing).
- Bar to Continued Service (Impose/appeal/lift) (See Chapter 30).
- Relief for cause.
- Administrative separation (which chapter, type of discharge, notification or board) (See Chapters 28 & 29).



### **3. Nonjudicial punishment (Article 15) (See Chapters 5 & 6)**

- Summarized
- Company-grade
- Field-grade
- Other Decisions: Suspend punishment, Filing determination, Appellate action.

### **4. Judicial action (See Chapter 1)**

Consult with your Servicing Judge Advocate immediately if you believe the situation will warrant judicial action. Chapter 1 contains a description of the types of courts available, which are: Summary, Special, and General Court-Martial.

### **5. RCM 306(b) Factors and Non-Binding Disposition Guidance**

When determining the disposition of a matter, the Commander should review and consider the non-binding disposition guidance issued by the Secretary of Defense which is contained at Appendix 2.1 of the 2019 Manual for Courts-Martial. Your servicing Judge Advocate can assist you in discussing and considering this guidance as it relates to a particular set of facts.

## **D. PRETRIAL RESTRAINT (R.C.M. 304)**

Absent emergency or exigent circumstances, you should ALWAYS discuss the case with your servicing Judge Advocate before imposing pretrial restraint of any type. By implementing any type of restraint higher than conditions on liberty, you may have triggered the “speedy trial clock”—that is you will have started to use the limited number of days the government has to prepare and bring the accused to trial.

### **1. Types of pretrial restraint (R.C.M. 304(a))**

#### ***a. Conditions on liberty***

Conditions on liberty include actions like pulling pass privileges and ordering an accused not to contact someone else. These types of conditions do not trigger the speedy trial clock.

#### ***b. Restriction in lieu of arrest***

Restriction in lieu of arrest includes restricting an accused to a specified area. These types of restrictions trigger the speedy trial clock. If you do something more severe than pulling pass privileges or issuing a no-contact order, you have probably issued restrictions in lieu of arrest.

#### ***c. Arrest***

The line between restriction in lieu of arrest and arrest is not clear. Generally, if the accused is still going to work and performing all duties, then he or she is not in arrest. However, if the restrictions you put on the accused are too strict, a court might conclude that the accused was under arrest. Arrest triggers both the speedy trial clock and another speedy trial protection that is found in Article 10 of the UCMJ. Under Article 10, someone that is being held in arrest or

pretrial confinement gets the highest priority for having his or her case processed. If the government is not moving the case at a reasonable pace, the case can be dismissed with prejudice. In addition, if the conditions are so strict that the accused is essentially in jail, then the accused may be entitled to other relief. The best thing to do is to consult your Judge Advocate about any conditions you put on an accused.

#### *d. Pretrial confinement.*

There is no bail system in the military. If you order an accused into confinement, he will stay there unless your decision is overruled. Therefore, you must consult with your servicing Judge Advocate and carefully follow the procedures outlined below. The presumption is that Soldiers will not go into pretrial confinement, and pretrial confinement is generally not appropriate for cases referred to summary courts-martial.

### **2. Procedures for pretrial confinement. (R.C.M. 305)**

To order someone into pretrial confinement, you must have reasonable grounds that the person committed an offense that is triable by court-martial; AND confinement is necessary because the accused is a flight risk OR will commit serious future misconduct; AND lesser forms of restraint are inadequate. It is not enough that the accused is a pain in the neck or a hassle. He must either be a flight risk OR have the potential to commit SERIOUS future misconduct, which could include SERIOUS threats to your unit's discipline and readiness. You are not required to try lesser forms of restraint in those cases where lesser forms will be obviously inadequate. Keep in mind that once the accused goes into pretrial confinement, you are responsible for his well-being while he is in confinement (you or someone from your command will likely have to visit him or her on a regular basis) and you will be responsible for bringing the accused to his attorney for case work and to all of the proceedings.

Within 48-hours of ordering the accused into confinement, your decision must be reviewed by a neutral and detached officer. Within 72-hours, you must memorialize your decision into a memorandum. Within 7-days, a magistrate will review your decision and decide whether continued pretrial confinement is necessary. Very often, you will write the 72-hour memorandum immediately and the magistrate will conduct the 7-day review within 48-hours, which satisfies the 48-hour review requirement, too. Remember, it is essential that you consult with your servicing Judge Advocate before placing any restraints on a Soldier's liberty.

## **E. TRIAL DECISIONS**

### **1. Request for Discharge in Lieu of Court-Martial. Chapter 10, AR 635-200**

#### *a. Requirements*

- Offense must carry a punitive discharge as a possible punishment or,
- Combination of charges would permit a BCD under R.C.M. 1003(d) and
- Case is referred to a court authorized to adjudge a punitive discharge.

***b. Approval Authority***

Only a General Court-Martial convening authority may approve or disapprove.

***c. Type of discharge***

Usually Under Other than Honorable Conditions.

***d. When to recommend/accept?***

Some examples: Unlikely court will give much of a sentence; protects child victims from testifying; precludes massive outlay of resources; unit preparing to deploy, if no negative effect on command disciplinary climate.

**2. Plea Agreements. R.C.M. 705.**

- Many courts-martial are resolved by plea agreements. Plea agreements are made between the accused and convening authority where the accused agrees to plead guilty to some or all of the charged offenses and the convening authority agrees to limit any possible sentence. You may be asked for your recommendation on whether the convening authority should accept a pretrial agreement.
- Either side, the government or defense, may initiate the agreement.
- Some examples of when you may consider recommending that the convening authority accept a plea agreement are: the agreement offers an acceptable sentence for the offense; the agreement will save significant resources; the agreement will speed the resolution of the process; the case relies on the testimony of reluctant witnesses.
- Counter-offers from the side that did not initiate the agreement are permitted; you may be asked for your recommendation if there is a counter-offer.



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# Unlawful Command Influence

## A. SHIFT IN ROLE

In your legal role as a commander, you must have a shift in mindset. You play a quasi-judicial role within the military justice system that precludes you from directing subordinate commanders in the way that you might otherwise do in an operation. Even if you think that you are just “mentoring” and “coaching,” you can commit Unlawful Command Influence (UCI). Generally, UCI is the improper use, or perception of use, of a superior authority to interfere with the court-martial process. The readings in the Appendix to this Chapter offer a good explanation as to why commanders should use caution when discussing the military justice system, and why, before you do so, you should consult with your servicing Judge Advocate. This chapter is not meant to discourage commanders from talking about military justice, good order and discipline with subordinates. When done so properly, a command appropriately exercises lawful command emphasis, which is a tool you should use to reinforce issues related to military justice.

## B. FRAMEWORK

### 1. Accusatory (the process of bringing charges) v. adjudicative (the actual trial)

Accusatory UCI happens when someone that is responsible for bringing charges or processing charges takes a certain action because someone else pressured him or her to take that action. Adjudicative UCI is UCI that taints the trial process itself – the military judge, the defense counsel, the panel members, or a witness is pressured to do or not do something.

### 2. Apparent v. actual

UCI does not have to actually occur for there to be a problem. If the situation just looks bad– as in, members of the public would think that the accused cannot receive a fair trial – then that can be enough for the military judge to grant the accused some relief.

### 3. Inadvertent v. intentional

A commander or superior does not have to intend to commit UCI or have some sinister purpose. A commander or superior can have good intentions and still commit UCI. This happens most frequently when commanders mentor subordinates or address Soldiers about military justice topics but stray from discussing good order, discipline and process into discussing specific cases or expected results.

#### **4. The MCM v. administrative matters**

The principles of UCI fully apply to Article 15s and all courts-martial. Because this concept arises in the UCMJ, it is generally limited to procedures that are found in the UCMJ. Accusatory UCI concepts generally do not apply to administrative proceedings like administrative separation boards. In fact, there are several regulations that include requirements for subordinates to initiate separation boards, GOMORs, or grade reduction boards. The Secretary of the Army can direct a subordinate to initiate a GOMOR or a separation board. However, the Secretary of the Army could not do the same for a court-martial or Article 15. Because tampering with an administrative proceeding is already a violation of the UCMJ, UCI generally does not apply to administrative proceedings.

#### **5. What Are Things You Can Do That Are NOT UCI?**

- Withhold authority over types of offenses, types of offenders, or certain commanders. Often, battalion commanders withhold drug offenses and certain types of assaults to their level, and often, commanding generals withhold the authority to deal with officer and senior NCO misconduct. A very recent example is the withholding of the disposition of Sexual Assault cases to the Brigade Commander by Secretary of Defense Policy Memo (See Chapter 12).
- Reach down and take specific cases.
- Send cases back down to subordinate commanders with the guidance to take any action, to include no action, in order to dispose of the case at their level. If you send a case back down to a subordinate, you cannot attach strings, as in, "I'll let you handle this case provided you at least give X, Y, or Z."

### **C. PROBLEM AREAS**

#### **1. Deployed Commander Communicating To Rear Detachment Commander**

Rear detachment commanders usually brief the forward commander on what is going on in detachment. That can be a problem when the rear commander briefs legal actions to the forward commander. The forward commander may give explicit instructions on what to do in cases, or there might be implicit approval of certain actions but not others. If you are a rear detachment commander and you have UCMJ authority, you must exercise it independently from that forward commander. If your forward commander wants information on the legal actions in the rear unit, the best course of action is to have your Judge Advocate communicate that information. Your Judge Advocate will be vigilant toward the UCI concerns.

#### **2. Policy Memos, OPDs, And Mentoring**

Commanders are used to coaching and mentoring across the full spectrum of leadership and often want to share their philosophy on military justice as they try to develop junior leaders. When this coaching and mentorship covers military justice, however, problems may arise. Subordinate commanders may start to change their actions based not on what they think the appropriate action is, but based on what they think their superior wants to see. Congress was

aware of this tension and wrote in Article 37 that it is acceptable to give general instruction on military justice on things like procedure and what constitutes offenses. Once you start to talk about expectations of results, specific offenders, or any matter that may alter the way a subordinate commander decides disposition, a witness testifies, or a potential panel member votes regarding guilt or a sentence, you may be committing UCI. In Appendix B, you will see some readings on this problem. Note that this tension has been around for a long time. You will not be the first commander that will want to coach and mentor on military justice, and you won't be the last. The best thing to do is to talk to your Judge Advocate about how to craft a message that provides Lawful Command Emphasis and avoids UCI.

### **3. Subordinates Committing UCI Without Your Knowledge**

As you gain experience and responsibility in the court-martial process, you tend to commit fewer mistakes and instead, have to deal with the mistakes of your subordinates. If your Judge Advocate brings you a problem that a subordinate has created, work to fix the problem at your level. Often, if you fix the problem, the military judge will later find that you solved the problem.

## **D. EXAMPLES OF UCI**

- “I am absolutely uncompromising about discipline in the leader ranks.”
- “I am going to CRUSH leaders who fail to lead by example.”
- “There is no place in the Army for drug users.”
- “Reduction in grade and \$500 is a starting point.”
- “TDS is the enemy.”
- “The accused is a scumbag. Stay away from him.”
- “You testified for the accused? You have embarrassed the unit.”
- PAO comments: “They will likely be discharged from the Army.”

## **E. PREVENTING A PROBLEM**

- Have your Judge Advocate give a class to your unit on lawful command emphasis vs. unlawful command influence and the ways that people in at your level of command can communicate without committing unlawful command influence.
- Have your Judge Advocate review statements or policies prior to signature or release.
- Ensure that your SJA and PAO are working together on statements.
- Focus on the process, not the result; focus on the offense, not the offender. If you need to make a public statement about a case, use language like this:

“[This type of misconduct] has no place in the Army. [This type of misconduct] erodes unit cohesion and mission effectiveness. Allegations of [this type of misconduct] will be thoroughly investigated and appropriate action will be taken based on that investigation.”

## **F. FIXING A PROBLEM**

While each problem is unique, there are some common steps you might consider. Consult your servicing Judge Advocate before you take action in any case. By taking proactive action to cure UCI before trial, you reduce the chances of the military judge taking adverse action at trial.

- 1. Consult with your SJA.**
- 2. Issue a revised policy statement.**
- 3. Conduct an investigation.**
- 4. Take corrective action against someone who commits UCI.**
- 5. Transfer offenders.**
- 6. Apologize.**
- 7. Provide a briefing on duty to testify.**



# Appendix A

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## The 10 Commandments of Unlawful Command Influence

COMMANDMENT 1: Do not stack the panel, nor select nor remove court-members in order to obtain particular result in a particular trial.

COMMANDMENT 2: Do not disparage the defense counsel or the military judge.

COMMANDMENT 3: Do not communicate an inflexible policy on disposition or punishment.

COMMANDMENT 4: Do not place outside pressure on the judge or panel members to obtain a particular decision.

COMMANDMENT 5: Do not intimidate witnesses or discouraged them from testifying.

COMMANDMENT 6: Do not order a subordinate to dispose of a case in a certain way.

COMMANDMENT 7: Do not coach or mentor subordinate commanders on military justice without talking to your legal advisor first.

COMMANDMENT 8: Do not disparage the accused or tell others not to associate with him, and do not allow subordinates to do so, either.

COMMANDMENT 9: Ensure that subordinates and staff do not commit unlawful command influence, inadvertently or not.

COMMANDMENT 10: If a mistake is made, raise the issue immediately and cure with an appropriate remedy.

# Appendix B

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## Recurring Problem: The Policy Statement

When commanders make policy statements about the military justice system, particularly about what types of offenses warrant what kinds of courts or sentences, commanders run the risk that they will commit both adjudicative UCI (some witnesses may not now come forward on the accused's behalf, and some panel members may now punish in accordance with what they believe the convening authority believes) and accusatory UCI (some commanders may make a particular decision in a case because that is what they think their commander wants them to do, not because that is their independent decision).

Commanders are used to coaching and mentoring their subordinates in all areas of command responsibility and leadership, but here, the law has carved out an exception. Commanders should consult with their staff judge advocates before entering this area.

Note that Art. 37(a) exempts general instructional or informational courses on military justice if such courses are designed solely for the purpose of instructing members of the command in the substantive and procedural aspects of courts-martial. Commanders should consider asking their staff judge advocate to provide general instruction, and should allow judge advocates to give advice on particular cases. The readings below help illuminate the line between mentorship and unlawful command influence.

United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984)

The duties of a division commander as a court-martial convening authority and as the primary leader responsible for discipline within the division are among the most challenging a commander can perform. On the one hand, effective leadership requires a commander to supervise the activities of his subordinates diligently and ensure that state of good order and discipline which is vital to combat effectiveness. On the other hand, he must exercise restraint when overseeing military justice matters to avoid unlawful interference with the discretionary functions his subordinates must perform. The process of maintaining discipline yet ensuring fairness in military justice requires what the United States Court of Military Appeals has called "a delicate balance" in an area filled with perils for the unwary. Many experienced line officers have expressed similar conclusions. Excerpts from two particularly useful and authoritative examples are reproduced [below].

Correction of procedural deficiencies in the military justice system is within the scope of a convening authority's supervisory responsibility. Yet in this area, the band of permissible activity by the commander is narrow, and the risks of overstepping its boundaries are great. Interference with the discretionary functions of subordinates is particularly hazardous. While a commander is not absolutely prohibited from publishing general policies and guidance which may relate to the discretionary military justice functions of his subordinates, several decades of practical experience under the Uniform Code of Military Justice have demonstrated that the risks often outweigh the benefits. The balance between the command problem to be resolved and the risks of transgressing the limits set by the Uniform Code of Military Justice is to be drawn by the com-

mander with the professional assistance of his staff judge advocate. Although the commander is ultimately responsible, both he and his staff judge advocate have a duty to ensure that directives in the area of military justice are accurately stated, clearly understood and properly executed.

*Excerpts from a letter which the Powell Committee recommended The Judge Advocate General of the Army send to officers newly appointed as general court-martial convening authorities. (Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army: Report to Honorable Wilber M. Bruckner, Secretary to the Army, 17–21 (18 Jan 1960)).*

Dear :

Because it is of the utmost importance that commanders maintain the confidence of the military and the public alike in the Army military justice system, the following suggestions are offered you as a commander who has recently become a general court-martial convening authority, in the hope that they will aid you in the successful accomplishment of your military functions and your overall command mission.

A serious danger in the administration of military justice is illegal command influence. Congress, in enacting the Uniform Code of Military Justice, sought to comply with what it regarded as a public mandate, growing out of World War II, to prevent undue command influence, and that idea pervades the entire legislation. It is an easy matter for a convening authority to exceed the bounds of his legitimate command functions and to fall into the practice of exercising undue command influence. In the event that you should consider it necessary to issue a directive designed to control the disposition of cases at lower echelons, it should be directed to officers of the command generally and should provide for exceptions and individual consideration of every case on the basis of its own circumstances or merits. For example, directives which could be interpreted as requiring that all cases of a certain type, such as larceny or prolonged absence without leave, or all cases involving a certain category of offenders, such as repeated offenders or offenses involving officers, be recommended or referred for trial by general court-martial, must be avoided. This type of directive has been condemned as illegal by the United States Court of Military Appeals because it is calculated to interfere with the exercise of the independent personal discretion of commanders subordinate to you in recommending such disposition of each individual case as they conclude is appropriate, based upon all the circumstances of the particular case. The accused's right to the exercise of that unbiased discretion is a valuable pre-trial right which must be protected. All pre-trial directives, orientations, and instructions should be in writing and, if not initiated or conducted by the staff judge advocate, should be approved and monitored by him.

The results of court-martial trials may not always be pleasing, particularly when it may appear that an acquittal is unjustified or a sentence inadequate. Results like these, however, are to be expected on occasion. Courts-martial, like other human institutions, are not infallible and they make mistakes. In any event, the Uniform Code prohibits censuring or admonishing court members, counsel, or the law officer with respect to the exercise of their judicial functions. My suggestion is that, like the balls and strikes of an umpire, a court's findings or sentence which may not be to your liking be taken as 'one of those things.' Courts have the legal right and duty

to make their findings and sentences unfettered by prior improper instruction or later coercion or censure.

*Excerpts from an article by General William C. Westmoreland discussing the relationship of military justice to good order and discipline in the Army. (Westmoreland, Military Justice—A Commander's Viewpoint, 10 Am.Crim.L.Rev. 5, 5-8 (1971)).*

As a Soldier and former commander, and now as Chief of Staff of the Army, I appreciate the need for a workable system of military justice. Military commanders continue to rely on this system to guarantee justice to the individual and preserve law and order within the military.

An effective system of military justice must provide the commander with the authority and means needed to discharge efficiently his responsibilities for developing and maintaining good order and discipline within his organization. Learning and developing military discipline is little different from learning any discipline, behavioral pattern, skill, or precept. In all, correction of individuals is indispensable.... The military commander should have the widest possible authority to use measures to correct individuals, but some types of corrective action are so severe that they should not be entrusted solely to the discretion of the commander. At some point he must bring into play judicial processes. At this point the sole concern should be to accomplish justice under the law, justice not only to the individual but to the Army and society as well.

I do not mean to imply that justice should be meted out by the commander who refers a case to trial or by anyone not duly constituted to fulfill a judicial role. A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.

The protection of individual human rights is more than ever a central issue within our society today. An effective system of military justice, therefore, must provide of necessity practical checks and balances to assure protection of the rights of individuals. It must prevent abuses of punitive powers, and it should promote the confidence of military personnel and the general public in its overall fairness. It should set an example of efficient and enlightened disposition of criminal charges within the framework of American legal principles. Military justice should be efficient, speedy, and fair.

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# Commander's Preliminary Inquiry

## (R.C.M. 303)

### A. DEFINED

Under Rule for Court-Martial 303, 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. The preliminary inquiry is usually informal; however, the degree of investigation required depends on the seriousness or complexity of the case.

### B. WHO MAY CONDUCT THE INQUIRY?

Inquiry into simple or minor offenses may be a matter of the commander obtaining information from the suspected offender's chain of command. More complicated cases may require the appointment of an investigating officer. See Chapter 15 for more information on conducting an investigation under Army Regulation 15-6. In complex or serious cases the commander should seek the assistance of law enforcement investigators. In incidents of sexual assault, the commander must refer the case to the Criminal Investigation Division for investigation.

A commander who is a special or general courts-martial convening authority should not personally conduct the preliminary inquiry, but instead should appoint another officer to do so. This will preserve the quasi-judicial role of the commander and prevent his disqualification as the convening authority.

If there is any doubt as to whether to seek the assistance of law enforcement, the commander should contact the command's Judge Advocate.

### C. WHAT IS THE SCOPE OF THE INQUIRY?

The inquiry should gather all reasonably available evidence on:

- Guilt or innocence;
- Aggravation; and
- Extenuation and Mitigation.



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# Nonjudicial Punishment

## (Article 15, UCMJ)

### A. REFERENCES

- UCMJ art. 15.
- Manual for Courts-Martial, pt. V (2019) [hereinafter MCM].
- U.S. Dep’t of Army, Interim Reg. 27-10, Legal Services: Military Justice, chs. 3, 4, 20 (1 Jan 2019) [hereinafter AR 27-10].

### B. INTRODUCTION

Proceedings under Article 15 are not criminal prosecutions. Nonjudicial punishment (NJP) provides commanders with an essential and prompt means of maintaining good order and discipline, and promotes positive behavior changes in service members without the stigma of a court-martial.

### C. AUTHORITY TO IMPOSE NONJUDICIAL PUNISHMENT

#### 1. Who may impose?

##### *a. Commanders (AR 27-10, para. 3-7a.)*

The term “commander” means a commissioned officer who, by virtue of that officer’s grade and assignment, exercises primary command authority over a military organization or prescribed territorial area, that under pertinent official directives is recognized as a command. This can include detachment commanders and commanders of provisional units. Whether an officer is a commander is determined by the duties he or she performs, not necessarily by the title of the position occupied.

##### *b. Joint Commanders (AR 27-10, para. 3-7b.)*

A joint commander or officer in charge, to whose command soldiers are assigned or attached, may impose nonjudicial punishment upon such Soldiers. A joint commander or officer in charge, alternatively, may designate one or more Army units and will for each such Army unit designate an Army commissioned officer as commanding officer for the administration of discipline pursuant to Article 15, UCMJ.

#### 2. Can Article 15 authority be delegated? (AR 27-10, para. 3-7c.)

Article 15 authority may not be delegated. However, the exception is that General court-martial convening authorities and commanding generals can delegate Article 15 authority to one deputy or assistant commander, or the chief of staff (if the chief of staff is a general officer or frocked to general officer rank). The delegation must be in writing.

### **3. Can Article 15 Authority of Subordinate Commanders Be Limited?**

The short answer is, “Yes.” However, only certain types of limitations are permissible and there are some limits that are expressly not permitted.

#### ***a. Permissible limitations (AR 27-10, para. 3-4c.)***

The superior commander may totally withhold all Article 15 authority from the subordinate. Alternatively, the superior commander may partially withhold authority, for example over certain categories of personnel (i.e., all officer cases), particular offenses (i.e., all cases involving drugs), or individual cases (i.e., the disposition of SPC Smith’s case). There is no requirement that limitations be written but is a good idea to do so (e.g., write a memorandum or publish in post regulation).

#### ***b. Impermissible limitations (MCM pt. V, para. 1d(2); AR 27-10, para. 3-4b.)***

The superior commander cannot direct a subordinate commander to impose an Article 15. If the authority to issue nonjudicial punishment remains with the subordinate, it is up to the subordinate to decide, independently, how to dispose of the case, by either issuing nonjudicial punishment or not. Similarly, the superior commander cannot issue regulations, orders, or “guides” that either directly or indirectly suggest to subordinate commanders that:

- Certain categories of offenders or offenses are to be disposed of under Article 15.
- Predetermined kinds or amounts of punishment are to be imposed for certain categories of offenders or offenses.

## **D. WHO CAN RECEIVE NONJUDICIAL PUNISHMENT?**

### **1. Military Personnel of a Commander’s Command (AR 27-10, para. 3-8.)**

- Assigned.
- Affiliated, attached, or detailed.
- The “Beans and Bullets” Rule. AR 27-10, para. 3-8a(3)(b). Look to the facts to determine where the Soldier slept, ate, was paid, performed duty, the duration of the status, and other similar factors. If the facts show the Commander is providing the Soldier these services, then the Soldier can be considered ‘of the command’ of the Commander for purposes of imposing nonjudicial punishment.

### **2. Personnel of Other Armed Forces (services) (AR 27-10, para. 3-8c.)**

An Army commander is not prohibited from imposing NJP on members of his or her command that are from other services. However, if an Army commander imposes NJP on members of another service, he or she may only do so under the circumstances and procedures outlined for imposing NJP prescribed by that member’s parent service.



## **E. HOW TO DECIDE WHAT OFFENSES ARE APPROPRIATE FOR NONJUDICIAL PUNISHMENT**

### **1. Relationship to administrative corrective measures**

NJP should be used when administrative corrective measures (for example, denial of pass privileges, counseling, extra training, administrative reductions in grade, administrative reprimands) are inadequate due to the nature of the minor offense or because of the servicemember's service record. NJP is generally used to address intentional disregard of or failure to comply with standards of military conduct, while administrative corrective measures generally are used to address misconduct resulting from simple neglect, forgetfulness, laziness, inattention to instructions, sloppy habits, and similar deficiencies. AR 27-10, para. 3-3a.

Commanders and supervisors need to ensure that extra training does not become extra duty (punishment) that was given without following NJP procedures. Extra training must relate directly to the deficiency observed and must be oriented to correct that particular deficiency, although extra training can occur after duty hours. AR 27-10, para. 3-3c.

### **2. NJP may be imposed for minor offenses (MCM pt. V, para. 1e; AR 27-10, para. 3-9.)**

Whether an offense is minor depends on several factors:

- The nature of the offense and the circumstances surrounding its commission;
- The offender's age, rank, duty assignment, record and experience;
- The maximum sentence impossible for the offense if tried by a general court-martial. As a rule of thumb, a minor offense is one that does not authorize the imposition of a dishonorable discharge or confinement in excess of one year if tried at a general court-martial. MCM pt. V, para. 1e. However, the maximum punishment authorized for an offense is not controlling. Determining what is a minor offense versus a major offense is within the discretion of the imposing commander.

### **3. Limitations**

#### ***a. Double punishment prohibited***

Once Article 15 imposed, cannot impose another Article 15 for same offense or substantially same misconduct. Commanders need to bring all known offenses that are determined to be appropriate for disposition by NJP and that are ready to be considered at that time. This includes all offenses arising from a single incident or course of conduct. MCM pt. V, para. 1f(3); AR 27-10, para. 3-10.

#### ***b. Statute of limitations***

Except in very limited circumstances, NJP may not be used for offenses which were committed more than 2 years before the date of imposition.

### *c. Civilian courts*

NJP may not be imposed for an offense that has been tried by a federal court. NJP may not be imposed for an offense that has been tried by a state court unless the Commander complies with Chapter 4 of AR 27-10. If you think you have such a case, discuss it with your servicing Judge Advocate before taking any action.

### *d. Courts-Martial*

NJP should not be used when it is clear that only a court-martial will meet the needs of justice and discipline.

## **4. Preliminary inquiry**

Prior to deciding on how to handle the disciplinary issue at hand, Commanders need to comply with the requirements of AR 27-10, para. 3-14a. This may be accomplished by a cursory review of available evidence, including police reports and other documents.

NJP should be conducted at the lowest level of command commensurate with the needs of discipline. If the commander believes that his or her authority is insufficient to impose proper NJP, then he or she should send the case to a superior using DA Form 5109. A superior commander may also return a case to a subordinate commander for appropriate disposition.

## **F. TYPES OF NONJUDICIAL PUNISHMENT**

### **1. Summarized Article 15 (AR 27-10, para. 3-16.)**

Summarized Article 15's may only be used with enlisted Soldiers. In summarized proceedings, the punishment cannot exceed:

- 14 days extra duty
- 14 days restriction
- An oral admonition or reprimand, or
- Any combination thereof.

Summarized Article 15's may be imposed by company or field grade officers and are recorded on DA Form 2627-1.

### **2. Formal Article 15 (AR 27-10, para. 3-17.)**

Formal Article 15's are appropriate whenever:

- Soldier is an officer, or
- Punishment (for any soldier) might exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

Formal Article 15's are classified as company grade Article 15s, field grade Article 15s, and general officer Article 15s. Technically, "general officer Article 15s" are only imposed on officers (general officers can impose greater punishments on officers that other commanders can).

General officers can impose Article 15s on enlisted personnel, too, but the available punishments are the same as those available to field grade officers. All formal Article 15's are recorded on DA Form 2627.

The maximum available punishment is based on rank of imposing commander (company grade, field grade, or for officer offenders, general officer) and the rank of the soldier receiving the punishment. AR 27-10, para. 3-19, tbl. 3-1. This table of punishments is reproduced in Tables 5-1 and 5-2 below. Usually, commanding generals withhold authority over officer misconduct using the local AR 27-10. Company grade or field grade NJP over another officer is very rare.

**TABLE 5-1: ENLISTED PUNISHMENTS**

	<b>Summa- rized</b>	<b>Company Grade</b>	<b>Field Grade</b>
<b>Extra Duty</b>	14 days	14 days	45 days
<b>Restriction</b>	14 days	14 days	60 days (45 days if combined with extra duty)
<b>Correctional Custody</b>		7 days (E1-E3)	30 days (E1-E3)
<b>Reduction</b>		1 grade (E1-E4)	1 or more grade (E1-E4) 1 grade (E5-E6)
<b>Forfeitures</b>		7 days	½ of 1 month's pay for 2 months
<b>Reprimand/Admonition</b>	Oral	Oral /written	Oral/written

**TABLE 5-2: OFFICER PUNISHMENTS**

	<b>Company Grade</b>	<b>Field Grade</b>	<b>General Officer</b>
<b>Restriction</b>	30 Days	30 Days	60 Days or 30 Days Arrest in Quarters
<b>Forfeitures</b>			½ of 1 month's pay for 2 months
<b>Reprimand /Admonition</b>	Written	Written	Written

*a. Reduction in grade*

In general, a commander who can promote to a certain grade can also reduce from that grade. Officers and enlisted soldiers above the grade of E-6 cannot be reduced at an Article 15.

### ***b. Forfeiture of pay***

Forfeitures are based on grade to which reduced, whether or not reduction is suspended. Forfeitures may be applied against a soldier's retired pay. AR 27-10, para. 3-19b(6)(b).

### ***c. Admonition and reprimand***

Officer admonitions and reprimands must be in writing. Enlisted admonitions and reprimands can be oral or in writing. Admonitions and reprimands imposed under NJP should state clearly that they were imposed as punishment under Art. 15. This is to contrast them with admonitions and reprimands given as an administrative matter, which have different procedures. See AR 600-37. Written admonitions and reprimands are prepared in memorandum format and attached to the DA Form 2627.

### ***d. Combination of punishments (AR 27-10, para. 3-19b(7))***

Commanders can combine punishments. No two or more punishments involving the deprivation of liberty may be combined to run either consecutively or concurrently, except that restriction and extra duty may be combined but not to run for a period in excess of the maximum duration allowed for extra duty. For officers, arrest in quarters may not be imposed in combination with restriction.

### ***e. When Does Punishment Begin?***

Punishment generally begins on the day imposed. Unsuspended punishments of reduction and forfeiture take effect on the day imposed. Commanders can delay other punishments for up to 30 days for legitimate reasons (quarters, TDY, brief field problem). However, once commenced, deprivation of liberty punishments will run continuously unless the Soldier is at fault or is incapacitated (cannot pause deprivation of liberty once it has commenced because of a field exercise).

## **G. NOTICE REQUIREMENTS (THE "FIRST READING")**

### **1. Soldier must be notified of the following:**

- Commander's intention to dispose of the matter under Article 15.
- Offense(s) of which the Soldier is suspected.
- Maximum punishment that the commander could impose under Article 15.
- Soldier's rights under Article 15.

### **2. Delegating the notice responsibility**

The commander may delegate the notice responsibility to any subordinate who is a SFC or above (if senior to soldier being notified). The commander still needs to personally sign the DA Form 2627 or 2627-1. This is a good way to involve the first sergeant or command sergeant major. For a script that can be used during the first reading, see AR 27-10, App. B, or Chapter 6 of this handbook.

## H. SOLDIER'S RIGHTS

### 1. Formal Article 15's

During a formal Article 15, the Soldier is entitled to the following rights.

#### *a. A copy of DA Form 2627*

Items 1 and 2 must be completed on the copy the Soldier receives that the defense counsel may review and properly advise the Soldier.

#### *b. Reasonable decision period and to consult with counsel*

This period is usually 48 hours. However, the actual period is determined by the complexity of the case and the availability of counsel. So the period can be longer than 48 hours. Additionally, the Soldier can request a delay, which the imposing commander can grant for good cause.

#### *c. Right to remain silent*

#### *d. Right to Demand trial by court-martial (unless attached to or embarked on a vessel)*

#### *e. Right to Request an open or closed hearing (AR 27-10, para. 3-18(g)(2))*

Ordinarily, hearings are open. An open hearing usually takes place in the commander's office with the public allowed to attend. In practical terms, an open hearing means the office door would be open; a closed hearing, the office door would be closed. The commander should consider all facts and circumstances when deciding whether the hearing will be open or closed.

#### *f. Right to Request a spokesperson*

The spokesperson need not be a lawyer. Trial Defense Service does not usually provide counsel for Article 15 hearings. The TDS counsel will advise the Soldier, and then the Soldier will attend the hearing on their own. However, the Soldier may retain a lawyer at his or her own expense.

#### *g. Right to Examine available evidence*

#### *h. Right to Present evidence and call witnesses (AR 27-10, para. 3-18i.)*

The commander determines if the witness is reasonably available, considering that witness and transportation fees are not available. Reasonably available witnesses will ordinarily only be those at the installation concerned.

### *i. Right to Appeal*

Only one appeal is permissible pursuant to UCMJ, Art. 15 proceedings. An appeal not made within a reasonable time may be rejected as untimely by the superior authority. A reasonable time will vary according to the situation; however, an appeal (including all documentary matters) submitted more than 5 calendar days after the punishment is imposed will be presumed to be untimely, unless the superior commander, in the superior commander's sound discretion for good cause shown, determines it to be timely. While the punishment generally runs during the appeals period, if the command takes longer than the designated period, and the Soldier requests, the punishments involving deprivation of liberty will be interrupted until the appeal is completed.

## **2. Summarized**

The rights in a summarized proceeding are similar to the formal proceeding, but are limited to the following:

- Reasonable decision period (normally 24 hours).
- Demand trial by court-martial.
- Remain silent.
- Hearing.
- Present matters in defense, extenuation, and mitigation.
- Confront witnesses.
- Appeal.

## **I. HEARING**

### **1. The hearing is non-adversarial**

This means that the hearing is not like a courtroom hearing (i.e., a court-martial). Neither the Soldier nor their spokesperson (or retained lawyer) may examine or cross-examine witnesses unless allowed by the commander. However, the Soldier or spokesperson or lawyer can indicate to the imposing commander the relevant issues or questions that they would like the commander to explore or ask witnesses about.

### **2. In the commander's presence unless extraordinary circumstances**

The Soldier will be allowed to personally present matters in defense, extenuation, or mitigation to the Commander, except when appearance is prevented by the unavailability of the Commander or by extraordinary circumstances (i.e. – the Soldier is stationed at a remote geographic location separate from the Commander).

### **3. Rules of evidence**

Commander is not bound by the formal rules of evidence, except for the rules pertaining to privileges. Privileges include spouses not being required to testify against their spouse and clergy not being required to testify against their parishioner.

The Commander may consider any matter the he or she believes is relevant (including, e.g., unsworn statements and hearsay). But beware that if the Soldier turns down the Art. 15, the Military Rules of Evidence will apply at a court-martial. So, evidence that the commander considers at Article 15 may not be admissible at the court-martial.

#### **4. Degree of Proof**

As a criminal law matter, the commander must be convinced beyond a reasonable doubt that the Soldier is guilty of the offense in order to find the Soldier guilty and punish him or her.

### **J. CLEMENCY (AR 27-10, SECTION V)**

The imposing commander, a successor in command, or the next superior authority may grant clemency. Clemency can include the following processes.

#### **1. Suspension of the Punishment**

The execution of a punishment of reduction or forfeiture may be suspended for no more than four months. Other punishments may be suspended for no more than six months. For summary Art. 15s, suspensions are for no more than three months. The suspended punishment is automatically remitted if no misconduct during the suspension period.

##### *a. Vacation of Suspension*

If the Soldier violates a punitive article of the UCMJ (or other stated condition) during the suspension period, the commander may vacate the suspension. If the vacation involves a condition on liberty, reduction in rank, or forfeiture of pay, the commander should hold a hearing as outlined in AR 27-10, para. 3-25. For the vacation of other punishments, the Soldier should be given notice and an opportunity to respond. If the Soldier is absent without leave when the commander proposes vacation, special rules apply. In this instance, ensure that you consult with your servicing Judge Advocate. The conduct that led to the vacation can serve as a separate basis for a new NJP action.

##### *b. Appeal of Vacation of a Suspended Sentence*

No appeal is authorized from the vacation of a suspended sentence.

#### **2. Mitigation**

The commander can reduce the quantity or quality of the punishment.

#### **3. Remission**

The commander can cancel any portion of the unexecuted punishment.

#### **4. Setting aside and restoration**

Commanders can set aside any part or amount of a punishment, whether executed or unexecuted, and restore whatever rights, privileges or property that was affected are restored. This should only be done when there was “clear injustice,” or an unwaived legal or factual error that

clearly and affirmatively injured the substantial rights of the Soldier. Generally, this type of clemency should occur within four months from the date that punishment was imposed.

## **K. FILING (AR 27-10, PARAS. 3-6, 3-37)**

Any record of nonjudicial punishment which includes a finding of guilty for having committed a sex-related offense will be filed as a sex-related offense in the performance folder of the Soldier's AMHRR. This requirement applies to Soldiers in all components, regardless of grade. Imposing commanders do not have the option to designate these documents be filed locally or in the restricted folder of the Soldier's AMHRR. AR 27-10, para. 3-6b.

### **1. Summarized Article 15**

DA Form 2627-1 is filed locally. The form is destroyed two years after imposition of the Article 15 or upon the transfer of the Soldier from the unit.

### **2. Formal Article 15**

#### ***a. Specialist/Corporal (E-4) and below***

The original DA Form 2627 is filed locally in the unit nonjudicial punishment or unit personnel files. The form is destroyed two years after imposition of the Article 15 or upon transfer of the Soldier to another general court-martial convening authority.

#### ***b. All other soldiers***

##### **1) Performance restriction or restricted section of AMHRR**

In addition to the local filing discussed above, the Commander may file the Article 15 in the Soldier's Army Military Human Resource Record (AMHRR). If filing in the AMHRR, the Commander must decide whether to file the Article 15 in the performance portion of the file or the restricted portion. The performance section is routinely used by career managers and selection boards for the purpose of assignment, promotion, and schooling selection. The restricted section contains information not normally viewed by career managers or selection boards, so filing in the restricted portion benefits the Soldier. NOTE: If an E5 or above already has an Art. 15 in restricted section, AR 27-10 requires that it will be redirected to performance section.

##### **2) Factors Informing the Commander's Filing Decision**

A commander's decision where to file is as important as the decision relating to the imposition of NJP itself. Commanders should consider:

- Interests of the Soldier's career.
- Soldier's age, grade, total service, whether Soldier has prior NJP, and recent performance.
- Army's interest in advancing only the most qualified personnel for positions of leadership, trust, and responsibility.



- Whether the conduct reflects unmitigated moral turpitude or lack of integrity, patterns of misconduct, evidence of serious character deficiency, or substantial breach of military discipline.

### **3. Review of the Filing Decision by Superior Authority**

The imposing commander's filing decision is subject to review by superior authority. However, the Superior commander cannot withhold the subordinate commander's filing determination authority.

## **L. APPEALS (AR 27-10, SECTION VI)**

The Soldier only has the right to one appeal under Article 15. This appeal operates as follows.

### **1. Time limits to appeal**

The Soldier has a "reasonable" time to appeal. However, after five calendar days, the appeal is presumed to be untimely and may be rejected.

### **2. Who acts on an appeal?**

The next superior commander generally handles the appeal. The superior authority should act on appeal within five calendar days (three calendar days for summarized proceedings). While the punishment generally runs during the appeals period, if the command takes longer than the designated period, and the Soldier requests, the punishments involving deprivation of liberty will be interrupted until the appeal is completed.

### **3. Procedure for submitting appeal**

The Soldier submits their appeal through the imposing commander using the appropriate space on DA Form 2627. The submission of additional matters is optional. However, if additional materials are submitted, they must be forwarded to the appellate authority.

### **4. Action by appellate authority**

The appellate authority may conduct an independent inquiry into the matter. They may also take appellate action, even if Soldier does not appeal.

#### ***a. Legal Review***

In certain circumstances, the Article 15 must be referred to the OSJA for a legal review prior to action on the appeal. MCM, Part V, para. 7(e)(3).

Circumstances requiring a legal review include:

- Reduction in one or more pay grades from E4 or higher, or
- More than 7 days arrest in quarters, more than 7 days correctional custody, more than 7 days forfeiture of pay, or more than 14 days of either extra duty or restriction

You may always refer an Article 15 for legal review in any case, regardless of punishment imposed. Review is typically done by the trial counsel.

### *b. Matters considered*

The appellate authority must review the appropriateness of the punishment and whether the proceedings were conducted under law and regulations. Their consideration is not limited to the written matters in the record; the appellate authority may make additional inquiries. The appellate authority may consider the record of the proceedings, any matters submitted by the service member, any matters considered during the legal review, and any other appropriate matters. The rules do not require that the service member be given notice and an opportunity to respond to any additional matters considered.

### *c. Appellate Authority's Options*

In acting on the Appeal, the Appellate authority may:

- Approve the punishment.
- Suspend all or any part of the punishment.
- Mitigate the punishment.
- Remit all or any part of the punishment.
- Set Aside the Article 15. This includes setting aside the earlier NJP in order to refer the case to court-martial.

## **5. Petition to the Department of the Army Suitability Evaluation Board (DAS-EB)**

Sergeants (E-5) and above may petition to have DA Form 2627 transferred from the performance to the restricted section. The Soldier must present evidence that the Article 15 has served its purpose and transfer would be in the best interest of the Army.

Soldiers can also petition for complete removal of the Article 15. Normally, petitions are not considered until at least one year after imposition of punishment. Soldiers may seek assistance with these types of petition from the Trial Defense Service or Legal Assistance Office at their installation.

## **M. PUBLICIZING NONJUDICIAL PUNISHMENT (AR 27-10, PARA. 3-22)**

It is permissible for commanders to publish the results of Article 15's, but they must delete the Soldier's social security number and relevant privacy information.

### **1. Timing**

Commanders may announce the result at next unit formation after punishment is imposed, or, if the Article 15 is appealed, after the decision on appeal. Additionally Commanders can post the results on the unit bulletin board.

## 2. Commander Considerations

When considering whether to publicize Article 15's or not, the Command must avoid inconsistent or arbitrary policies. So, the commander should decide whether they will publish the Article 15's or not, and then be consistent in publishing them throughout the command tour. Additionally, before publishing the punishments of sergeants and above, consider:

- The nature of the offense.
- The individual's military record and duty position.
- The deterrent effect.
- The impact on unit morale or mission.
- The impact on the victim.
- The impact on the leadership effectiveness of the individual concerned.

## N. SUPPLEMENTAL ACTIONS

Supplemental Action is any action taken by an appropriate authority to suspend, vacate, mitigate, remit, or set aside a punishment under formal Art. 15 proceedings after action has been taken on an appeal, or the DA Form 2627 has been distributed to agencies outside the unit (personnel, finance). Supplemental actions must be recorded on a DA Form 2627-2.



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# Company Grade Article 15 Script

In the following script, **BOLD** language are instructions and notes, **NORMAL PRINT** is what you would read/say to the Soldier.

**Appendix B of AR 27-10 is the source document for this script. It has been modified for clarity and to make it easier to follow the recommended procedures.**

**Note: As commander, you may delegate performance of the Notification, Election of Rights, and Appellate Rights sections to an appropriate subordinate. Your First Sergeant is especially well suited for this role.**

## **A. NOTIFICATION**

**Note: The commander may delegate the Notification portion.**

**Note: It is important the commander sign following Item 2 on the DA Form 2627 before Notification takes place. Leave the Date and Time blocks blank. The person performing the notification should fill in these blanks with the current time and date at the actual Notification.**

**CDR/ISG:** As your commander, (I have)(the company commander has) disciplinary powers under Article 15 of the UCMJ. (I have)(The commander has) received a report that you violated the Uniform Code, and (I am)(the commander is) considering imposing nonjudicial punishment. This is not a formal trial like a court-martial. As a record of these proceedings (I)(he) will use DA Form 2627. I now hand you this form. Read items 1 and 2. Item 1 states the offense(s) you are reported to have committed and item 2 lists the rights you have in these proceedings. Under the provisions of Article 31 of the UCMJ, you are not required to make any statement or provide any information concerning the alleged offense(s). If you do, it may be used against you in these proceedings or in a trial by court-martial. You have the right to consult with a lawyer as stated in item 2.

**Note: Wait for the soldier to read items 1 and 2 of DA Form 2627. Allow him or her to retain a copy of the form until the proceedings are finished and the commander has either imposed punishment or decided not to impose it.**

**CDR/ISG:** Do you understand item 1? Do you understand the offense(s) you are reported to have committed?

**Soldier:** Yes/No.

**Note: If the soldier does not understand the offense(s), explain the offense(s) to him/her.**

**CDR/ISG:** Do you understand item 2? Do you have any questions about your rights in these proceedings?

**Soldier:** Yes/No.

**Note: If the soldier does not understand his or her rights, explain them in greater detail. If the soldier asks a question you cannot answer, recess the proceedings. You may find the answer in one of the following sources: Article 15, UCMJ; Part V of the Manual for Courts-Martial (MCM) (2019); AR 27-10, Chapter 3; or contact your JA office.**

**CDR/ISG:** There are some decisions you have to make.

**CDR/ISG:** Number One. You have to decide whether you want to demand trial by court-martial. If you demand a court-martial, these proceedings will stop. (I)(the commander) then will have to decide whether to initiate court-martial proceedings against you. If you were to be tried by court-martial for the offense(s) alleged against you, you could be tried by summary court-martial, special court-martial, or general court-martial. If you were to be tried by special or general court-martial you would be able to be represented by a military lawyer appointed at no expense to you or by a civilian lawyer of your choosing at no expense to the government.

**CDR/ISG:** Number Two. If you do not demand trial by court-martial, you must then decide whether you want to present witnesses or submit other evidence in defense, extenuation, and/or mitigation. Your decision not to demand trial by court-martial will not be considered as an admission that you committed the offense(s); you can still submit evidence in your behalf.

**CDR/ISG:** Evidence in defense is facts showing that you did not commit the offense(s) stated in item 1. Even if you cannot present any evidence in defense, you can still present evidence in extenuation or mitigation.

**CDR/ISG:** Evidence in extenuation is circumstances surrounding the offense, showing that the offense was not very serious.

**CDR/ISG:** Evidence in mitigation is facts about you, showing that you are a good soldier and that you deserve light punishment.

**CDR/ISG:** Number Three. You can make a statement and request to have a spokesperson appear with you and speak on your behalf. (I)(The commander) will interview any available witnesses and consider any evidence you think (I)(he/she) should examine.

**CDR/ISG:** Number Four. Finally, you must decide whether you wish to request that the proceedings be open to the public. Do you understand the decisions you have to make?

**Soldier:** Yes/No.

**Note: If the soldier does not understand, explain each of the decisions to the soldier.**

**CDR/ISG:** If you do not demand trial by court-martial and after you have presented your evidence, (I am)(the commander is) convinced that you committed the offense, (I)(he/she) could then punish you. The maximum punishment (I)(he/she) could impose on you would be:

*E1-E4: Admonition/reprimand; 14 days extra duty; 14 days restriction; forfeiture of 7 days pay; and reduction in rank of one grade.*

*E5-E6: Admonition/reprimand; 14 days extra duty; 14 days restriction; and forfeiture of 7 days pay.*

**CDR/ISG:** You should compare this punishment with the punishment you could receive in a court-martial.

**Note: If the soldier requests to be informed of the maximum court-martial sentence you may state the following: The maximum sentence you could receive in a court-martial is (sentence) for the offense(s).**

**Note: Part IV, MCM lists for each punitive article the punishments a court-martial may impose for violations of the various Articles of the UCMJ. You may inform the soldier that referring the charges to a summary or special court-martial would reduce the maximum sentence. For example, a summary court may not impose more than 1 month of confinement at hard labor. A special court may not impose more than 12 months of confinement.**

**Note: You should not inform the soldier of the particular punishment you/the commander may consider imposing until all evidence has been considered.**

**CDR/ISG:** As Item 2 points out, you have a right to talk to an attorney before you make your decisions. A military lawyer whom you can talk to free of charge is located at \_\_\_\_\_. Would you like to talk to an attorney before you make your decisions?

**Soldier:** Yes/No.

**Note: If the answer is yes, go to (1) below. If the answer is no, continue at (2) below.**

**(1) CDR/ISG:** I will provide you whatever assistance I can to help you consult an attorney. I encourage you to consult the attorney promptly. You may consult with an attorney by telephone. You are to notify me if you encounter any difficulty in consulting an attorney.

**Note: Skip the following statement and go to the next one.**

**(2) CDR/ISG:** I understand you do not wish to consult an attorney. You should understand you are provided an opportunity to do so.

**CDR/ISG:** You now have 48 hours to think about what you should do in this case. You may advise (me) (the commander) of your decision at any time within the 48-hour period. If you do not make a timely demand for trial or if you refuse to sign that part of DA Form 2627 indicating your decision on these matters, (I)(the commander) can continue with these Article 15 proceedings even without your consent.

**CDR/ISG:** You are dismissed unless you have made all your decisions and are fully prepared to proceed immediately. Do you want to wish to proceed immediately?

**Soldier:** Yes/No.

**Note:** If the answer is no, go to (1) below. If the answer is yes, continue at (2) below.

**(1) CDR/ISG:** You are dismissed.

**Note.** At this point, you should recess the proceedings.

**(2) CDR/ISG:** I understand you do not wish consult with an attorney, have made your decisions, and are prepared to proceed immediately.

## **B. ELECTION OF RIGHTS**

**Note:** The commander may delegate the performance of the Election of Rights portion.

**Note:** If conducted during the same session as the Notification, skip the next statement.

**CDR/ISG:** As your commander, (I have)(the commander has) disciplinary powers under Article 15 of the UCMJ. (I have)(The commander has) received a report that you violated the Uniform Code, and (I am)(the commander is) considering imposing nonjudicial punishment. This is not a formal trial like a court-martial. As a record of these proceedings, I will use DA Form 2627. I am handing you this form. (I)(The First Sergeant) initially notified you of this charge on \_\_\_\_\_.

**CDR/ISG:** Turn your attention to Item 3 of the DA Form 2627. Do you demand trial by court-martial?

**Soldier:** Yes/No.

**Note:** If the answer is yes, go to (1) below. If the answer is no, continue at (2) below.

**(1) CDR/ISG:** Initial Block a, sign and date Item 3. Because you have demanded trial by court-martial, these proceedings will stop. (I)(The commander) now must decide whether to initiate court-martial proceedings against you. I will notify you when (I have)(the commander has) reached a decision. You are dismissed.

**Note:** This concludes the proceeding.

**(2) CDR/ISG:** Initial Block b of Item 3 indicating your choice to not demand trial by court-martial.

**CDR/ISG:** An open hearing means that the proceeding is open to the public. If the hearing is closed, only you, I, designated soldiers of the chain of command, available witnesses and a spokesperson, if designated, will be present. Do you request an open hearing?

**Soldier:** Yes/No.



**CDR/ISG:** Initial Block b(1) of Item 3 indicating your choice.

**CDR/ISG:** Do you wish to be accompanied by a spokesperson?

**Soldier:** Yes/No.

**CDR/ISG:** Initial Block b(2) of Item 3 indicating your choice.

**CDR/ISG:** Do you want to submit any evidence showing that you did not commit the offense(s), or explaining why you committed the offense(s), or any other information about yourself that you would like me to know? And/or do you wish to have any witnesses testify, including witnesses who would testify about your good past military record or character?

**Soldier:** Yes/No.

**CDR/ISG:** Initial Block b(3) of Item 3 indicating your decision, and sign and date the form in the space provided under that item.

**Note: Wait until the soldier initials the blocks and signs and dates the form.**

**Note: In the event the soldier does not make a decision within the specified time or refuses to complete or sign item 3 of DA Form 2627, see paragraph 3-18f(4) of AR 27-10.**

## **C. PRESENTATION OF EVIDENCE AND MATTERS**

**Note: The commander CANNOT delegate the Presentation of Evidence and Matters portion.**

**Note: If the soldier has no witnesses or matters to present, the commander may skip to Imposition of Punishment.**

**Note: If the commander delegated both the Notification and Election of Rights for this Article 15, making this is the first time the soldier is appearing before the commander, read the following statement. If not, the commander may skip to the next statement.**

**CDR:** As your commander, I have disciplinary powers under Article 15 of the UCMJ. I have received a report that you violated the Uniform Code, and I am considering imposing nonjudicial punishment. This is not a formal trial like a court-martial. As a record of these proceedings, I will use DA Form 2627. I am handing you this form. You were initially notified of this charge on \_\_\_\_\_.

**CDR:** Do you need additional time to gather your evidence?

**Soldier:** Yes/No.

**Note: If the soldier needs additional time to gather his or her evidence, give the soldier a reasonable period to gather the evidence. Tell the soldier when the proceedings will resume and recess the proceedings.**

**Note: If the soldier has witnesses and/or evidence, and the soldier is prepared to present them, proceed as follows:**

CDR: I will now examine whatever matters you wish to present.

**Note: Insure that the soldier has the opportunity he or she deserves to present any evidence.**

CDR: Do you have any further evidence to present?

Soldier: Yes/No.

**Note: Consider the evidence presented. If the evidence persuades you that you should not punish the soldier, terminate the proceedings, inform the soldier, and destroy all copies of DA Form 2627. If you are convinced that the soldier committed the offense(s) beyond a reasonable doubt and deserves to be punished, proceed to Imposition of Punishment.**

## **D. IMPOSITION OF PUNISHMENT**

**Note: The commander CANNOT delegate the Imposition of Punishment portion.**

**Note: If the soldier presented evidence and matters to the commander, skip the following statement and go one to the next one.**

CDR: As your commander, I have disciplinary powers under Article 15 of the UCMJ. I have received a report that you violated the Uniform Code, and I am considering imposing nonjudicial punishment. This is not a formal trial like a court-martial. As a record of these proceedings, I will use DA Form 2627. I am handing you this form. (I)(The First Sergeant) initially notified you of this charge on \_\_\_\_\_.

CDR: I have considered all the evidence. I am convinced that you committed the offense(s). I impose the following punishments: \_\_\_\_\_.

**Note: Announce punishment. Many Legal Offices prefer you do not annotate the punishment on the DA Form 2627. They may provide you a punishment worksheet to use. Consult with your Legal Office to determine the preferred method.**

**Note: After you have imposed punishment, complete Items 4, 5 and 6 of DA Form 2627, and sign and date in the blanks below Item 6.**

## **E. APPELLATE ADVICE**

**Note: The commander may delegate the Appellate Advice portion.**

**Note: Hand the DA Form 2627 and the punishment worksheet (if used) to the soldier.**

**CDR/ISG:** Read the (DA Form 2627)(punishment worksheet) which lists the punishment (I have) (the commander has) just imposed on you. Now read Item 6 which points out that you have a right to appeal this punishment to \_\_\_\_\_. You can appeal if you believe that you should not have been punished at all, or that the punishment is too severe. Any appeal should be submitted within 5 calendar days. An appeal submitted after that time may be rejected. Even if you appeal, the punishment is effective today (unless the imposing commander sets another date). Once you submit your appeal, it must be acted upon by within 5 calendar days, excluding the day of submission. Otherwise, any punishment involving deprivation of liberty (correctional custody, restriction or extra duty), at your request, will be interrupted pending the decision on the appeal.

**CDR/ISG:** Do you understand your right to appeal?

**Soldier:** Yes/No.

**CDR/ISG:** Do you desire to appeal?

**Soldier:** Yes/No.

**Note: If the answer is yes, go to (2) below. If the answer is no, continue at (1) below.**

**(1) CDR/ISG:** If you do not want to appeal, initial Block a in Item 7 and sign and date in the blanks below Item 7.

**Note: Now give the soldier detailed orders as to how the commander wants him or her to carry out the punishments.**

**CDR/ISG:** You are dismissed.

**Note: This concludes the proceeding.**

**(2) CDR/ISG:** Do you want to submit any additional matters to be considered in an appeal?

**Soldier:** Yes/No.

**Note: If the answer is yes, go to (2) below. If the answer is no, continue at (1) below.**

**(1) CDR/ISG:** Initial Block b in Item 7 and sign and date the blanks below Item 7. I will notify you when I learn what action has been taken on your appeal. You are dismissed.

**Note: This concludes the proceeding.**

**CDR/ISG:** If you intend to appeal and do not have the additional matters with you, Item 7 will not be completed until after you have obtained all the additional material you wish to have considered on appeal.

**CDR/ISG:** Do you have your additional material with you?

**Soldier:** Yes/No.

**Note: If the answer is yes, go to (2) below. If the answer is no, continue at (1) below.**

**(1) CDR/ISG:** When you have obtained this material, return with it by \_\_\_\_\_ (Five calendar days from imposition of punishment). At that time, you will complete Item 7 by initialing Block c and signing and dating in the blanks below. After you complete Item 7, I will send the DA Form 2627 and the additional matters you submit to \_\_\_\_\_ (Appeal authority). Remember that the punishment will not be delayed (unless the imposing commander sets another date).

**CDR/ISG:** You are dismissed.

**Note: This concludes the proceeding.**

**(2) CDR/ISG:** Give me the material. Complete Item 7 by initialing Block c and signing and dating in the blanks below. After you complete Item 7, I will send the DA Form 2627 and the additional matters you submit to \_\_\_\_\_ (Appeal authority). Remember that the punishment will not be delayed (unless the imposing commander sets another date).

**CDR/ISG:** You are dismissed.

**Note: This concludes the proceeding.**

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# Search & Seizure

## A. INTRODUCTION

The Fourth Amendment protects individuals from “unreasonable” searches and seizures, and requires that searches and seizures be based upon probable cause and a warrant. The Fourth Amendment applies to Soldiers - they do not waive their Fourth Amendment rights when they join the Army. However, the Fourth Amendment applies to Soldiers differently than it does to civilians. This is because a Soldier’s privacy rights are balanced against not only law enforcement needs but also against military necessity and national security. Consequently, a search may be considered reasonable in a military setting, but would not be so in the civilian world.

An example of how the Fourth Amendment applies to Soldiers differently than it does to civilians is search authorizations. A civilian search “warrant” must be in writing, under oath, and issued by a civilian magistrate. A military search “authorization,” on the other hand, need not be in writing, need not be under oath, and may be issued by a commander. Despite these technical distinctions, the terms “search warrant” and “search authorization” basically mean the same thing and are often used interchangeably.

Another example of how the Fourth Amendment applies to Soldiers differently than to civilians is urinalysis testing. Most civilians presently are not subject to random urinalysis testing for illegal drug use. Soldiers, however, must give urine samples during routine health and welfare inspections. This greater intrusion into a Soldier’s privacy is justified because of the detrimental impact that illegal drug use has on military operations and national security.

Searches and seizures need not always be based on probable cause and a search warrant or authorization. There are several situations where the Fourth Amendment does not apply, such as searches of government property or seizures of items in plain view. There are also situations where the Fourth Amendment applies but no probable cause or warrant is required.

The search and seizure rules are complex and constantly changing because of court interpretations. Therefore, the best advice is to contact your legal adviser whenever a search and seizure issue comes up. Your legal adviser can assist you with proposed courses of action, and recommend alternatives which will decrease the likelihood that evidence may be found inadmissible at a court-martial.

## B. PROBABLE CAUSE & WARRANTS

### 1. Probable Cause

#### *a. Defined*

There is probable cause to search when there are reasonable grounds to believe that items connected with criminal activity are located in the place or on the person to be searched.

## ***b. Evaluating Probable Cause***

A commander may determine that probable cause exists based on his or her personal observations, or information from others. The commander's task is to determine from the totality of the circumstances whether it is reasonable to conclude that evidence of a crime is in the place to be searched. Probable cause determinations should be based on factual and reliable information.

### **1) Factual Basis**

If the commander did not personally observe the information, but is relying on an informant, the following can use the following criteria to evaluate the factual basis of the information:

- *Personal observation.* The trustworthiness of information can be established if the informant personally observed the criminal activities. In drug cases, you should also inquire why the informant believes that what he or she saw was drugs. You should determine whether the informant had a class on drug identification, furnished reliable information in the past, or had substantial experience with drugs.
- *Admission of the suspect.* An informant's information is considered reliable if based on statements he or she heard the suspect or an accomplice make.
- *Self-verifying detail.* The factual basis of an anonymous tip may be established if the tip is so detailed that the information must have been obtained as a result of a personal observation.

### **2) Reliability**

The commander should also be satisfied as to the credibility of the person furnishing the information. This may be established by one or more of the following:

- *Demeanor.* When the information is personally given to the commander, the commander can judge the informant's believability at that time. In many cases the individual may be a member of the commander's unit and the commander is in the best position to judge the credibility of the person. Even when the person is not a member of the commander's unit, the commander can personally question the individual and determine the consistency of statements made by the individual.
- *Past reliability.* This is one of the easiest methods for establishing believability: knowledge that the informant has proven reliable in the past. A commander should examine the underlying circumstances of past reliability, such as a record that the informant has furnished correct information in the past.
- *Corroboration.* Corroboration means that other facts back up the information provided. Corroboration and the demeanor of the person are particularly important when questioning first-time informants with no established record of past reliability.
- *Declaration against interest.* The person furnishing the information may provide information that is against that person's penal interest. For example, when a person knowingly admits to an offense and has not been promised any benefit, he or she may be prosecuted for that offense. This lends a great degree of reliability to the information furnished.

- *Good citizen informants.* Often, the informant’s background renders him or her credible. For instance, a victim or a bystander with no reason to lie may be considered reliable. In addition, law enforcement officers and good Soldiers are generally considered reliable sources of information.

## **2. Search Warrants and Authorizations**

### ***a. Commander’s Authorization***

A commander may authorize searches of his or her Soldiers and equipment, or areas he or she controls, when there is probable cause to believe that items connected with criminal activity are located in the place or on the person to be searched. When time permits, the commander should consult a legal adviser first. A commander may not delegate the authority to authorize searches to others in the unit. The power to authorize a search, however, may devolve to an acting commander if the commander is absent. The authority of an acting commander to authorize searches should be documented in writing by the absent commander.

### ***b. Magistrate’s and Judge’s Authorization***

A magistrate (designated JAG officer) or a military judge on your installation can also authorize searches. Using a magistrate to authorize a search may be preferable to requesting authorization from a commander for several reasons. First, commanders may be involved in an investigation related to a search and their neutrality could become an issue. Second, the magistrate may authorize searches anywhere on an installation; therefore, issues of scope of authority are avoided. Third, if a search authorization is contested at trial, the commander will not have to testify.

### ***c. Procedures for Obtaining an Authorization to Search***

AR 27-10, Military Justice (1 January 2019), sets out the procedures for obtaining an authorization to search. Written or oral statements (including those obtained by telephone or radio), sworn or unsworn, should be presented to the commander, magistrate, or military judge. The authorizing official will then decide whether probable cause to search exists, based upon the statements and will issue either a written or an oral authorization to search. Written statements and authorizations are preferred to avoid problems later if the search is challenged at trial. When granting authority to search, the authorizing official must specify the place to be searched and the things to be seized. Commanders should consult with their servicing Judge Advocate to prepare a request for search authorization (DA Form 3744); DA Form 3745 is a search authorization form.

### ***d. Scope of an Authorized Search***

Once authorization to search has been obtained, the person conducting the search must carefully comply with the limitations imposed by the authorization. Only those locations which are described in the authorization may be searched and the search may be conducted only in areas where it is likely that the object of the search will be found. For example, if an investigator has authority to search the quarters of a suspect, the investigator may not search a car

parked on the road outside. Likewise, if an authorization states that an investigator is looking for a 25-inch television, the investigator may not look into areas unlikely to contain a TV, such as a medicine cabinet or file cabinet.

### *e. Detention*

**Pending Execution of Search Authorizations.** An authorization to search for contraband implicitly carries the limited authority to detain occupants of a home, apartment, or barracks room while the search is conducted. Police may also detain occupants leaving the premises at the time police arrive to execute the search authorization.

## **3. Commander Must Be Neutral and Detached**

A commander, much like a judge, must remain objective when deciding whether there is sufficient information to justify a search authorization. When a commander is actively involved in a criminal investigation, he or she is disqualified from acting as the authorizing official.

A commander is not neutral and detached if he or she initiated or orchestrated the investigation or conducted the search personally. On the other hand, knowledge of an ongoing investigation within the unit, disdain for certain kinds of crime, and personal information or knowledge about a suspect's character does not disqualify a commander from granting a search authorization.

If a commander is unsure whether a court will view his or her involvement in a particular case as disqualifying, the commander should play it safe by sending the person seeking the authorization to the military magistrate or to the next higher commander who has no involvement with the case.

## **C. WHEN THE FOURTH AMENDMENT DOES NOT APPLY**

### **1. Nongovernmental Searches**

The Fourth Amendment only protects Soldiers against searches by U.S. government officials. It does not cover searches by private persons or foreign officials.

#### *a. Private Searches*

The Fourth Amendment does not prohibit searches by private persons (roommates or family members), unless the private search was directed by a commander or police investigator. Be careful when working with unit informants. Telling them to "keep your eyes open" is permissible; telling them to bring you evidence may violate the Fourth Amendment and render the evidence inadmissible.

#### *b. Foreign Searches*

The Fourth Amendment applies only to the U.S. Government. Searches by German or Korean police need not comply with the Fourth Amendment unless the foreign search is directed, conducted, or participated in by U.S. agents. Foreign police may freely exchange criminal information with the military police.



## 2. No Reasonable Expectation of Privacy

The Fourth Amendment does not apply unless the suspect has a reasonable expectation of privacy in the area searched.

### *a. Government Property*

A Soldier has no reasonable expectation of privacy in most government property, including military vehicles, tents, common tool kits, and office desks. No authorization is required to search these places. But the Fourth Amendment does cover items issued for personal use, such as wall lockers, foot lockers, and field gear. These items may be examined only during inspections and authorized searches.

### *b. Government E-Mail and Computer Systems*

Although government e-mail, computers, and cell phones should follow the rules stated above for government property, appellate case law has found a reasonable expectation of privacy in these areas in certain circumstances. Changes in technology and how we use it often occur faster than case law can adapt to them, so consult your trial counsel or legal advisor if you want to search for digital evidence on a government information system. Depending on the circumstances, an authorization may not be required, especially if there was a proper DOD log-on banner on the device to be searched, and a properly filled out user agreement signed by the individual to be searched.

### *c. Abandoned Property*

There is generally no expectation of privacy in abandoned property, such as a car abandoned on a public road, on-post quarters after a person has checked out, items thrown from a window or to the ground, garbage containers placed on a street curb, or a building destroyed by fire. Therefore, no authorization or probable cause is required to search or seize these items.

### *d. Open View (Plain View)*

What a person knowingly exposes to the public is not subject to Fourth Amendment protection. For example, the exterior of a car parked on a public street is not protected by the Fourth Amendment. An item is in plain view if law enforcement (or military personnel) can see it from a place they have a lawful right to be in. For example, a platoon sergeant conducting room inspections has a right to be in each barracks room. If he sees a bong on a desk in the room, that bong is in plain view and there is no reasonable expectation of privacy in the item.

### *e. Sensory Aids*

So long as a person is lawfully present in an area, he or she may properly use low-technology devices that enhance the senses. For example, flashlights may be used to look inside cars and dogs may sniff autos, luggage, or field gear. On the other hand, a thermal imaging device may not be used to observe activity inside a private home. In addition, special rules exist for the use of wiretaps and electronic “bugs.” See your trial counsel if you feel electronic surveillance is necessary.

## **D. EXCEPTIONS TO THE FOURTH AMENDMENT**

### **1. Exigent Circumstances**

In emergencies, where the delay necessary to get a warrant would result in the removal, destruction, or concealment of evidence, a warrant is not required. However, probable cause is still required in these situations. For example, a staff duty officer walking through a barracks who smells marijuana coming from a Soldier's room may enter the room and "freeze" the situation. If he apprehends the Soldier for using marijuana, he may conduct a search of the Soldier incident to apprehension and may also seize any items in plain view. He should then seek authorization before he searches the rest of the room.

### **2. Automobile Exception**

If there is probable cause to search an automobile, a warrant or authorization is generally not required. For example, if a staff duty officer has probable cause to believe that drugs are located in a Soldier's car, he may search the car without obtaining a warrant or search authorization. This exception exists because such evidence may be easily lost if the automobile is driven away before a warrant or authorization is obtained. The entire automobile may be searched, to include the trunk. However, the best course of action would be to "freeze the scene" (by not allowing a driver to move the automobile) and call military law enforcement to investigate.

### **3. Consent Searches**

A Soldier may consent to a search. However, the consent must be voluntary and not coerced by the influence of rank or position. When requesting consent you should advise the Soldier that he or she has the right not to consent. If the Soldier does consent, he or she can withdraw the consent at any time. In this case, the search must stop immediately. A Soldier may consent to a partial search (for example, everything in the room, but not the wall locker). Article 31 rights and written consent are recommended but not required. Do not "threaten" a Soldier that the search will be conducted even if he or she refuses to give consent (such a threat invalidates consents).

### **4. Search Incident to Apprehension**

Any person who has been properly apprehended may be searched in order to ensure the safety of the apprehending person and others, and to prevent destruction of evidence. Only the person's clothing and body and any areas within the person's reach may be searched. The searcher may not search the contents of a cellular phone seized from the apprehended person, without a search authorization. When a person is apprehended in an automobile, the entire passenger compartment may be searched, but only if the individual is within reaching distance of the passenger compartment at the time of the search, or if it is reasonable to believe the vehicle contains evidence of the crime for which the individual was just arrested. The scope of this vehicle search incident to apprehension includes the glove box, console, backseat and under the seats, but does not include the trunk.

## 5. Inspections

### *a. General*

Inspections are a function of command. The commander has the inherent right to inspect the barracks to ensure the command is properly equipped, maintained, and ready, and that personnel are present and fit for duty. A commander conducting an inspection may find items that could aid in a criminal prosecution. These items may be seized and used as evidence for an Article 15 or court-martial.

#### 1) Primary Purpose Test

An inspection must have a primary administrative purpose. For example, inspections to ensure security, readiness, cleanliness, order, and discipline are permissible. Inspections may include an examination to locate and confiscate unlawful weapons and other contraband, since confiscation of contraband is a means of ensuring security, readiness, and order. An inspection whose primary purpose is to obtain evidence for an Article 15 or court-martial is not permissible, and any evidence discovered will be inadmissible. An inspection may have a dual purpose (both administrative and criminal) so long as the primary purpose is administrative.

#### 2) Scope

The scope of an inspection must reflect its purpose. If the purpose is broad (general security, readiness, fitness for duty) then the intrusion may be broad (unroll sleeping bags, check inside pockets, unlock containers). If the purpose of the inspection is narrow (for example, only to check helmet accountability), then one cannot inspect beyond that purpose.

#### 3) Subterfuge rule

An inspection may not be used as a subterfuge for a search. This normally takes place when a commander “feels” an individual has contraband in his possession or living area but lacks sufficient information to amount to probable cause, and uses an “inspection” to search that person for the contraband. Evidence discovered during an improper inspection usually is not admissible for court-martial (although technically admissible at an Article 15, commanders should be aware that if a Soldier refuses Article 15, there may not be enough evidence to prove a crime at a court-martial). If (1) an inspection immediately follows a report of a specific offense and was not previously scheduled, or (2) specific persons are targeted, or (3) specific persons are subjected to substantially different intrusions, then the government must show by clear and convincing evidence that the primary purpose of the examination was administrative, and that the inspection was not a ruse for an illegal criminal search. The commander’s testimony is crucial to this issue.

### *b. Health and Welfare Inspections*

The most common type of inspection is a commander’s inspection of the unit to protect the health and welfare of the unit’s Soldiers. The primary purpose of such an inspection must be administrative. Commanders should ensure that the scope of the inspection is consistent with the purpose and that everyone is treated alike. For example, if one Soldier’s wall locker is inspected

with “extra care” during a health and welfare inspection, the inspection will likely be found to be an unlawful subterfuge for a criminal search.

### *c. Drug Dogs*

A commander conducting a health and welfare inspection may use a drug detector dog to enhance the senses of individuals conducting the inspection. Drug detector dogs may be used to inspect barracks, automobiles, and other areas, but as a matter of DA policy, will not be used to inspect persons. Drug dogs may not sniff individual Soldiers or formations. When a request is made for a handler and dog to go to a particular unit, the commander requesting the team should ask the provost marshal about the reliability of the dog and handler. Before the dog is used, the handler should demonstrate the reliability of the dog. The test for reliability consists of certification from an approved training course, the training and utilization alert record, and performance demonstrated to the commander.

### *d. Lost Weapons Lock-downs*

The commander has the right to conduct an inspection for weapons or ammunition after a unit has been firing or has found a weapon missing. The commander or designated representatives may inspect all persons who were on the range and others who were in a position to steal the weapon, and their barracks and private automobiles. Commanders should exercise caution and ensure the inspection is conducted consistent with the primary purpose test and all Soldiers are treated alike.

### *e. Gate Inspections*

A gate inspection is another form of an administrative inspection. An installation commander may authorize gate inspections to check drivers’ licenses and vehicle registrations, deter drug traffic, reduce DWI incidents, prevent terrorist attacks, deter larcenies, or any other legitimate administrative purposes. Inspections may include all vehicles, or only those designated by the commander, such as every tenth vehicle.

#### **1) Written guidance**

The installation commander must issue written instructions defining the purpose (e.g. security, drugs, or and DWIs), times, locations, and methods for gate inspections. It is important to limit the discretion of the gate guards conducting the inspection. Some discretion to consider traffic patterns is permissible so long as it is provided by the written guidance.

#### **2) Notice**

All persons must receive notice in advance that they are subject to inspection upon entry, while within the confines, and upon departure from the installation. A warning sign or visitor’s pass are common ways to give notice.

#### **3) Drug dogs / Technological Aids**

Metal detectors, drug dogs, and other technological aids may be used during gate inspections.

#### **4) Civilian Employees**

Civilian employees may be entitled to overtime pay when their working conditions are affected by gate inspection delays. Check the local collective bargaining agreement to gauge this impact.

#### **5) Entry inspections**

Civilians entering the installation may only be inspected with their consent. If they refuse to consent, they should be denied access to the installation. Soldiers may be ordered to comply with an inspection, and may be inspected over their objection, using reasonable force, if necessary.

#### **6) Exit inspections**

Civilians exiting the installation may be inspected over their objection, using reasonable force if necessary. Civilians who refuse to comply with an exit inspection should be informed of possible administrative sanctions (loss of post driving privileges, bar letter). Immediately notify the installation commander if this happens. If contraband is found, detain the civilians and notify the local civilian police. The standard for exit inspections for Soldiers is the same as for entry inspections; they may be ordered to submit to an inspection and reasonable force may be used if necessary.

### ***f. Inventories***

#### **1) General**

A commander is required to conduct an inventory of a Soldier's property when the Soldier is AWOL, admitted to the hospital, or on emergency leave. See para. 12-14, AR 700-84, Issue and Sale of Personal Clothing (18 Nov 2004). The commander or a designated representative should also inventory the property of an individual who has been placed in military or civilian confinement. See para. 10-8, AR 190-47, The U.S. Army Correctional System (15 Jun 2006). If the person conducting the inventory discovers items that would aid in a criminal prosecution, those items may be seized and used as evidence.

#### **2) Automobiles**

Under some circumstances, automobiles may also be inventoried. When a person is arrested for DWI or for some other offense which requires transportation to the MP station, the person's vehicle may be secured. If the vehicle is impounded, it may be inventoried. If a person is arrested for DWI just as he pulls into his quarters' parking lot, there is no reason to impound the vehicle. But if the person is arrested on an outer road of the post where there is a possibility of vandalism, the vehicle may be impounded and inventoried.

## **E. APPREHENSIONS**

### **1. Contacts and Stops and Apprehensions**

#### *a. Contacts*

Officers, NCOs, and MPs may initiate “contact” with persons in any place they are lawfully situated. Generally, such contacts are not “apprehensions” subject to the Fourth Amendment. Most contacts do not result from suspicion of criminal activity. Examples of lawful contacts include questioning witnesses to crimes and warning pedestrians that they are entering a dangerous neighborhood. These types of contacts are entirely reasonable, permissible, and within the normal activities of law enforcement personnel and commanders. They are not detentions in any sense.

#### *b. Stops*

An officer, NCO, or MP who reasonably suspects that a person has committed, is committing, or is about to commit a crime has the obligation and authority to stop that person. Both pedestrians and occupants of vehicles may be stopped. If the person is a suspect and is to be questioned, Article 31 warnings should be read. The stop must be based on more than a hunch. The official making the stop should be able to state specific facts to support the decision to stop an individual. If the individual making the stop reasonably suspects the stopped person is armed and dangerous, they may frisk or pat down the person for weapons.

#### *c. Apprehensions*

Arrests in the military are called apprehensions. Any officer, noncommissioned officer, or military policeman may apprehend individuals when there is probable cause to apprehend. Generally, a person is apprehended when he or she is not free to leave. The person making the apprehension should identify himself or herself and tell the suspect he or she is under apprehension. The suspect should also be told the reason for the apprehension and read his or her Article 31 rights, preferably from a rights warning card, as soon as practicable. If the suspect resists apprehension he or she may be prosecuted for resisting apprehension or disobeying an order. Civilians may be detained until military or civilian police arrive.

### **2. Probable Cause to Apprehend**

A person may be apprehended only if there is probable cause that the person has committed a crime. Probable cause to apprehend is a common sense appraisal based on all of the facts and circumstances present. An example of probable cause to apprehend is when you or some other reliable person has seen an individual commit a violation of the UCMJ, such as using marijuana, assaulting someone, breaking another’s property, or being drunk and disorderly.

### **3. Arrest Warrants**

Generally, if there is probable cause, no authorization to apprehend (arrest warrant) is required in the military. There is one important exception, however; that is when you apprehend someone in a “private dwelling,” such as on-post family quarters, or any off-post quarters. If

the person to be apprehended is in a “private dwelling,” the apprehending officer must obtain authorization to make the apprehension from a military magistrate or the commander with authority over the private dwelling (usually the installation commander). Barracks and field encampments are not considered private dwellings; therefore, no special authorization is needed to apprehend someone there. Also, to apprehend a person at off-post quarters requires coordination with civilian authorities and may require an arrest warrant from a civilian judge.

## **F. URINALYSIS TESTS**

### **1. Use of Test Results**

There are four kinds of urine tests: inspections, probable cause tests, consent tests, and fitness-for-duty tests. Results from inspection, probable cause, and consent urine tests may be used for Article 15, court-martial and administrative separation purposes. The results of a fitness-for-duty test may not be used as a basis for an Article 15 or court-martial. In addition, a positive fitness-for-duty test result may not be used in an administrative separation action unless the Soldier receives an honorable discharge.

*Command-directed.* Be wary of the term “command-directed” urinalysis. Any urine test ordered by the commander (inspection, probable cause, fitness-for-duty) is “command-directed.” The ability to use the test results for UCMJ or separation purposes depends on the type of test (inspection, probable cause, consent), not on whether or not it is labeled “command-directed.” A fitness-for duty test is normally “command-directed,” but a positive result may not be used for UCMJ purposes.

### **2. Urinalysis inspections**

#### ***a. Unit integrity***

A unit urinalysis test is merely another form of inspection. All of the Soldiers in a unit may be tested or Soldiers may be “randomly” selected, usually based on the final digit of their social security number or DOD identification number, for testing. Alternatively, a portion of the unit (platoon, section, squad) may be tested.

#### ***b. Battalion Prevention Leader***

When the government loses a urinalysis case it is rarely due to laboratory errors. Army urine testing laboratories are now widely regarded as the models for comparison and employ the most stringent scientific testing equipment and techniques. When the government loses a urinalysis case or decides not to prosecute one, it is primarily due to problems at the unit level, usually with the chain of custody. Many of these problems stem from the Battalion Prevention Leader. If a commander takes a Soldier who cannot perform adequately as a squad leader and makes that Soldier the Battalion Prevention Leader, it is likely that there will be problems.

### **3. Probable cause urine tests**

Probable cause urine tests follow the same rules as other probable cause searches. If, under the totality of the facts and circumstances, a commander has a reasonable belief that a Soldier has used drugs, then he may order the Soldier to provide a urine sample. The results of that test are admissible at court-martial or administrative hearing. Common examples of probable cause urine tests are (1) when drugs are discovered on a Soldier's person, car, wall locker or field gear; and (2) when a Soldier has been observed using drugs.

### **4. Consent urine tests**

#### ***a. Consent must be voluntary***

A consent urine test is a form of consent search. No probable cause or authorization is required, but the commander must be able to show that the Soldier voluntarily consented to provide a urine sample and was not coerced by the rank or position of the person requesting the sample. Article 31 rights are not required to prove voluntary consent, but if the Soldier is asked questions about his suspected drug use, then Article 31 rights would be required.

#### ***b. What to do if the Soldier asks questions***

If a Soldier asks the commander, "What are my options?" a new problem arises. In response to the "what are my options" question, the commander should explain the differences between a consent urine test and one ordered by the commander. The results of a consent urine test may be the basis for an Article 15, court-martial or administrative elimination. The results of a fitness-for-duty urine test may not. If the Soldier understands these differences and nevertheless consents, the consent will probably be viewed as voluntary.

#### ***c. Consent as a back-up***

If a commander has probable cause to order a urine test, he may still request a consent sample as a precautionary alternative. If the Soldier asks "what are my options" the commander should explain that the results of a consent urine test are admissible and, if the Soldier refuses to consent, the commander may order a urine test. However, the commander should also tell the Soldier that if the commander orders the test, the results may not be admissible if it is later determined that the commander did not have probable cause. In this case, the test results may not be used for Article 15 or court-martial purposes and may only be used in an administrative separation if the Soldier receives an honorable discharge.

### **5. Fitness-for-duty urine tests**

#### ***a. Results inadmissible***

The most recent version of AR 600-85, Army Substance Abuse Program provides that a commander may order a urine test to determine the "fitness-for-duty" of any Soldier when the commander observes, suspects, or otherwise becomes aware that the Soldier may be affected by illegal drug use. The results of such a fitness-for-duty test are inadmissible for court-martial purposes. They are inadmissible because AR 600-85 balances the needs of the military with the



individual privacy rights of the Soldier and will not allow test results based on mere suspicion to be used for punishment. A commander can order a Soldier to provide a urine sample based solely on mere suspicion; but because this is not based upon probable cause, an inspection, or consent, the results may only be used to refer the Soldier for rehabilitative treatment or separate him from the service with an honorable discharge. Before a commander orders a Soldier to provide a urine sample, the commander should understand the admissibility of the urinalysis results to prevent later confusion when the results come back.

### ***b. Suspicion is less than probable cause***

Reasonable suspicion sufficient to order a fitness for duty test must be based upon facts which a commander can articulate. However, it need not amount to probable cause.

## **6. Confirmatory testing**

One of the most difficult cases that a commander must handle is when a senior NCO, particularly one who is a “good Soldier,” tests positive for drug use. The Soldier may deny drug use and challenge the validity of the testing procedures at the unit and the lab, often focusing on minor irregularities that do not invalidate the results. A commander has a few options to resolve these dilemmas.

### ***a. Polygraphs***

Offer the Soldier the opportunity to take a polygraph. A Soldier may not be required to take a polygraph, but if he consents to take one, the local CID polygrapher can be invaluable in distinguishing those who did not use drugs from those who only swear that the urine test was wrong. Few of these “wronged” Soldiers will be willing to take a polygraph, and many of those who do will admit to the drug use after failing the polygraph test. The polygraph results are inadmissible at a court-martial, but they can be used to help a commander decide the proper disposition of a case.

### ***b. Blood and DNA testing***

When a Soldier alleges that his or her urine sample was switched with someone else’s, the sample can be tested to ensure that the blood type of the positive sample is the same as the Soldier’s blood type. This method does not eliminate any possibility of error, but it may help determine whether the positive urine sample was, in fact, the Soldier’s sample. DNA found in the urine can also be compared with the Soldier’s DNA to confirm that the positive sample was submitted by the Soldier. Unless there is evidence that the Soldier’s urine sample was switched, the government is not required to perform blood or DNA testing.

### ***c. Hair testing***

If a Soldier denies ever using drugs, his or her hair may be tested to confirm this allegation. Since traces of drugs are deposited in a drug user’s hair as the hair grows, a hair sample will provide a history of an individual’s drug use. Although hair analysis may be unable to detect a single use of drugs, it will be able to detect chronic use. The government is generally not required to pay for hair testing.

# Appendix A

## Commander's Guide To Articulate Probable Cause To Search

1. Probable cause to authorize a search exists if there is a reasonable belief, based on facts, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion. Witness or source should be asked three questions:

### **a. What is where and when? Get the facts!**

1) Be specific: how much, size, color, etc. (2) Is it still there (or is information stale)?

a) If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.

b) If the witness saw large quantity of marijuana in barracks room one day ago, it is probably still there; the information is not stale.

### **b. How do you know? Which of these apply:**

1) "I saw it there." Such personal observation is extremely reliable.

2) "He [the suspect] told me." Such an admission is reliable.

3) "His [the suspect's] roommate/wife/friend told me." This is hearsay. Get details and call in source if possible.

4) "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.

### **c. Why should I believe you? Which of these apply:**

1) Witness is a good, honest Soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

2) Witness has given reliable information before; he has a good track record (CID may have records).

3) Witness has no reason to lie.

4) Witness has truthful demeanor.

5) Witness made statement under oath. ("Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?")

6) Other information corroborates or verifies details.

7) Witness made admission against own interests.

2. The determination that probable cause exists must be based on facts, not only on the conclusion of others. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented. Make a written note of the reasons why you authorized the search in case authorization becomes an issue later.
3. Talk to your legal advisor!

## Appendix B

# Drug Detection Times

Time periods which drugs and drug metabolites remain in the body at levels sufficient to detect are listed below. Source: FTDTL, Ft Meade, (301) 677-7086/7085.

Drug	Approximate Retention Time
THC (marijuana)	1-5 days*
Cocaine	2-4 days
Amphetamine / Methamphetamine	3 days (ecstasy)
Barbiturates	1-2 days
Opiates	1-3 days
PCP	3 days
LSD	12 hours – 3 days**
Synthetic Cannabinoids	1-3 days
Steroids	3 days or longer***

\* Longer than 5 days indicates chronic or heavy use.

\*\* LSD is only tested if command makes a specific request through AFIP.

\*\*\* Length of detection determined by type and duration of use. Testing is only done at UCLA; you must make a specific request to that lab to test for steroids.

Note – Only 10-50% of submitted samples are tested for PCP, Oxycodone/Oxymorphone, and Codeine/Morphine.



# 8

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## Self-Incrimination, Confessions, and Rights Warning

### A. SOURCES OF THE RIGHTS

A Soldier's privilege against self-incrimination and right to counsel come from four sources:

#### 1. The Fifth Amendment

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

#### 2. Uniform Code of Military Justice

##### *a. Article 31(a), UCMJ*

"No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

##### *b. Article 31(b), UCMJ*

"No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him . . ."

#### 3. The Sixth Amendment

"In all criminal prosecutions, the accused shall . . . enjoy the right to have the Assistance of Counsel for his defense."

#### 4. Army Regulations

##### *a. AR 15-6 – Investigations*

No military witness or respondent will be compelled to incriminate himself (see Article 31, UCMJ).

No witness or respondent not subject to the UCMJ will be deprived of his rights under the Fifth Amendment.

##### *b. AR 27-10 - Nonjudicial Punishment*

The imposing commander will ensure that the Soldier is notified of his right to remain silent and his right to consult with counsel.

### *c. AR 635-200 - Enlisted Personnel Separations*

Article 31, UCMJ, applies to board procedures.

This list of regulations is not exhaustive; other regulations also impose a rights warning requirement. Always review regulations governing a specific type of investigation or proceeding to decide if rights warnings are required.

## **B. THE RIGHTS WARNING DECISION**

How do you decide if you must actually read the rights warnings? The answer is: whenever you intend to conduct official questioning of a suspect or accused, you must read a rights warning. Each element of this standard is discussed below:

### **1. Official**

The first part of the rule requires rights warnings when the questioner acts in an official capacity. Law enforcement personnel and commanders almost always act in an official capacity. In contrast, when a Soldier brags about criminal conduct in response to a friend's question, those statements may be used against the Soldier because the friend is not acting in an "official" capacity and is not required to read rights warnings to the Soldier. The Soldier's act of bragging indicates that he or she did not feel pressured or coerced into talking about the crime, so the rationale underlying the rights warning requirement does not apply.

### **2. Questioning**

Questioning is a broad term and includes any formal or informal words or actions that are designed to elicit (or reasonably likely to result in) an incriminating response. See Mil. R. Evid. 305. In your official capacity, if you are trying to get the Soldier to tell you something that you can use against him or her, you are questioning the Soldier. For example, it is questioning if you bring a Soldier suspected of stealing a rifle into your office and attempt to get a response by showing the Soldier the recently recovered stolen weapon.

It is not questioning when a Soldier volunteers information or spontaneously gives information without any "words or actions reasonably likely to elicit an incriminating response" from the commander. If you simply listen to the Soldier, there is no requirement to stop the Soldier and advise him or her of their rights. If you want to question the Soldier after any volunteered information, then you must give rights warnings.

### **3. Suspect or accused**

You do not have to advise all Soldiers of their rights before questioning them. Witnesses, who are not suspected or accused of offenses, need not be advised of any privilege against self-incrimination, even though you are conducting official questioning. A Soldier becomes a suspect when you believe, or have enough information such that you reasonably should believe that the Soldier committed an offense. Because of this "reasonableness" standard, you cannot avoid rights warnings by simply saying that you did not suspect the Soldier being questioned. A Soldier becomes an "accused" after court-martial charges have been preferred against him.

## 4. Summary

When you officially question a suspect or accused, you must read the rights warnings prior to the questioning. If you must re-interview the suspect, you should complete another rights advisement before questioning, and ensure defense counsel is present if necessary.

## C. RIGHTS WARNINGS

Rights warnings should be read verbatim from DA Form 3881, Rights Warning Procedure/Waiver Certificate (attached below) or GTA 1966, How to Inform Suspect/Accused Persons of Their Rights (Rights Warning Card) (attached below).

## D. VOLUNTARY WAIVER OF RIGHTS

After reading the rights warnings to the suspect, ask these questions:

- Do you understand your rights? (Yes)
- Do you want a lawyer? (No)
- Are you willing to make a statement? (Yes)

If the answers in the parentheses are given, the suspect has waived his or her rights and you may proceed with your interview. If the suspect does not understand his or her rights, you should explain the rights further; if he or she wants to remain silent or see an attorney, you should stop the interview, make a note of the request, and call your trial counsel. Be sure to specifically note whether the suspect wants to remain silent, have an attorney, or both. Different rules apply to each request.

## E. PRESENCE OF COUNSEL

In certain circumstances, defense counsel must be present before questioning a Soldier about misconduct. For example, if charges have been preferred against a Soldier, then defense counsel must be present before questioning the Soldier about the charged offenses. However, if the questioning focuses on uncharged misconduct, defense counsel may not have to be present. Even if no charges are preferred, if the Soldier in a previous custodial interrogation requests to consult with a lawyer, then normally a defense counsel must be present before conducting a subsequent interrogation. This area can be very complicated; therefore, contact your trial counsel before questioning a Soldier who has had charges preferred against him, or has previously asked for a lawyer.

## F. REMEDY: EXCLUSION

If the questioning official violates the voluntariness doctrine; the requirement to give rights warnings; the rules on obtaining a waiver; or, the rules about the presence of counsel, then any statement obtained from a suspect that might have been used against the suspect at trial will be excluded from evidence. Any evidence derived from the statement must also be excluded. For example, if the statement told investigators where a stolen weapon was hidden, and the weapon

was recovered based upon that statement, then the weapon itself would also have to be excluded if the statement was improperly obtained. This can be catastrophic, but may not always terminate the government's ability to prosecute the case. If the trial counsel can prove the case with evidence that was obtained independently of the inadmissible statement, then the prosecution may go forward.

**HOW TO INFORM SUSPECT/ACCUSED  
PERSONS OF THEIR RIGHTS**

*Use this card only when DA Form 3881, Rights Warning Procedure/Waiver Certificate, cannot be used. Complete DA Form 3881 as soon as possible.*

**VERBAL RIGHTS WARNING**

*Inform the person of your official position, the nature of the offense(s), and the fact that he/she is a suspect/accused. Then read him/her the following-do not paraphrase; read verbatim.*

"BEFORE I ASK YOU ANY QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS."

1. "YOU DO NOT HAVE TO ANSWER MY QUESTIONS OR SAY ANYTHING."
2. "ANYTHING YOU SAY OR DO CAN BE USED AS EVIDENCE AGAINST YOU IN A CRIMINAL TRIAL."
3. (For personnel subject to the UCMJ) "YOU HAVE THE RIGHT TO TALK PRIVATELY TO A LAWYER BEFORE, DURING, AND AFTER QUESTIONING AND TO HAVE A LAWYER PRESENT WITH YOU DURING QUESTIONING. THIS LAWYER CAN BE A CIVILIAN YOU ARRANGE FOR AT NO EXPENSE TO THE GOVERNMENT OR A MILITARY LAWYER DETAILED FOR YOU AT NO EXPENSE TO YOU, OR BOTH."

(For civilians not subject to the UCMJ) "YOU HAVE THE RIGHT TO TALK PRIVATELY TO A LAWYER BEFORE, DURING, AND AFTER QUESTIONING AND TO HAVE A LAWYER PRESENT WITH YOU DURING QUESTIONING. THIS LAWYER CAN BE ONE YOU ARRANGE FOR AT YOUR OWN EXPENSE, OR IF YOU CANNOT AFFORD A LAWYER AND WANT ONE, A LAWYER WILL BE APPOINTED FOR YOU BEFORE ANY QUESTIONING BEGINS."

4. "IF YOU ARE NOW WILLING TO DISCUSS THE OFFENSE(S) UNDER INVESTIGATION, WITH OR WITHOUT A LAWYER PRESENT, YOU HAVE A RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME, OR SPEAK PRIVATELY WITH A LAWYER BEFORE ANSWERING FURTHER, EVEN IF YOU SIGN A WAIVER CERTIFICATE."

*Make certain the suspect/accused fully understands his/her rights, then say:*

"DO YOU WANT A LAWYER AT THIS TIME?"

"AT THIS TIME, ARE YOU WILLING TO DISCUSS THE OFFENSE(S) UNDER INVESTIGATION AND MAKE A STATEMENT WITHOUT TALKING TO A LAWYER AND WITHOUT HAVING A LAWYER PRESENT WITH YOU?"

(See DA Form 3881 for more detailed instructions.)  
Department of the Army Graphic Training Aid  
Supersedes GTA 19-6-5, July 1965

GTA 19-06-006, June 1991

Fig. 8-1 - Rights Warning Card



**RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE**

For use of this form, see AR 190-30; the proponent agency is PMG

**DATA REQUIRED BY THE PRIVACY ACT**

**AUTHORITY:** Title 10, United States Code, Section 3012(g)  
**PRINCIPAL PURPOSE:** To provide commanders and law enforcement officials with means by which information may be accurately identified.  
**ROUTINE USES:** Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.  
**DISCLOSURE:** Disclosure of your Social Security Number is voluntary.

1. LOCATION	2. DATE	3. TIME	4. FILE NO.
5. NAME (Last, First, MI)		8. ORGANIZATION OR ADDRESS	
6. SSN	7. GRADE/STATUS		

**PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE****Section A. Rights**

The investigator whose name appears below told me that he/she is with the United States Army \_\_\_\_\_ and wanted to question me about the following offense(s) of which I am suspected/accused: \_\_\_\_\_

Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:

- I do not have to answer any question or say anything.
- Anything I say or do can be used as evidence against me in a criminal trial.
- (For personnel subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.

- or -

(For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. I understand that this lawyer can be one that I arrange for at my own expense, or if I cannot afford a lawyer and want one, a lawyer will be appointed for me before any questioning begins.

- If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.

5. COMMENTS (Continue on reverse side)

**Section B. Waiver**

I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.

WITNESSES (If available)		3. SIGNATURE OF INTERVIEWEE
1a. NAME (Type or Print)	b. ORGANIZATION OR ADDRESS AND PHONE	4. SIGNATURE OF INVESTIGATOR
2a. NAME (Type or Print)		
b. ORGANIZATION OR ADDRESS AND PHONE		6. ORGANIZATION OF INVESTIGATOR

**Section C. Non-waiver**

- I do not want to give up my rights  
 I want a lawyer  I do not want to be questioned or say anything

2. SIGNATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED

DA FORM 3881, NOV 1989

EDITION OF NOV 84 IS OBSOLETE.

APD LC v2.02ES

Fig. 8-2 - Rights Warning /Waiver Certificate (Front Page)

PART II - RIGHTS WARNING PROCEDURE	
THE WARNING	
<p>1. WARNING - Inform the suspect/accused of:</p> <ol style="list-style-type: none"> <li>Your official position.</li> <li>Nature of offense(s).</li> <li>The fact that he/she is a suspect/accused.</li> </ol> <p>2. RIGHTS - Advise the suspect/accused of his/her rights as follows: "Before I ask you any questions, you must understand your rights."</p> <ol style="list-style-type: none"> <li>"You do not have to answer my questions or say anything."</li> <li>"Anything you say or do can be used as evidence against you in a criminal trial."</li> <li>(For personnel subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer</li> </ol>	<p>can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."</p> <p>- or -</p> <p>(For civilians not subject to the UCMJ) You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins."</p> <ol style="list-style-type: none"> <li>"If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."</li> </ol> <p>Make certain the suspect/accused fully understands his/her rights.</p>
THE WAIVER	
<p>"Do you understand your rights?" (If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)</p> <p>"Have you ever requested a lawyer after being read your rights?" (If the suspect/accused says "yes," find out when and where. If the request was recent (i.e., fewer than 30 days ago), obtain legal advice whether to continue the interrogation. If the suspect/accused says "no," or if the prior request was not recent, ask him/her the following question.)</p>	<p>"Do you want a lawyer at this time?" (If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)</p> <p>"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?" (If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect/accused says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)</p>
SPECIAL INSTRUCTIONS	
<p>WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.</p> <p>IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.</p> <p>PRIOR INCRIMINATING STATEMENTS:</p> <ol style="list-style-type: none"> <li>If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions.</li> </ol>	<ol style="list-style-type: none"> <li>If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.</li> </ol> <p>NOTE: If 1 or 2 applies, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.</p> <p>WHEN SUSPECT/ACCUSED DISPLAYS INDECISION ON EXERCISING HIS OR HER RIGHTS DURING THE INTERROGATION PROCESS: If during the interrogation, the suspect displays indecision about requesting counsel (for example, "Maybe I should get a lawyer."), further questioning must cease immediately. At that point, you may question the suspect/accused only concerning whether he or she desires to waive counsel. The questioning may not be utilized to discourage a suspect/accused from exercising his/her rights. (For example, do not make such comments as "If you didn't do anything wrong, you shouldn't need an attorney.")</p>
COMMENTS (Continued)	

REVERSE OF DA FORM 3881

APD LC v2.02ES

Fig. 8-3 - Rights Warning /Waiver Certificate  
(Back Page)

## Punitive Articles of the UCMJ

Art.	Title
<b>GENERAL PROVISIONS</b>	
77	Principals
78	Accessory after the fact
79	Conviction of offense charged, lesser included offenses, and attempts
<b>INCHOATE OFFENSES</b>	
80	Attempts
81	Conspiracy
82	Soliciting Commission of Offenses
<b>PLACE OF DUTY OFFENSES</b>	
83	Malingering
84	Breach of Medical Quarantine
85	Desertion
86	Absence without leave (AWOL)
87	Missing movement; Jumping from a Vessel
87a	Resistance, Flight, Breach of Arrest, and Escape
87b	Offenses Against Correctional Custody and Restriction
<b>AUTHORITY OFFENSES</b>	
88	Contempt toward officials
89	Disrespect toward / assault of a superior commissioned officer
90	Willfully disobeying a superior commissioned officer
91	Insubordinate conduct toward a Noncommissioned, petty officer or warrant officer
92	Failure to obey order or regulation

Art.	Title
93	Cruelty and maltreatment
93a	Prohibited activities with a military recruit/trainee by a person in a position of special trust
94	Mutiny and sedition
<b>ENEMY/POST OFFENSES</b>	
95	Offenses by Sentinel or Lookout
95a	Disrespect toward sentinel or lookout
96	Releasing prisoner without proper authority; drinking with a prisoner
97	Unlawful detention
98	Misconduct as a prison
99	Misbehavior before the enemy
100	Subordinate compelling surrender
101	Improper use of countersign
102	Forcing a safeguard
103	Spies
103a	Espionage
103b	Aiding the Enemy
<b>FALSITY OFFENSES</b>	
104	Public records offenses
104a	Fraudulent enlistment, appointment, or separation
104b	Unlawful enlistment, appointment, or separation
105	Forgery
105a	False or unauthorized pass offense
106	Impersonation of an officer, NCO, petty officer, agent, or official

Art.	Title
106a	Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button
107	False official statements; false swearing
107a	Parole violation
<b>PROPERTY OFFENSES</b>	
108	Loss / damage / destruction / wrongful disposition of military property
108a	Captured or Abandoned Property
109	Waste / spoilage / destruction of non-military property
109a	Mail matter; wrongful taking, opening, etc.
<b>VESSEL / VEHICLE OFFENSES</b>	
110	Improper hazarding of a vessel or aircraft
111	Leaving the scene of a vehicle accident
<b>INTOXICATION / DRUG OFFENSES</b>	
112	Drunkenness or other incapacitation offenses
112a	Wrongful use, possession, etc., of controlled substances
113	Drunken / reckless operation of a vehicle, etc.
<b>ENDANGERMENT / THREATENING OFFENSES</b>	
114	Endangerment offenses
115	Communicating Threats
116	Riot or breach of peace
117	Provoking Speech or Gestures
117a	Wrongful broadcast / distribution of inmate images
<b>MURDER / MANSLAUGHTER / CHILD ENDANGERMENT</b>	
118	Murder

Art.	Title
119	Manslaughter
119a	Death or injury of an unborn child
119b	Child endangerment
<b>SEXUAL OFFENSES</b>	
120	Rape and sexual assault generally
120a	Mails; deposit of obscene matter
120b	Rape and sexual assault of a child
120c	Other sexual misconduct (Indecent viewing / recording / broadcasting; forcible pandering; indecent exposure)
<b>LARCENY / FRAUD OFFENSES</b>	
121	Larceny and wrongful appropriation
121a	Fraudulent use of credit cards, debit cards, and other access devices
121b	False pretenses to obtain services
122	Robbery
122a	Receiving Stolen Property
123	Offenses concerning government computer
123a	Making / Drawing / Uttering check, draft, or order without sufficient funds.
124	Frauds against the United States
124a	Bribery
124b	Graft
<b>OFFENSES AGAINST PERSONS</b>	
125	Kidnapping
126	Arson; burning property with intent to defraud
127	Extortion
128	Assault
128a	Maiming
128b	Domestic Violence
129	Burglary; unlawful entry

Art.	Title
130	Stalking
<b>OBSTRUCTION OFFENSES</b>	
131	Perjury
131a	Subornation of Perjury
131b	Obstruction of Justice
131c	Misprision of a serious offense
131d	Wrongful refusal to testify
131e	Prevention of authorized seizure of property
131f	Noncompliance with procedural rules
131g	Wrongful interference with an adverse administrative proceeding
132	Retaliation
<b>OFFENSES OF GENERAL APPLICATION</b>	
133	Conduct unbecomg an officer and a gentleman
134	General Article

Art.	Title
	<b>Enumerated Article 134 offenses:</b>
	<ul style="list-style-type: none"> <li>• Animal Abuse</li> <li>• Bigamy</li> <li>• Check; worthless making and uttering by dishonorably failing to maintain funds</li> <li>• Child pornography</li> <li>• Debt; dishonorably failing to pay</li> <li>• Disloyal Statements</li> <li>• Disorderly conduct; drunkenness</li> <li>• Extramarital sexual conduct</li> <li>• Firearm; discharging through negligence</li> <li>• Fraternalization</li> <li>• Gambling with subordinate</li> <li>• Homicide, negligent</li> <li>• Indecent conduct</li> <li>• Indecent language</li> <li>• Pandering and prostitution</li> <li>• Self-injury with intent to avoid service</li> <li>• Stragglng</li> </ul>



# Urinalysis

## A. SCIENTIFIC ASPECTS OF URINALYSIS PROGRAM

### 1. What Urinalysis Test Proves

Urine test proves only past use; it proves that drug or drug metabolites (waste products) are in the urine. Urine test does not prove: impairment; single or multiple usages; method of ingestion; or, knowing ingestion.

### 2. Drugs Tested

- Marijuana (THC metabolite) and Cocaine (BZE metabolite).
- Other drugs tested (some only upon request):
- LSD – removed from testing in 2006. Still screened periodically under the “prevalence program.”
- Opiates (morphine, codeine, 6-MAM metabolite of heroin)
- PCP
- Amphetamines; including designer amphetamines MDMA, MDA, MDEA
- Oxymorphone/Oxycodone
- Anabolic steroids – testing only done by UCLA.

### 3. Cut-off Levels

Each sample is first subjected to “initial screening.” If initial screening shows the presence of drug metabolites above the DoD-established “cut off” levels, that sample is subject to confirmation testing. Samples which give test results below the cut-off levels are reported as negative. A sample is reported as positive only if it gives test results above the cut-off level during both the screening (every positive screened twice) and the confirming test. Source DoDI 1010.16, Ch. 1. Cut-off levels for different tests are in the tables below.

Cut-off levels for screening tests (EMIT and IA)	
Drug	ng/ml
Amphetamine/Methamphetamine	500
Benzodiazapines	200
Designer Amphetamines (MDMA, MDA, MDEA)	500
Cocaine (BZE)	150

Cut-off levels for screening tests (EMIT and IA)	
Drug	ng/ml
Marijuana (THC)	50
Synthetic Cannabinoids	10

Cut-off Levels for Confirmation Test (GC/MS)			
Initial Pre-sumptive Postive Test	Confirmation Drug / Metabolite	Cutoff (ng/ml)	Reported Drug Use
Amphetamines	Amphetamine	100	d-Amphetamine
	Methamphetamine	100	d-Methamphetamine
Designer Amphetamines	Methylenedioxymethamphetamine	500	MDMA
	Methylenedioxyamphetamine	50	MDA
Benzodiazepines	Lorazepam	100	Lorazepam
	Nordiazepam	100	Nordiazepam
	Oxazepam	100	Oxazepam
	Temazepam	100	Temazepam
	a-hydroxy-alprazolam	100	a – hydroxyl - alprazolam
Cannabinoids	Tetrahydrocannabinol-carboxylic acid	15	THC
Synthetic Cannabinoids	Synthetic Cannabinoid Compounds		
	JWH-018-N-pentanoic acid	1.0	SYCAN
	JWH-073-N-butanoic acid	1.0	SYCAN
	UR-144-N-pentanoic acid	1.0	SYCAN
	5-fluoro-PB22-3-carboxyindole	1.0	SYCAN
	MAM-2201-N-pentanoic acid	1.0	SYCAN
	AB-Chminaca metabolite	1.0	SYCAN
	AB-Fubinaca metabolite	1.0	SYCAN
AB-Pinaca metabolite	1.0	SYCAN	
Cocaine Metabolites	Benzoylcegonine	100	Cocaine
Opiates	Morphine	4,000	Morphine
Codeine/Morphine	Codeine	2,000	Codeine



Cut-off Levels for Confirmation Test (GC/MS)			
Initial Pre-sumptive Postive Test	Confirmation Drug / Metabolite	Cutoff (ng/ml)	Reported Drug Use
Heroin			
6-monacetyl-morphine	6-monacetylmorphine	100	Heroin
Opioid			
Oxycodone/	Oxycodone	100	Oxycodone
Oxymorphone	Oxymorphone	100	Oxymorphone
Hydrocodone/	Hydrocodone	100	Hydrocodone
Hydromorphone	Hydromorphone	100	Hydromorphone

#### 4. Drug Detection Times

*a. Time periods which drugs and drug metabolites remain in the body at levels sufficient to detect are listed below:*

Drug	Approx. Retention Time
<b>Marijuana (THC) (Half-life 36 hours)</b>	
Acute dosage (1-2 joints)	2-3 days
Marijuana (eaten)	1-5 days
Moderate smoker (4 times per week)	5 days
Heavy smoker (daily)	10 days
Chronic smoker	14-18 days (may exceed 20) days)
Cocaine (BZE) (Half-life 4 hours)	2-4 days
Amphetamines	1-2 days (2-4 days if heavy) use)
<b>Barbiturates</b>	
Short-acting (e.g. Secobarbital)	1 day
Long-acting (e.g. Phenobarbital)	2-3 weeks
Opiates	2 days
Phencyclidine (PCP)	14 days

### ***b. Factors which affect retention times***

- Drug metabolism and half-life.
- Donor's physical condition.
- Donor's fluid intake prior to test.
- Donor's method and frequency of ingestion of drug.

### ***c. Detection times may affect***

- Probable cause. Information concerning past drug use may not provide probable cause to believe the Soldier's urine contains traces of drug metabolites, unless the alleged drug use was recent.
- Jurisdiction over reservists. Reservists may not be convicted at a court-martial for drug use unless use occurred while on federal duty.

## **B. COMMANDERS' OPTIONS**

### **1. Courts-Martial**

Court-martial procedures are complex and the Military Rules of Evidence apply. USAR Soldiers must have committed the offense while in a UCMJ Article 2 status for commanders to court-martial.

### **2. Non-judicial Punishment**

Nonjudicial punishment procedures are relatively simple. Military Rules of Evidence do not apply. The burden of proof is beyond a reasonable doubt. USAR Soldiers must have committed the offense while in a UCMJ Article 2 status for commanders to impose non-judicial punishment.

### **3. Administrative Separations**

All Soldiers identified as drug abusers will be processed for administrative separation. AR 600-85, paras. 10-6 and 16-8a(3); see also, AR 635-200, para. 14-12c(2) and AR 135-178, para. 12-1d. "Processed for separation or discharge" means that separation action will be initiated and processed through the chain of command to the separation authority for appropriate action. Commanders may recommend retention or suspension of discharge, if warranted.

## **C. BASIS FOR URINALYSIS TESTING**

### **1. Inspections**

- Urinalysis conducted as a function of command, to ensure the security, military fitness, and good order and discipline, conducted pursuant to MRE 313. AR 600-85, para 3-5 and 4-5.
- If the primary purpose of the urinalysis is to obtain evidence for use in trial or other disciplinary proceedings, it is not an inspection. Mil. R. Evid. 313(b)(2).

## **2. Probable Cause Urinalysis**

- Evidence collected during urinalysis may be admissible in court when there is probable cause “to believe a Soldier possesses an illicit drug [or alcohol] within their body.” AR 600-85, paras. 3-5 and 4-5; Mil. R. Evid. 312(d) and 315.
- A warrant or search authorization may be required.

## **3. Competence for Duty**

- When a Soldier demonstrates uncharacteristic or aberrant behavior a urinalysis may be used to determine competence for duty or need for counseling, rehabilitation or medical treatment. AR 600-85, paras. 3-5 and 4-5; Mil. R. Evid. 312(d) and 315.
- Cannot be used for disciplinary proceedings, but can be used as a basis for separation with honorable characterization of service. AR 600-85, Table 10-1.

## **4. Consent Urinalysis**

- Urinalysis test conducted after receiving lawful, voluntary consent from the Soldier being tested. Mil. R. Evid 314(e).
- Voluntariness is determined by reviewing the totality of the circumstances. Consent is involuntary if commander announces his intent to order the urine test should the accused refuse to consent. Mil. R. Evid. 314(e)(4).

## **5. Medical Urinalysis**

- A urinalysis conducted for a valid medical purpose: emergency treatment, periodic physicals, and as necessary for diagnostic or treatment. Mil. R. Evid. 312(f).
- However, in the Army, most medical tests may only be used for limited purposes. AR 600-85, para. 10-12, and Table 10-1.

## **D. LIMITED USE POLICY**

This policy prohibits the use of some urinalysis results in UCMJ or administrative proceedings. An example is a positive urinalysis result for test taken during the Army Substance Abuse Program (ASAP) by a Soldier who self-referred to the program. AR 600-85, para. 10-12, and Table 10-1.



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# Fraternization and Improper Senior-Subordinate Relationships

## A. REFERENCES

- Manual for Courts-Martial, 2019 Edition
- AR 600-20, Army Command Policy, 6 November 2014

## B. OVERVIEW

The Army's policy regarding senior-subordinate relationships imposes prohibitions on many personal and business relationships between officers and enlisted Soldiers and noncommissioned officers (NCOs) and junior enlisted Soldiers. The policy does, however, permit many relationships in settings such as community-based organizations, church activities, sports events, and family and unit social functions. Violations of the policy may be punishable under the UCMJ, as violations of a lawful general regulation.

For purposes of these provisions, the term "officer" includes both commissioned and warrant officers. When used without a qualifier, the term "enlisted" refers to both noncommissioned officers and junior enlisted Soldiers. The term "noncommissioned officer" refers to Soldiers in the grade of corporal to command sergeant major/sergeant major. The term "junior enlisted Soldier" refers to Soldiers in the grade of private to specialist.

## C. PROHIBITED PERSONAL RELATIONSHIPS

Certain types of relationships between officers and enlisted Soldiers or between noncommissioned officers (NCOs) and junior enlisted Soldiers are automatically prohibited. These types of relationships include dating, shared living accommodations (other than due to operational necessity), engagement in intimate or sexual relationships, ongoing business relationships and gambling. This policy applies to relationships between Army officers and enlisted Army Soldiers or Army NCOs and junior enlisted Soldiers, as well as between Army officers or enlisted and members of other services. If a Soldier is about to be promoted to a rank which would place a previously acceptable relationship into a prohibited category (e.g. junior enlisted to NCO or NCO to warrant officer) the couple must terminate the relationship or marry within one year of the appointment or change of status. There is an exception for Guard and Reserve Soldiers when the relationship exists primarily due to civilian acquaintanceship as long as they are not in an activated status.

The regulation also prohibits relationships between trainees and all permanent party Soldiers (regardless of rank or assignment) as well as between recruits and recruiters. Training commands (e.g. TRADOC, AMEDDC) and the U.S. Army Recruiting Command publish supplemental regulations prohibiting additional conduct.

## **D. PERSONAL RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS**

This policy prohibits all relationships between officers or Soldiers of different rank (whether the relationships are officer-officer, officer-enlisted, or enlisted-enlisted, NOT relationships based on position, e.g. CO and XO where both are O-3s) which result in any of the following effects:

- Compromise, or appear to compromise, the integrity of supervisory authority or the chain of command.
- Cause actual or perceived partiality or unfairness.
- Involve or appear to involve the improper use of rank or position for personal gain.
- Are, or are perceived to be, exploitative in nature.
- Cause an actual or clearly predictable adverse impact on discipline, authority, morale or the command's ability to accomplish its mission.

## **E. BUSINESS RELATIONSHIPS AND GAMBLING**

All business relationships between officers and enlisted Soldiers or NCOs and junior enlisted Soldiers, except for landlord-tenant relationships and one-time business transactions (such as the sale of a car) are prohibited. Furthermore, the policy prohibits the borrowing and lending of money (no de minimis exception), and commercial solicitations, between officers and enlisted Soldiers or NCOs and junior enlisted Soldiers. There is an exception for Guard and Reserve Soldiers when the relationship exists primarily due to civilian employment. Gambling between officers and enlisted personnel or NCO's and junior enlisted Soldiers is strictly prohibited, e.g. an NCAA pool with a monetary buy-in.

## **F. TEAM-BUILDING RELATIONSHIPS**

Social contacts between officers and enlisted Soldiers, or between Soldiers of different ranks, in forums such as community organizations, church activities, sports events, family gatherings, and unit social functions are permitted.

## **G. ENFORCEMENT OF POLICY**

The policy recognizes that commanders are responsible for enforcing the terms and conditions of the policy. It also recognizes, however, that all military personnel share the responsibility for maintaining professional relationships.

### **1. Responsibility of All Soldiers**

While the senior Soldier in a relationship generally is in the best position to terminate or limit the relationship; the policy holds accountable all Soldiers concerned who violate the policy.

## 2. Commanders' Options

Commanders have a wide variety of options at their disposal in addressing violations of the policy. Commanders must carefully consider all of the facts and circumstances in reaching a disposition that is warranted, appropriate and fair while evaluating the minimum action necessary to ensure the needs of good order and discipline are satisfied. These options include, but are not necessarily limited to, the following:

- Counseling.
- Orders to Cease the Prohibited Conduct.
- Verbal or Written Reprimands.
- Reassignment.
- Adverse Evaluation Reports.
- Nonjudicial Punishment.
- Separation from the Army.
- Bar to Reenlistment.
- Denial of Promotion.
- Demotion.
- Court-Martial.

## 3. UCMJ Violations

Violations of the policy as defined in AR 600-20 paras. 4-14 and 4-15 may be punished under Article 92, UCMJ, Failure to obey general order or regulation. If the offender is an officer, the conduct may be punished under Article 134, Fraternalization. Applicable punitive articles under the UCMJ may include:

- Articles 90 & 92: Disobedience of a Lawful Order or Regulation.
- Article 93a: Prohibited Activities with Military Recruit or Trainee by Person in Position of Special Trust.
- Article 133: Conduct Unbecoming an Officer.
- Article 134: Fraternalization.
- Article 134: Extramarital Sexual Conduct.





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# Proper Responses to Reports of Sexual Assault

The DoD policy on sexual assault is found in **Department of Defense Instruction 6495.02**. Army policy on sexual assault is found in **Army Regulation 600-20, Chapter 8**. Here is the policy statement from your senior leaders, found in paragraph 8-2:

*“Sexual assault is a criminal offense that has no place in the Army. It degrades mission readiness by devastating the Army’s ability to work effectively as a team . . . Sexual assault is incompatible with Army values and is punishable under the UCMJ and other Federal and local civilian laws . . . The Army will treat all victims of sexual assault with dignity, fairness, and respect . . . The Army will treat every reported sexual assault incident seriously by following proper guidelines.”*

- A sexual assault report is one of the most sensitive issues that you will have to deal with as a commander. This is especially true if both the victim and the alleged offender are in your unit.
- All commanders must immediately report information about a sexual assault to CID, make sure all notification and reporting requirements are completed, protect sensitive information, and work with CID, the Trial Counsel (TC) and possibly the Special Victim Counsel (SVC) throughout the military justice process.
- The victim’s commander must ensure the safety and well-being of the victim, reserve judgment on the credibility of the report, treat the victim with dignity and respect, and protect the victim from retaliation.
- The accused’s commander must ensure the safety and well-being of the accused, make sure the accused is flagged, understand the accused is innocent until proven guilty, and protect the accused from pretrial punishment and ostracism in the unit.

The Department of Defense (DoD) and the Army are committed to reducing sexual assault incidents, while increasing reporting rates, through a comprehensive policy that includes prevention, training/education, victim advocacy, response, reporting and accountability.

## **A. IDENTIFY AND UNDERSTAND THE SPECIAL VICTIM CAPABILITY**

Early in your command, you should identify and meet the key professionals that will assist you in this area. In addition to your servicing judge advocate, the following personnel will be a part of the special victim team:

- **Special Victim Prosecutor (SVP)** - SVPs are specially-trained judge advocates who assist with domestic violence and sexual crimes cases. They are located at twenty-three Army installations worldwide and provide regional coverage.
- The unit **Trial Counsel** remains a critical part of a commander's response to sexual assault and a critical part of the team in providing services to the victim.
- **Special Victim Counsel (SVC)** – SVCs are specially-trained judge advocates who represent eligible victims of sexually related offenses. SVCs are located at installations worldwide.
- **Special Victim Investigator** - CID investigator responsible for the investigation of certain offenses, involving victims of sex-related offenses and domestic violence.
- **Special Victim Paralegal** - Specially trained paralegal who works alongside the SVP.
- **Special Victim Witness Liaison (SVWL)** – Specially trained facilitator and coordinator who provides information and assistance in obtaining available victim/witness services in sexual assault cases. The SVWL also works with the Victim Advocate (VA) who is responsible for providing crisis intervention, referral, and ongoing nonclinical support to a sexual assault victim.
- **Victim Witness Liaison (VWL)** – Impartial facilitator who guides victims and witnesses through the trial process. Provides services to all victims and government witnesses as a facilitator and coordinator for services, benefits (including transitional compensation) and possibly travel. Maintains relationship with the local confinement facility.
- The **Sexual Assault Response Coordinator (SARC)** is the principal POC for sexual assault and sexual harassment. Every Brigade has at least one SARC. The SARC is also the single point of contact and supervisor for all unit Victim Advocates. The SARC can act as a command advisor and assist in establishing a meaningful training program that will meet the annual requirements, and importantly, help commanders to identify local trends and issues.
- **Sexual Assault Prevention and Response (SAPR) Victim Advocates (VA)** are assigned to your organization and will help to facilitate services for victims of sexually related offenses. All conversations between the VA and the victim are confidential and privileged.
- **Family Advocacy Program Victim Advocates (FAP VA)** are not assigned to your unit and will provide victim advocacy services in cases of domestic abuse and sexual assault.
- The **Sexual Assault Review Board (SARB)** convenes monthly and is designed to ensure proper case management of sexual assault cases. It is chaired by a senior commander, usually the installation commander, and includes the SARC, VA, CID, SJA, Chaplain, behavioral health, care provider, along with any other invited members (ex. victim's commander, SVWL, ASAP).

## B. PREVENTING SEXUAL ASSAULT

Get involved early so that you can set the conditions that will prevent sexual assaults from happening in the first place. Sit down with the unit SARC within 30 days of taking command and go over unit trends, assessment tools and proposed prevention strategies.

While most reported sexual assaults include female victims and male accused, recent data suggests that more males are victims of sexual assault in the military. Some DoD identified trends to keep in mind include:

- The DoD estimates that only 10 percent of male victims would report a sexual assault. (*see* 2014 RAND Military Workplace Study and FY 2015 DoD Annual Report on Sexual Assault in the Military).
- Soldiers who are within the first four months of their assignment to the unit or are within 18 months of entry onto active-duty are high risk;
- Many reported sexual assaults involve alcohol and occur while out with friends or at a party, and most offenders are people the victim knows;
- Peer to peer mentorship and bystander intervention may be effective prevention techniques to help reduce incidents of sexual assault.

### **Understand these conditions and work to control them.**

Assessment tools include but are not limited to command climate surveys, and Defense Equal Opportunity Organizational Climate Surveys (DEOCS). The DEOCS is a DoD command management tool offered annually or within 120 days of taking command. See Army Directive 2013-29 for mandatory command assessments.

Elements of prevention include leadership involvement, peer to peer mentorship, education and training, accountability, organizational support, community involvement, deterrence, and communication. Prevention begins with leadership and your command climate, fostering a culture of mutual respect and responsibility. Every incident of sexual assault, sexual harassment and retaliation degrades mission readiness, and the command's handling of each unrestricted allegation will be seen and evaluated by all.

## **C. RETALIATION**

**Commanders at all levels must work to prevent professional and social retaliation against crime victims, those who report crimes, witnesses and victim advocates while holding offenders accountable.**

Staff Judge Advocates, Brigade Judge Advocates, Trial Counsel, or Special Victim Prosecutors will assist commanders in identifying and investigating retaliation, and holding offenders appropriately accountable. Commanders will incorporate unit-level SHARP annual training, MEO training and training on the prevention of hazing, bullying, retaliation and reprisal into the overall training plan for the unit. See "Improving the Effectiveness of Essential and Important Army Programs," Army Directive 2018-23.

Reprisal is a form of professional retaliation, which is an important training subject because command actions can be the subject of reprisal complaints, and investigated as a crime under "Retaliation," Article 132, UCMJ. Article 132 defines reprisal as any personnel action taken or withheld, with the intent to retaliate against any person for reporting or planning to report a criminal offense. This could include imposing an unfavorable personnel action, or withholding a favorable personnel action from a victim or someone who reported a crime because

they reported (or you believed they reported) a crime, and done with the intent to retaliate. Army Directive (AD) 2014-20 also prohibits reprisal against crime victims or persons who report and is punishable under Article 92, UCMJ. The inspector general investigates allegations of reprisal.

Ostracism is a word to describe social retaliation. It happens when anyone excludes the victim or someone who reported a crime from social acceptance or friendship because they reported (or someone believed they reported) a crime. If anyone ostracizes a reporter or victim with the intent to discourage reporting or to discourage justice in any way, that could also be punishable under AD 2014-20 and Article 92, UCMJ. Usually the command will investigate allegations of social retaliation.

Social retaliation presents a complex issue for the command, as identified in the April 2016 DoD Retaliation Prevention and Response Strategy. While acts of social retaliation may technically be punished under the UCMJ, many acts that feel like social retaliation to the victim may not rise to the level of criminal conduct. Commanders must assess whether taking UCMJ action will have the effect of making the retaliation worse along with any impacts on good order and discipline. Social retaliation may be better addressed as a larger command culture issue, and through engaged leadership at all command levels and corrective training promoting a culture of dignity and respect, commanders may better address and prevent peer-to-peer retaliation.

Acts of cruelty, oppression or maltreatment against crime victims or persons who report crimes is also prohibited by AD 2014-20. For example, if a peer, teammate, or friend of the accused commits acts of cruelty, oppression or maltreatment against someone who they believed reported a criminal offense, they could be prosecuted under Article 92, UCMJ (AD 2014-20). Anyone who assaults, threatens, wrongfully punishes, harasses or mistreats a Soldier subject to their orders could also open themselves up to prosecution for cruelty and maltreatment under Article 93, UCMJ.

Online misconduct may also form the basis for command action. Online misconduct is the use of electronic communication to inflict harm, including but not limited to harassment, bullying, hazing, stalking, discrimination, retaliation or any other types of misconduct that undermine dignity and respect. Soldiers or civilian employees who participate in or condone misconduct, whether offline or online, may be subject to criminal (see e.g. AR 600-20, para. 4-19; AD 2014-20) or administrative action. Online-related incidents should be reported and addressed at the lowest possible level.

Victims of sexually related offenses will most likely disclose incidents of retaliation to their SVC or VA. However, everyone should play a role in identifying possible retaliation when they see it happening after any report of a criminal offense.

## **D. REPORTS OF SEXUAL ASSAULT**

There are two kinds of reports: restricted and unrestricted. Victims can only officially make a restricted report when they sign a DD Form 2910 electing the restricted reporting option. Only a select group of people (SARCs, VAs, and health care professionals) may complete the DD Form 2910. Other individuals, including the chaplain or an attorney, may have confidentiality and privilege, but cannot officially receive a restricted report. If a sexual assault is reported by any person to the chain of command (including NCO chain of command), then the command must

call CID immediately, and CID has a responsibility to investigate. If a restricted report already exists, CID should conduct an independent investigation without the assistance of the victim, SARC or VA. If a restricted report does not exist at the time when the SARC is notified by CID or the command, then the report is unrestricted. Commanders should be aware of the “Victim Confiding in Another Person” provision of DoDI 6495.02 (victim can maintain a restricted report even if they tell someone outside the chain of command) as well as any local policies on the duty of Soldiers to report sexual assault. Commanders should work with SARCs to correctly train all Soldiers outside the chain of command on what they should do when their friend or teammate tells them about a sexual offense. The guidelines you are required to follow are found in paragraph 8-5 and in Appendix F of AR 600-20. You should also be familiar with DoDI 6495.02. You need to go to these references to ensure that you completely comply with them, and you need to seek help from those who have special training in this issue.

## **1. Immediate Action Drill 1: Relay Report To Law Enforcement**

**Report EVERY allegation of a sexual assault offense to CID immediately. You must also inform your chain of command, servicing judge advocate, and the SARC.**

At your level, there very little discretion in what you do when you hear about a sexual assault. If you learn about an allegation of sexual assault, you must report that allegation to CID immediately. DO NOT conduct any internal command directed investigation into the sexual assault.

Sexual assault is broadly defined as intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent. The term “sexual assault” when used for reporting purposes, may include the crimes of rape, sexual assault (which now includes nonconsensual oral and anal sex), abusive or aggravated sexual contact, and attempts to commit these acts. If the offense occurred on or after 1 January 2019, then a report that any part of the offender’s body or an object touched the victim’s vulva, penis, scrotum, anus, groin, breast, inner thigh or buttocks, should be reported to CID. If there is any type of contact, regardless of where the contact occurred, which was alleged to have intended to arouse the sexual desire of any person, then call your judge advocate or CID to determine who the investigative authority will be.

Many sexual harassment allegations involving contact may fall into the category of abusive sexual contact. When in doubt, call CID and your judge advocate. Also, keep in mind that rape and sexual assault are commonly interchanged, but there are legal distinctions.

The Department of Defense defines a sexual assault victim as anyone who makes an allegation of sexual assault. You should not make a credibility judgment about the victim, and decide not to treat them as a victim. You must treat the victim with dignity and respect at all times. You must also remember that the alleged perpetrator is presumed innocent until proven guilty in a court of law.

## **2. Immediate Action Drill 2: Safeguard The Victim**

You need to take immediate actions to ensure that the victim is safe. Notify the SARC immediately and make sure a VA makes contact with the victim as soon as possible. Active duty, reserve component (including National Guard), dependents over 18 years, and DoD civilian

employees are all entitled to SARC and VA services. You should require that the victim receives timely access to comprehensive medical and psychological treatment, including emergency care, unless the victim declines healthcare.

Medical examinations and the health and safety of the victim take priority over any CID investigation. If you are speaking with the victim before the VA and the reported incident may have occurred recently, discuss the Sexual Assault Forensic Examination (SAFE) option and ask if the victim would be willing to have a SAFE.

Inform the victim that they have the opportunity to consult with a Special Victim's Counsel (SVC). Ask if the victim would like to speak to a chaplain, family member, emergency contact, or other support person. Facilitate any requests for support.

If the victim and alleged offender work in the same unit, they may have daily interaction. You should consider issuing a military protective order (DD Form 2873) to the alleged offender to minimize contact and safeguard the victim. You may also consider other forms of pretrial restraint against the alleged offender, to included pretrial confinement. Consult with your TC on the forms and consequences of pretrial restraint decisions.

The victim may also request a transfer from the unit. The first commander authorized to transfer the victim, must make a decision within 72-hours (weekends and holidays are not excluded from the 72-hour rule). The presumption is that you will transfer the victim if requested after a credible report. A victim's request may ONLY be disapproved by the first general officer in the chain of command. That general officer has a further 72 hours to act upon the request. When a victim requests transfer to another installation, the authority to disapprove the request is reserved to the Commander, Human Resources Command. (*See Army Regulation 614-200 and Army Directive 2011-19.*)

In some cases, the victim may not want to transfer from the unit. In those cases, consider transferring the alleged offender. Always discuss your options with your TC or judge advocate.

The SARB will also conduct a safety assessment determining the victim's safety, risk of suicide, and concerns about retaliation. If the victim's safety is in jeopardy, the installation commander should set up a High-Risk Response Team (HRRT) which will monitor the victim's safety and develop a plan to manage the situation.

If you are the victim's immediate commander, dealing with a victim can be complex. You have to be careful not to re-traumatize them with the actions that you take. Work with the SARC, VA, TC or SVC to ensure that any actions you take are truly in the victim's best interest or are necessary for good order and discipline. For example, the decision to remove the victim from their duties may be made with the best intentions, however some victims will perceive that act as retaliation and harmful to their career. Victim advocates and SVCs are specially trained and will help you to interact with and safeguard the victim. If the victim elects to have an SVC, call the SVC after discussing with the Trial Counsel and determine the appropriate scope of your interactions with the victim. Understand that the SARC, VA and SVC all have confidentiality and privilege with the victim and so they cannot tell you what the victim has told them unless they are given permission from the victim.

### 3. Immediate Action Drill 3: Reporting Requirements

Immediately send a Commander Critical Information Requirements Report (CCIR) in accordance with Dep't of the Army Memorandum "Guidelines and Process for Commander's Critical Information Requirements (CCIR) Regarding Sexual Assault and Sexual Harassment Incidents," 11 April 2018, your local policy and with the assistance of the victim's SARC and investigators. When the subject of the report is a senior leader, SHARP professional, SVC, SVP, CID Investigator, SVWL, Drill Sergeant, Recruiter, Chaplain, Sexual Assault Nurse Examiner (SANE), or any other curious case, the information should be reported to the Army Operations Center within 24 hours. Always protect the personal information of the victim and subject and only send to those who have a legitimate "need to know."

Within 8 calendar days, complete a Sexual Assault Incident Response Oversight Report (SAIRO) with assistance from the victim's SARC and CID. Guidance for the SAIRO can be found in AD 2015-10. The SAIRO will be provided to the installation commander, first O-6 and GO in the victim's chain of command, and the first O-6 and GO in the subject's chain of command. If the victim is a servicemember, the victim's immediate commander submits the SAIRO. If the victim is a civilian, then the accused's immediate commander will submit the SAIRO. Contents include basic information about the incident (no Personally Identifiable Information or information that could lead to identification of the victim or subject); advocacy services offered; input of victim's commander; healthcare; investigation; safety; expedited transfers; and legal services.

Within 14 days of the unrestricted report, the Battalion Commander must update the victim on the status of the case and within 45 days of final disposition, the Battalion Commander will follow-up with the victim to make sure the victim's needs have been addressed. The Battalion Commander is also tasked with ensuring the monthly status update to the victim is completed by a member of the command team. This monthly status update could be done within 72 hours of the SARB to satisfy that monthly notification requirement.

### E. DISPOSITION ACTION

Law enforcement agents, prosecutors, and defense counsel will develop the evidence in the case and will eventually present what they have learned to commanders for disposition. At the conclusion of the investigation, you will be asked to recommend or determine what action you believe should be taken in the case. For your reference, there is non-binding disposition guidance in Appendix 2.1 of the 2019 Manual for Courts-Martial, and you should always consult your servicing judge advocate.

The file should contain documentation of the victim's preferences for certain dispositions, along with the victim's preference as to whether the charges are prosecuted by the military, or by any other state or federal civilian criminal jurisdiction with the ability to prosecute the accused. (See Rule for Courts-Martial 306(e)). The commander should consider the victim's preferences, but always maintains the discretion to prefer or refer charges to a court-martial.

**Department of Defense policy is that the authority to dispose of allegations of rape, sexual assault, forcible sodomy, and attempts to commit these acts is WITHHELD TO BRIGADE COMMANDERS. Army policy is that the authority to dispose of allegations**

**of aggravated or abusive sexual contact, and attempts to commit these acts is WITHHELD TO BATTALION COMMANDERS.** A company commander cannot dispose of a sexual assault case, or make the case go away. The company commander can make a recommendation that no action, or another appropriate action be taken, but must transmit the case to the disposition authority for decision.

Disposition authority for a victim or accused's collateral misconduct directly related to a sexual assault is also withheld to Brigade Commanders. The victim's collateral misconduct may include crimes like underage drinking or fraternization. Any decision on that collateral misconduct would have to be made by the victim's Brigade Commander and can be deferred until after the final disposition of the accused's case. Discuss your options regarding collateral misconduct with your judge advocate. Your local withholding policy may withhold the authority higher, so always check what authority you have when you arrive to a new location.

If the disposition involves a punitive administrative action (to include a memorandum of reprimand), non-judicial punishment or a court-martial conviction for rape, sexual assault, aggravated or abusive sexual contact (Article 120); rape or sexual assault of a child (Article 120b); indecent viewing, recording and broadcasting, forcible pandering, indecent exposure (Article 120c); stalking (Article 130), or attempts of any of the above crimes, then the action must be filed in the performance-disciplinary section of the Soldier's AMHRR. Additionally, commanders must contact their servicing judge advocate (BJA or TC) to ensure that the offense meet the criteria for a sex-related offense, and the process for coding the Soldier's or Officer's ERB or ORB with the appropriate assignment consideration code (ACSO) is completed through HRC (see para. 3-4, AR 600-37)

## **F. REGISTERED SEX OFFENDERS**

If one of your Soldiers is convicted of an offense for which he or she needs to register as a sex offender and the Soldier receives a sentence of less than four months confinement with no punitive discharge, or the Soldier is convicted by a civilian court after he or she enlists, then the command must initiate separation. For a list of qualifying convictions, see AR 27-10, ch. 24. In those situations, consider the following administrative courses of action. It is very important, however, that you consult your TC before proceeding.

### **1. Separation UP AR 600-20 and 635-200**

You MUST initiate a separation action IAW AR 600-20, para. 8-5o(34) or AR 635-200, ch.14. This does not mean that you must separate; however, you must initiate the action and consider the Soldier for separation. The commander who initiates separation is likely not the separation authority and the Soldier will have an opportunity to challenge the separation (either through a separation board or rebuttal). The Department of Defense policy is that registered sex offenders are generally to be separated. Also see AD 2013-21 for the prohibition of TDY, TCS, or PCS to duty stations OCONUS and the need to return Soldiers convicted of a sex offender registerable offense back to CONUS locations.

If, after initiating separation, the Soldier is retained, separation under the Secretary of the Army's plenary authority will be initiated IAW AR 635-200, para. 5-3 or AR 135-178, para. 14-3. For commissioned and warrant officers, commanders will initiate an elimination action



under AR 135-75 or AR 600-8-24 as appropriate. No further action is required if a commissioned or warrant officer has already been subject to an elimination action for conviction of a sex offense and has been retained.

## **2. Bar to Reenlistment**

If the Soldier is retained under that separation procedure, you may issue a bar to reenlistment under AR 601-280, para. 8-3a.

## **3. Security Clearance**

You may choose to revoke the Soldier's security clearance under AR 380-67, para. I-13b(1) (c).

## **4. Administrative Reduction**

If the Soldier was convicted at a civilian trial, you may initiate administrative reduction procedures under AR 600-8-19, para. 10-3.

## **5. Administrative Reprimand**

You may issue an administrative reprimand under AR 600-37, para. 3-4.

## **6. Prohibited Assignments**

Soldiers convicted of an offense noted in AR 27-10 or Title 42, USC §16911, will not be assigned or deployed on a temporary duty, temporary change of station, or permanent change of station status to duty stations OCONUS.

**Please see the Commander's Checklist  
which begins on the next page.**

# Appendix A

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## Commander's Sexual Assault Victim Assistance Checklist

The actions in the following list are to be taken in the event of receiving a report of sexual assault. Although the commander has significant leadership responsibility for actions after a report of sexual assault, not necessarily all of the actions listed below will be taken by the commander personally. This list is non-inclusive. Commanders must review AR 600-20, AR 27-10, DoDI 6495.02, the Commander's Legal Handbook, and the SHARP Guidebook along with other pertinent guidance regarding sexual assault to ensure they are aware of all requirements.

### VICTIM'S COMMANDER

1. \_\_\_\_ Ensure the physical safety of the victim-determine if the alleged offender is still nearby and if the victim needs protection.
2. \_\_\_\_ Provide the victim emergency healthcare, regardless of visible injuries, unless the victim declines healthcare. Ensure that sexual assault victims are given priority, and treated as emergency cases.
3. \_\_\_\_ Notify CID and commanders in the chain of command (as appropriate) immediately, as soon as the victim's immediate safety is assured, and medical treatment procedures elected by the victim are initiated.
4. \_\_\_\_ Ensure the SARC is notified immediately.
5. \_\_\_\_ Ensure the victim understands the availability of victim advocacy and the benefits of accepting confidential advocacy and support.
6. \_\_\_\_ Inform the victim of the availability of the Special Victim Counsel (SVC), to confidentially explain, among other issues, the military justice process.
7. \_\_\_\_ Contact your judge advocate.
8. \_\_\_\_ Collect only the necessary information (e.g., victim's identity, location, and time of the incident, name and/or description of offender(s)). **DO NOT ASK DETAILED QUESTIONS AND/OR PRESSURE THE VICTIM FOR RESPONSES OR INFORMATION ABOUT THE INCIDENT.**

9. \_\_\_\_\_ Ask if the victim needs a support person to immediately join them. If the support person is a personal friend or family member, advise the victim this support person could later be called to testify as a witness if the case goes to trial.
10. \_\_\_\_\_ Ask if the victim would like a chaplain to be notified and notify accordingly.
11. \_\_\_\_\_ Make appropriate administrative and logistical coordination for movement of victim to receive care. (Involve minimum number of personnel possible on a need-to-know basis).
12. \_\_\_\_\_ Ensure the victim is made aware of his/her options during each phase of the medical, investigative, and legal processes to include notification of the right to Special Victim Counsel. (Reference AR 600-20, AR 27-10, DoDI 6495.02, DoDI 1030.2)
13. \_\_\_\_\_ Ensure CID notifies victims and witnesses of their rights through a completed Victims and Witnesses of Crime form, DD Form 2701. (Reference AR 27-10).
14. \_\_\_\_\_ Inform the victim of the resources available through the Victim and Witness Assistance Program (VWAP) (AR 27-10). Also, inform the victim of resources accessible from anywhere in the world (that is, Military One Source (from U.S.: 1-800-464-8107; International: 800-464-81077; International collect: 484-530-5889, 24-hours-a-day, 7-days-a-week)).
15. \_\_\_\_\_ To the extent practicable, strictly limit knowledge of the facts or details regarding the incident to only those personnel who have a legitimate need-to-know. Protect the victim's privacy.
16. \_\_\_\_\_ Take action to safeguard the victim from any formal or informal investigative interviews or inquiries, except those conducted by authorities who have a legitimate need-to-know, including but not limited to, the Criminal Investigation Command investigator(s) and the trial counsel.
17. \_\_\_\_\_ Throughout the investigation, consult with the victim, and listen/engage in quiet support, as needed, and provide the victim appropriate emotional support resources.
18. \_\_\_\_\_ Continue to monitor the victim's well-being, particularly if there are any indications of suicidal ideations.
19. \_\_\_\_\_ Determine the best courses of action for separating the victim and the alleged offender during the investigation:
  - Determine whether the victim desires to be transferred to another unit.
  - Determine if the alleged offender needs/desires to be transferred to another unit.
  - Consider whether a Military Protection Order (MPO) (DD Form 2873), referred to as "no contact order," is appropriate.
  - Coordinate with sexual assault response agencies and the chain of command (involve as few people as possible and only on a need to know basis, protecting the victim's privacy) to determine if the victim's condition warrants redeployment or reassignment until there is a final legal disposition of the sexual assault case and/or the victim is no longer in danger.

• To the extent practicable, preferential consideration related to the reassignment should be based on the victim's desires.

20. \_\_\_\_ If the alleged offender is a foreign national or from a coalition force, confer with SJA on responsibilities, options, and victim's rights (in theater).
21. \_\_\_\_ Brigade commanders should consider deferring discipline for victim misconduct until all investigations are completed and the sexual assault allegation has been resolved. Keep in mind the implications of this decision on speedy trial and/or statute of limitations and consult your TC.
22. \_\_\_\_ When practicable, consult with the servicing legal office, CID, and notify the assigned SAPR VA or SARC prior to taking any administrative or disciplinary action affecting the victim.

### **Reporting and Notification Requirements**

23. \_\_\_\_ Complete a CCIR in accordance with local policy.
24. \_\_\_\_ Confirm the SARC entered all reported sexual assaults into the DoD Sexual Assault Incident Database (DSAID) within 48 hours of the report.
25. \_\_\_\_ Complete and forward the SAIRO report within 8 calendar days of the unrestricted report.
26. \_\_\_\_ Attend the monthly Sexual Assault Review Board (SARB) Meeting. If the Deputy Installation Commander, chair the monthly SARB meeting. Direct the required SARB members attend the meetings.
27. \_\_\_\_ Update the victim on the status of the case within 72 hours of the monthly SARB.
28. \_\_\_\_ Ensure the victim receives monthly reports regarding the status of the sexual assault investigation from the date the investigation was initiated until there is a final disposition of the case (the commander can update the victim within 72 hours of the SARB). If the victim or alleged offender is transferred or redeployed prior to the case closing, coordinate with investigative and SJA personnel before ceasing monthly updates on parties involved.
29. \_\_\_\_ If you are the Battalion Commander, update the victim on the status of the case within 14 days of the unrestricted report and within 45 days of the final disposition of the accused's case.

### **ALLEGED OFFENDER'S COMMANDER**

1. \_\_\_\_ Notify CID, military police, installation provost marshal (per AR 195-1, paragraph 6), and commanders in the chain of command (as appropriate) immediately after receiving a report of a sexual assault incident.
2. \_\_\_\_ Avoid questioning about the sexual assault allegation with the alleged offender, to the extent possible, since doing so may jeopardize the criminal investigation.
3. \_\_\_\_ Contact your judge advocate.

4. \_\_\_\_\_ Flag (suspend favorable personnel actions) any Soldier under charges, restraint, or investigation for sexual assault in accordance with AR 600–8–2 (Suspension of Favorable Actions), and suspend the Soldier’s security clearance in accordance with AR 380–67, The Department of the Army Personnel Security Program.
5. \_\_\_\_\_ Strictly limit information pertinent to an investigation to those who have a legitimate need-to-know.
6. \_\_\_\_\_ Ensure procedures are in place to inform the alleged offender, as appropriate, about the investigative and legal processes that may be involved.
7. \_\_\_\_\_ Ensure procedures are in place to inform the alleged offender about available counseling support. As appropriate, refer the alleged offender to available counseling groups and other services.
8. \_\_\_\_\_ Monitor the well-being of the alleged offender, particularly for any indications of suicide ideation, and ensure appropriate intervention occurs if indicated.
9. \_\_\_\_\_ With the benefit of the SARC, VA, legal, and/or investigative advice, determine the need for a “no contact” order, or the issuance of an MPO, DD Form 2873.
10. \_\_\_\_\_ Always confer with TC and/or servicing SJA office to consider legal options and responsibilities such as pretrial restraint and appropriate disposition of the alleged offense.

# Appendix B

## Critical Time Standards in Sexual Assault Cases

### Critical Time Standards in Sexual Assault Cases

**Initial Action Upon Unrestricted Report:**

- Take immediate steps to ensure victim's physical safety, emotional security, and medical treatment (600-20, para. 8-5o(1) & (29)).
- Commander immediately notifies CID. (DODI 6495.02, ENCL 5 para 3(h)(1)). This should be done "as soon as the victim's safety is established and victim's medical treatment procedures are in motion," but NLT 24 hours after receipt of the report. AR 600-20, para. F-2(h)
- Encourage a victim to get medical attention (600-20, para 8-5o(5) & (20)).
- Notify SARC, Chaplain (if requested), and higher-level command (600-20, para 8-5o); collaborate with SARC, legal, medical, and chaplain to provide timely, coordinated responses (600-20, para 8-5o(4)).
- SJA immediately refers victim to VWL, notifies of victim advocacy rights, notifies SARC (600-20, para 8-5o(2) & (4)).
- Flag any Soldier under charges, restraint, or investigation for sexual assault (600-20, para 8-5o(32)).
- Notify CID (see initial actions above), MPs, Provost Marshal, and appropriate members of the chain of command (600-20, para. F-2h)

**Within 24 Hours:**

- Notify SJA (600-20, para 8-5o(8)).
- Per AR 600-20, para 8-2o. All Soldiers should report sexual assault within 24 hours.
- CCIR to AOC (2018 Memo)

**Within 8 Calendar Days:**

- Victim or subject's immediate commander submits SAIRO report through CoC to first O6 and GO in Vic and Subject's CoC and to the Installation Commander (AD 2015-10)

**Monthly:**

- SJA updates victim on legal actions, courtroom procedures and necessary testimony (600-20, para 8-5g(6) & (7)).
- Unit Commander updates higher commands on status of the victim and subject (600-20, App F).
- BATTALION Commander ensures victim update on case status (AR 600-20, para. 8-5o(30), DoDI 6495.02).

**Within 14 Calendar Days:**

- BATTALION Commander updates the victim on the status of the case (600-20, para 8-5o(30)).
- Unit Commander updates higher commands on status of the victim and suspect (600-20, App F).

**Upon Final Case Disposition:**

- BATTALION Commander ensures victim is updated on the case disposition (600-20, para 8-5o(30) and 27-10, para 17-14).
- Complete DA Form 4833 (600-20, para 8-5o(28)).

**Within 45 Calendar Days After Disposition:**

BATTALION Commander follows-up with the victim to ensure the victim's needs have been addressed (600-20, para 8-5o(30)).

**Ongoing:**

- Provide emotional support to the victim.
- Protect victim privacy.
- Upon request, consider transfer or redeployment of victim.
- Follow local procedures for reporting sexual assault through the CoC. (600-20, para 8-5o(23))
- Determine in a timely manner how to best dispose of alleged victim misconduct. (600-20, para 8-5o(24))
- Consult with SJA, CID, SVC and Victim Advocate prior to taking any administrative action affecting the victim.

AS OF: 1 May 2019

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# Victim Programs

## A. REFERENCES

- Army Reg. 600-20, Army Command Policy, Ch. 7 & 8, 6 November 2014
- Army Reg. 27-10, Chapter 17 (Victim Witness Assistance)
- DoDD 6495.01, Sexual Assault Prevention and Response Program (23 January 2012, Incorporating Change 3, 11 April 2017)
- DoDI 6495.02, Sexual Assault Prevention and Response Program Procedures (28 March 2013, Incorporating Change 3, Effective 24 May 2017)
- DoDD 1030.1, Victim and Witness Assistance (13 April 2004)
- DoDI 1030.2, Victim and Witness Assistance Procedures (4 June 2004)
- Special Victims' Counsel (SVC) Handbook, 4th Edition, June 2017

## B. SEXUAL HARASSMENT/ASSAULT RESPONSE AND PREVENTION (SHARP) PROGRAM (AR 600-20, CH. 8)

SHARP reflects the Army's commitment to prevent incidents of sexual assault and sexual harassment before they occur. The goals of SHARP are to: create a climate that minimizes sexual assault/harassment incidents; create a climate that encourages victims to report incidents of sexual assault/harassment without fear; establish sexual assault/harassment training & awareness programs to educate Soldiers, focus on the "bystanders" to the incident, encouraging them to protect and support their fellow Soldiers; ensure sensitive and comprehensive treatment to restore victim's health and well-being.

### 1. Command Responsibilities Regarding SHARP Program

(See AR 600-20, Chapter 8 and Appendix F for a complete list of command responsibilities.)

#### a. Senior/Installation Commanders

- Ensure 24/7 sexual assault response capability and Victim Advocate (VA) availability.
- Provide and train SARCs and VAs.
- Educate all Soldiers and staff on restricted/unrestricted reporting policies.
- Establish written procedures for reporting of sexual assault throughout the chain of command and to law enforcement.

### *b. Unit Commanders*

- Ensure victim safety. Consider a Military Protective Order (MPO). Inform both military and civilian authorities if a MPO is issued.
- Appoint two UVAs per battalion level.
- Appoint deployable SARCs and VAs.

## **2. Command Responsibilities Regarding Sexual Harassment Allegations/Cases**

**(See AR 600-20, Chapter 7 and Appendix C for a complete list of responsibilities)**

Sexual Harassment is a form of gender discrimination that involves unwelcomed sexual advances, requests for sexual favors and other verbal and physical conduct of a sexual nature, where submission to or rejection of the conduct may affect a person's career, or where the behavior "creates an intimidating, hostile or offensive working environment." Sexual harassment is unacceptable conduct that will not be tolerated. Sexual harassment complaints are handled by the Equal Opportunity Advisor (EOA), with notifications to the Sexual Assault Response Coordinator (SARC). Commanders and supervisors will ensure that assigned personnel are familiar with the Army policy on sexual harassment.

- Upon receipt of a complaint, notify your judge advocate, SARC and EOA.
- Ensure that the complainant has been sworn to the complaint (DA Form 7279).
- Complete block 11 of DA Form 7270 acknowledging receipt of the complaint.
- Report all formal complaints to the GCMCA within 3 calendar days.
- Provide a progress report to the GCMCA 21 days after the date on which the investigation commenced and 14 days thereafter until completion.
- Conduct an investigation personally or appoint an investigating officer (AR 15-6).
- Establish and implement a plan to protect the complainant, any named witnesses, and the subject from acts of reprisal.
- Resolve the complaint as quickly as possible through thorough and immediate investigation.
- Take corrective action as appropriate.

NOTE: Sexual harassment allegations may also be investigated by CID as cruelty, oppression, or maltreatment when in conjunction with another offense normally investigated by CID. If the victim is a military recruit or trainee, and the offender is in a training leadership position or a recruiter, then the new offense of "Prohibited Activities with Military Recruit or Trainee by Person in Position of Special Trust," Article 93a, UCMJ, may apply. At any time, a battalion or brigade commander may request a CID investigation. See AR 195-2, Appendix B.



## C. SPECIAL VICTIM COUNSEL PROGRAM

A Special Victim Counsel (SVC) is a legal assistance attorney who may represent, counsel, and advise victims of rape, sexual assault, aggravated and abusive sexual contact (Article 120); rape and sexual assault of a child (Article 120b); indecent viewing, recording and broadcasting, forcible pandering, indecent exposure (Article 120c); stalking (Article 130 as exception to policy) and attempts thereof under Article 80 of the Uniform Code of Military Justice. Eligibility for a SVC is tied to 10 USC §1044 eligibility for legal assistance. Victims who make either a restricted or unrestricted report of any of the aforementioned crimes must be offered the services of a SVC upon report to a Sexual Assault Response Coordinator (SARC), Victim Advocate (VA), Military Criminal Investigative Office, Victim Witness Liaison, Trial Counsel or healthcare personnel. Trial counsel and CID must notify the victim of their right to an SVC before taking a statement or beginning an interview.

### Special Victim Counsel provide the following legal services to victims:

- Legal consultation regarding the Victim Witness Assistance Program.
- Legal consultation regarding responsibilities and support provided by the SARC and VA, including Military Rule of Evidence 514.
- Legal consultation regarding potential for civil litigation against parties other than the Department of Defense.
- Legal consultation regarding collateral misconduct and the victim's right to seek defense counsel.
- Legal consultation regarding the military justice system.
- Accompanying the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the offense.
- Legal consultation regarding eligibility and requirements for services available for medical and mental health services.
- Legal consultation and assistance in personal civil legal matters.
- Legal consultation regarding any proceedings of the military justice process in which a victim can participate as a witness or other party, in Military Protective Orders and Civilian Protective Orders, in understanding and obtaining any military and veteran benefits, such as transitional compensation.
- Other legal assistance as the Secretary of Defense authorizes of the relationship between a SVC and client.

## D. FAMILY ADVOCACY PROGRAM (AR 608-18)

The Victim Advocacy Services Program falls under the Family Advocacy Program (FAP). The program provides comprehensive assistance and support to victims of domestic abuse and sexual assault, including the services of a Victim Advocate, crisis intervention, safety planning, assistance in securing medical treatment for injuries, information on legal rights and proceedings, and referral to military and civilian shelters and other resources available to victims.

Victim Advocacy services are available 24 hours a day/7 days a week to Soldiers and Family members. Victims have the same reporting options as victims do through SHARP: restricted and unrestricted.

## **E. VICTIM WITNESS ASSISTANCE PROGRAM (AR 27-10, CH. 17; DoDI 1030.1)**

The victim witness assistance program (VWAP), supervised by the SJA office, was established to support all victims of and witnesses to crime by mitigating the hardships suffered by victims and witnesses as they are guided through the military justice process. The goal is to foster the full cooperation of victims and witnesses within the military justice system, and ensure that victims and witness are advised of and afforded certain rights. The program supports military justice prosecution efforts by encouraging the development and strengthening of victim and witness services, communicating with local confinement facilities, consolidating information pertaining to victim and witness services, and coordinating multidisciplinary victim/witness services by and through victim/witness liaisons (VWL). Specially trained VWLs called special victim witness liaisons (SVWLs) will handle sexual assault cases and be a member of the prosecution team. VWLs do not have confidentiality with victims or witnesses.

### **1. Victim Witness Liaisons**

- Act as primary point of contact for victims and witnesses to obtain information and assistance in securing available services.
- Act in conjunction with unit victim advocate.
- Advise victims of their rights to certain services using DD Forms 2701 and 2702.
- Ensure that victims receive the appropriate assistance to which they are entitled.

### **2. Victim Rights (Article 6b, UCMJ and AR 27-10, Chapter 17-10)**

All crime victims have rights which must be ensured by the OSJA as well as the command:

- The right to be reasonably protected from the accused.
- The right to reasonable accurate and timely notice of hearings regarding confinement, Article 32 preliminary hearings, courts-martial, sentencing, parole hearings and the release or escape of the accused.
- The right to be treated with fairness, dignity, and a respect for privacy.
- The right to be present at public court proceedings unless the court determines otherwise for fairness or other good cause.
- The right to confer with the Government attorney.
- The right to restitution, if appropriate.
- The right to proceedings free from unreasonable delay.
- The right to have an attorney or victim advocate present with them in a defense interview.



# Investigations



# Administrative Investigations

This chapter provides an OVERVIEW of the considerations when conducting various administrative investigations. Many of the areas are discussed in more detail in later chapters of the Guide. Cross-references are provided in that instance.

## A. REFERENCES

- DODI 6055.07, Mishap Notification, Investigation, Reporting, and Record Keeping, 6 June 2011.
- AR 15-6, Procedure for Administrative Investigations and Boards of Officers, 1 April 2016.
- AR 195-2, Criminal Investigation Activities, Appendix B, 9 June 2014.
- AR 385-10, The Army Safety Program, 24 February 2017.
- AR 638-8, Army Casualty Program, 23 June 2015.
- AR 600-8-2, Suspension of Favorable Actions (Flags), 11 May 2016.
- AR 600-8-4, Line of Duty Policy, Procedures, and Investigations, 15 March 2019.
- AR 638-34, Army Fatal Incident Family Brief Program, 12 February 2015.
- AR 735-5, Property Accountability Policies, 9 November 2016.
- DA Pam 735-5, Property Accountability Procedures and Financial Liability Officer's Guide, 23 March 2016.

## B. INTRODUCTION

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 investigations and boards. If an investigation is appointed under a specific regulation, that regulation will control the proceedings.

Commanders have inherent authority to investigate any matter under their responsibility, unless otherwise prohibited or limited, if undertaken for the purpose of furthering the good order and discipline of their command. Administrative investigations are different from criminal investigations and are usually conducted by non-law enforcement personnel. However, administrative investigations may form the basis for criminal charges, or may lead to criminal investigation. (See Appendix B, AR 195-2, Criminal Investigation Activities, to determine which UCMJ offenses are investigated by CID, MPI, or unit commander.)

## C. FLAGGING ACTION IS MANDATORY

Suspension of favorable personnel actions is mandatory if an investigation (formal or informal) is initiated on a Soldier by military or civilian authorities. Regardless of the reason for an arrest by civilian authorities, an arrested Soldier must be immediately flagged IAW AR 600-8-2, paragraphs 2-1 and 2-2. The regulation now defines “investigation” broadly and suspension of favorable actions on a Soldier is mandatory when military or civilian authorities initiate any investigation or inquiry that may potentially result in disciplinary action, financial loss, or other loss to the Soldier’s rank, pay, or privileges. AR 600-8-2, paragraphs 2-1e and 2-2a.

## D. WHAT DO WE INVESTIGATE?

- Training accidents
- Operational accidents
- Combat operations (e.g. friendly fire, hostile deaths)
- Garrison operations
- Minor misconduct
- Serious military-specific misconduct
- Complaints and inquiries
- Property damage
- Off-duty and on-duty incidents
- Other incidents/events that may affect unit readiness or effectiveness

## E. WHY DO WE INVESTIGATE?

- To gather, analyze, and record relevant information
- To collect, assemble, analyze, and record available evidence about a particular matter
- To discover information upon which to make decisions
- To ascertain facts and to report them to the appointing authority
- To learn lessons, sustain success and correct mistakes
- To further transparency and accountability

**\*\*Expect that every investigation will be scrutinized by Congress and released to the public\*\***

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# AR 15-6 Investigations

**This chapter provides an OVERVIEW of procedures for conducting investigations in accordance with Army Regulation 15-6.**

## A. AR 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS 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

AR 15-6 establishes procedures for administrative 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 would govern.

Even when not specifically directed, 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 (IO) or board to thoroughly and impartially ascertain and consider the evidence on all sides of each issue, to make findings and recommendations that are warranted by the facts, and to comply with all appointing authority instructions.

## B. TYPES OF INVESTIGATIONS AND BOARDS

When deciding whether to use a preliminary, administrative investigation or board of officers, consider the purpose of the fact-finding, 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.

## **1. Preliminary Inquiry (Chapter 4, AR 15-6)**

A preliminary inquiry is used to ascertain the magnitude of a problem, to identify and interview witnesses, to summarize or record witnesses' statements, to determine whether an investigation or board may be necessary or to assist in determining the scope of a subsequent investigation. A preliminary inquiry may be used to satisfy the inquiry requirement, sometimes referred to as "commander's inquiry," in RCM 303, MCM.

## **2. Administrative Investigation (Chapter 5, AR 15-6)**

Administrative 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.

Administrative investigations provide great flexibility. Generally, one IO is appointed (although an investigation team may be appointed consisting of one IO and one or more assistant IOs); there is generally no formal hearing that is open to the public but IOs can use whatever method they deem most efficient and effective for acquiring information. 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, or other additional rights specific to AR 15-6 boards of officers.

Although the investigative procedures are not intended to provide a hearing for interested persons, field grade officers have a right to respond to adverse information in a report of proceedings. This right exists regardless of whether adverse administrative action is recommended or contemplated against the field grade officer. When a field grade officer has the right to respond, the portion of the report of proceedings and supporting evidence pertaining to the adverse information will be referred to the office after being properly redacted. The officer will have at least 10 business days to respond. The field grade officer's response will be included as an exhibit to the report of proceedings.

## **3. Board of Officers (Chapter 7, AR 15-6)**

Generally, boards of officers are used to provide a hearing for an individual. An appointing authority may wish to designate a named respondent. A formal board of officers offers extensive due process rights to respondents under investigation (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).

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 will be appointed to the board.



Boards of officers 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).

## **C. FLAGGING ACTION MANDATORY**

Suspension of favorable personnel actions is mandatory if a preliminary inquiry, an administrative investigation, or board of officers is initiated on a Soldier by military or civilian authorities. Regardless of the reason for an arrest by civilian authorities, an arrested Soldier must be immediately flagged IAW AR 600-8-2, paragraphs 2-1 and 2-2. The regulation now defines “investigation” broadly and suspension of favorable actions on a Soldier is mandatory when military or civilian authorities initiate any investigation or inquiry that may potentially result in disciplinary action, financial loss, or other loss to the Soldier’s rank, pay, or privileges. AR 600-8-2, paragraphs 2-1e and 2-2a.

## **D. APPOINTING AUTHORITY (PARA. 2-1)**

### **1. Boards**

The following people may appoint a board of officers after consulting with the JA or legal advisor prior to appointing a board: any general court-martial or special court-martial convening authority; any general/flag officer; any commander, deputy commander or special, personal or principal staff officer in the grade of colonel or above at HQDA, the installation, activity, or unit level; any state adjutant general; and any DA GS-14 or above civilian supervisor assigned as a division or department chief. Principal Deputies, Assistant Deputy Chiefs of Staff, and Assistant Secretaries of the Army are authorized to serve as appointing authorities at HQDA.

### **2. Preliminary Inquiries and Administrative Investigations**

The following individuals may appoint a preliminary inquiry, administrative investigation or board: any officer or civilian employee authorized to appoint a board; a commander at any level; a special, personal or principal staff officer or supervisor in grade of major or above.

### **3. Special cases**

Only a General Court-Martial Convening Authority (GCMCA) or general/flag officer in a command billet with a servicing SJA can appoint an investigation or board if there is property damage of \$2,000,000 or more, the loss or destruction of Army aircraft or unmanned aircraft system with a replacement cost of \$2,000,000 or more, an injury or illness likely to result in death or permanent total disability, the death of one or more persons. Class A training accidents resulting in, or likely to result in, the permanent total disability or death of one or more persons; combat related deaths involving non-DOD personnel and insider (green on blue) attack will be appointed by the next superior authority to the GCMCA or general/flag officer authorized to appoint serious incident investigations.

#### **4. Friendly Fire Mishaps**

In accordance with DoDI 6055.07, the combatant commander has the responsibility to convene an investigation to inquire into a friendly fire incident. DoDI 6055.07 defines friendly fire as a circumstance in which members of a U.S. or friendly military force are mistakenly or accidentally killed or injured 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.

DoDI 6055.07 states that the Combatant Commander or his or her designee will convene a legal investigation for all incidents of friendly fire. U.S. 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).

AR 638-8 requires commanders to complete an AR 15-6 investigation of all friendly fire incidents that result in the death or wounding of a Soldier.

AR 638-8 requires all AR 15-6 investigations of 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.)

#### **5. Hostile Death Investigations**

AR 638-8 requires AR 15–6 investigations for all hostile deaths. 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.

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.

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 IO 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 notify the combatant commander who will appoint a new investigation into the friendly fire incident. The combatant commander 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 IO or board conducting the friendly fire investigation.

#### **6. Suspected Suicides**

Army Directive 2010-01 and AR 600-63 require AR 15-6 investigations for all suspected suicides. This requirement does not apply to suicide attempts. The appointing authority is a GCMCA, as in most other investigations into deaths. Directive 2010-01 also provides specific guidance to the IO.

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.”

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 practicable) 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.

## **E. METHOD OF APPOINTMENT – THE MEMORANDUM OF APPOINTMENT (PARA. 2-1)**

Administrative investigations and boards will be appointed in writing but, when necessary, may be appointed orally and later confirmed in writing. Preliminary inquiries may be appointed orally or in writing. A written memorandum of appointment is preferred.

The memorandum of appointment should specify purpose and scope of investigation and nature of findings and recommendations required. The appointing authority should include any special instructions or guidance for the IO. AR 15-6 includes examples of memorandums of appointment. The memorandum of appointment is important and should include enough detail as is necessary to fully inform and guide the IO. Any changes to the scope of the investigation should be documented in writing.

Those who may be appointed as IOs and board members shall be those persons who are best qualified for the duty by reason of education, training, experience, length of service, and temperament. Only commissioned officers, warrant officers, or Department of the Army civilian employees permanently assigned to a position graded as a GS-11 or above will be appointed as IOs or voting members of boards. Non-commissioned officers in the grade of E-7 or above may be appointed as IOs when the appointing authority determines that military exigencies exist and no commissioned officers, warrant officers or qualified Department of the Army civilian employees are readily available.

IOs 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. Specific regulations may require additional qualifications (i.e., officers, professionally certified, security clearance.)

## **F. CONDUCTING THE ADMINISTRATIVE INVESTIGATION (CH. 3)**

Before starting an informal investigation, the IO must review all written materials provided by the appointing authority and must meet with the legal advisor prior to beginning an administrative investigation. The legal advisor should explain the rules and legal concerns for AR 15-6 investigations and assist the IO in developing an investigation plan.

In developing the investigation plan, the IO should ask the following questions which should already be generally addressed in the appointment memorandum: What are the questions that need answering so the approving authority can make a decision? What specific findings and recommendations must be made? What is the timeline? What is the scope of the investigation?

The IO should consider the facts known and gaps (and more importantly, how to fill the gaps); potential witnesses and order of interviewing; physical and documentary evidence required; possible criminal, counter-intelligence, or other implications; Article 31 Uniform Code of Military Justice (UCMJ) warnings; Privacy Act requirements; regulations and laws involved; and chronology of the investigation as well as chronology of the incident under investigation. The IO should discuss all of these matters with the legal advisor.

Generally, an IO is not bound by the Military Rules of Evidence (MREs). Anything that in the minds of reasonable persons is relevant and material to an issue may be accepted as evidence. The IO may gather evidence that is ultimately determined irrelevant; if the evidence is not relevant, it should not be included in the investigation. 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.

Although an IO is generally not bound by the Military Rules of Evidence, the following limitations do still apply:

- **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), spousal privilege (MRE 504), psychotherapists (MRE 513), and victim advocates (MRE 514) apply.
- **Investigations related to sex offenses.** With limited exceptions, evidence of an alleged victim's sexual behavior or sexual predisposition is not relevant (MRE 412).
- **Polygraph Tests.** The person involved in the polygraph test must consent to the use of any evidence regarding the results, or regarding the taking or refusing of a polygraph.
- **Relevance.** Evidence must be relevant. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- **“Off the record” statements are not allowed.** Findings and recommendations cannot be based on statements not contained in the report of investigation.
- **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.

IOs 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. 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. Before any Soldier is ordered to appear or testify, the legal advisor should be consulted.

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 U.S. Constitution. 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 in determining 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's supervisor for assistance.

Weingarten rights may be necessary for bargaining unit member employees. 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.

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.

A confession or admission obtained by unlawful coercion or inducement likely to affect its truthfulness will not be accepted as evidence.

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 by an IO or board. Such evidence is acceptable only if it can reasonably be determined by the legal advisor or, if none, by the IO 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.

## **1. Findings and Recommendations (Para. 3-10 thru 3-11)**

A finding is a clear and concise statement of fact directly established by evidence in the record. It includes negative findings (evidence does not establish a fact). In arriving at findings, the IO should not exceed the scope of appointment. Each finding of fact should refer back to evidence gathered in the investigation. If however, there is a matter that emerged during the investigation that is outside of the scope, the IO should consult with the legal advisor on how to proceed regarding that matter. The IO must make all efforts to avoid a investigation "gap" that is never addressed because of a seemingly limited scope.

The standard of proof is preponderance of the evidence: findings must be supported by greater weight of evidence than supports a contrary conclusion. The weight is not determined by number of witnesses, but by considering all evidence and factors such as demeanor, opportu-

nity for knowledge, information possessed, ability to recall and relate events, and other indicators of veracity.

The IO 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.

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.

IOs and boards make recommendations according to their understanding of the rules, regulations, and customs of the service, guided by fairness to the Government and to individuals.

## **2. Deliberations and Voting (Boards of Officers)**

Deliberations are conducted in private. Only voting members of the board may deliberate and vote. If consultation with non-voting member is required, the named respondent, if any, has right to attend consultation.

Boards with more than one member reach decisions by voting. Majority vote controls. In the event of a tie, the president's vote determines the ultimate outcome.

## **3. Legal Review (Para. 2-7)**

All administrative investigations and boards directed under AR 15-6 require a legal review. The legal review determines whether the investigation complies with requirements in the appointing order and other legal requirements, what effects of any investigation errors would have, whether sufficient evidence (preponderance of the evidence) supports the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations, and whether the recommendations are consistent with the findings. The legal review should also advise the appointing authority whether the evidence supports any additional relevant findings, or suggests that additional investigation is appropriate to address additional concerns.

Appointing errors occur when the appointing authority does not have the authority to appoint the particular investigation. If that is the case, the proceedings are a nullity unless an appropriate authority ratifies the appointment.

Substantial errors are errors that have a material adverse effect on an individual's substantial rights.

Harmless errors are defects in the proceedings that do not have a material adverse effect on an individual's substantial rights.

The preference is to not have the legal advisor that advised the IO from also completing the legal review. It is recommended that a second attorney conduct an independent legal review in high-profile cases, complex cases, or cases in which the legal advisor's involvement in the case prevents him or her from conducting an independent legal review.

If a judge advocate finds an investigation legally insufficient, he or she should work with the IO to try to remedy the error(s). 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 or anyone else. 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 necessarily bound by the legal review.

#### **4. Action By Appointing Authority (Para. 2-8)**

Unless otherwise provided by another directive, the appointing authority is neither bound, nor limited, by the findings or recommendations of an investigation or board. The appointing authority has the option to approve as is, disapprove, return to the IO for additional investigation, or except/substitute findings and recommendations ("Exceptions and Substitutions"). The appointing authority 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), the appointing authority is not bound by findings or recommendations and may take action less favorable than recommended.

The appointing authority's decision can be documented on DA Form 1574-1 (Report of Proceedings by IO) or DA Form 1574-2 (Report of Proceedings by Board of Officers) or can be documented in a separate memorandum. If documented in a separate memorandum, the DA Form 1574-1 or 1574-2, if used, should still be annotated and signed by the approving authority.

Once approved by the approving authority, the report of investigation becomes an official agency decision and thus becomes subject to the provisions of the Freedom of Information Act (5 USC § 552).

No adverse administrative action may be taken by a commander based on an administrative investigation until the following occurs (unless another regulation already provides appropriate due process procedures): (1) notice is given to the subject of the investigation of the allegations against him or her; (2) the subject is given a copy of the investigation subject to any required redactions; and (3) the subject is given a reasonable opportunity to rebut the allegations. The Commander must consider the subject's rebuttal to the investigation, if submitted in a timely manner, before taking any adverse action.

#### **5. Release of AR 15-6 Investigative Reports and Materials (Para. 3-18)**

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.

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 approving authority. Note, one exception to this is concerning field grade officers when there has been a substantiated finding containing adverse information (as defined in the glossary of AR 15-6) regarding that field grade officer. In these cases, the portion of the report of investigation and supporting evidence pertaining to the adverse information must be referred to the officer.

Administrative investigations must be retained by the approving authority for five years in digital and original hard copy. In cases where the report of investigation contains adverse information regarding a field grade officer, cases that are serious, complex, or high-profile cases that result in national media interest, Congressional investigation, and/or substantive changes in Army policies or procedures or have value for historical and lessons-learned purposes, appointing authorities are required to keep the report of proceedings for a period of ten years. When investigation or board is conducted in a deployed environment and pertains to deployed operations, the approval authority should provide a copy of the final report of proceedings to the replacing unit prior to redeploying. The approval authority will keep the original and a digital copy of the report of proceedings at home station.



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# Accident Investigations (AR 385-10)

**This chapter provides an OVERVIEW of procedures for conducting accident investigations. Please consult your legal advisor early and often during the process of the investigation.**

## A. APPLICABILITY

AR 385-10, The Army Safety Program applies to Active Army, the Army National Guard, and the U.S. Army Reserve. It also applies to Army civilian employees and the U.S. Army Corps of Engineers and Civil Works activities and tenants and volunteers.

### 1. Purpose

AR 385-10 provides policy on Army safety management procedures. Chapter 3 provides policies and procedures for initial notification, investigating, and reporting of Army accidents and incidents.

### 2. Function of an AR 385-10 Accident Investigation (Chapter 3)

The accident investigation's purpose is 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. Because the primary purpose is prevention, a safety investigation cannot be used as the basis for disciplinary action.

## B. WHAT IS AN ACCIDENT? (PARA. 3-3)

An Army accident is defined as an unplanned event, or series of events, which results in one or more of the following: occupational illness to Army military or Army civilian personnel; injury to on-duty Army civilian personnel; injury to Army military on-duty or off-duty; damage to Army property; damage to public or private property, and/or injury or illness to non-Army personnel caused by Army operations.

Accident categories (classes) are used to determine reporting and investigation requirements. Class A is damage totaling \$2M or more; accidents involving manned aircraft (unmanned aircraft accidents determined by cost to repair/replace) destroyed/missing/abandoned; injury/occupational illness resulting in fatality or permanent total disability. (Note: friendly fire fatalities must be reported and investigated as a Class A accident.) Class B is damage between \$500k - \$2M; injury/occupational illness resulting in permanent, partial disability; three or more personnel hospitalized in a single occurrence. Class C is damage between \$50k - \$500k; a nonfatal injury/ occupational illness that causes one or more days away from work or train-

ing 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). Class D is damage between \$20k - \$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. Class E is an aviation accident in which there has been damage between \$5k and \$20k. Class F is an aviation incident in which there has been 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)**

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.

All Class A, Class B, and Class C Aviation accidents and incidents (includes in flight and on ground, and unmanned aerial systems.) must be immediately reported to the U.S. Army Combat Readiness/Safety Center.

## **D. CATEGORIES OF ACCIDENT INVESTIGATION REPORTS (PARA. 3-10)**

The Army has two categories of safety accident investigation reports—limited use reports and general use reports.

### **1. Limited-Use Safety Accident Investigation Reports**

These are close-hold, internal communications of the 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. They are required for all flight/flight related and 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, U.S. Army Combat Readiness/Safety Center.

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.

Under limited use reports, 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.

Findings, recommendations, and analysis are privileged. Only the Freedom of Information Act Initial Denial Authority for safety investigations, Cdr, U.S. Army Combat Readiness/Safety Center, may release that information.

## 2. General-Use Safety Accident Investigation Reports

These reports are prepared to record data concerning all recordable DA accidents not covered by the Limited-Use Safety Accident Investigation Report. They are intended for accident prevention purposes only. They may not be used as evidence in any disciplinary, administrative, or legal action (punitive). Promises of confidentiality cannot be made that information will be treated as exempt from mandatory disclosure in response to a request under the FOIA.

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. The appointing authority is a Commander with general court-martial jurisdiction over the installation or unit responsible for the operation, personnel, or materiel involved in the accident; Commander, U.S. Army Reserve Command, for U.S. Army Reserve units; and State Adjutant General for National Guard units.

The following accidents must be investigated by a board consisting of at least three members:

- **All on-duty Class A and B accidents.** Upon notification of a Class A or B accident, the Cdr, U.S. Army Combat Readiness/Safety Center, will determine whether a Centralized Accident Investigation or a Local Accident Investigation will be conducted.
- **Centralized Accident Investigation Board.** Some members provided by Army Combat Readiness Center and some provided from the local command.
- **Local Accident Investigative Board.** Members provided from the local command.
- Any accident that an **appointing authority**, or Cdr, U.S. Army Combat Readiness/Safety Center, **believes may involve a potential hazard serious enough to warrant investigation** by multimember board.
- **Class C Aircraft Accidents** must be investigated by a board consisting of at least one member.

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:

- All off-duty military accidents
- Class C and D ground accidents

- Aircraft Class D, E, and F accidents
- Class E and FOD incidents.

The board must be composed of 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, 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, Combat Readiness/Safety Center.

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.

Note special board member qualification requirements of AR 385-10, para. 3-16 (aviation accident boards will include qualified aviators; watercraft investigations will include Army marine warrant officer.)

The U.S. Army Combat Readiness/Safety Center will review all accident reports.

## **F. LEGAL ACCIDENT INVESTIGATION (LEGAL INVESTIGATION) (PARA. 3-10)**

**These investigations are formerly known as the collateral investigation.**

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.

Legal Accident Investigations are required for all Class A accidents, to include cases of friendly fire, as directed by the SJA IAW the claims regulation (AR 27-20); on accidents where there is a potential claim or litigation for or against the government or government contractor; or on accidents with a high degree of public interest or anticipated disciplinary or adverse administrative action against any individual.

Commanders may direct a legal investigation into any other accident. The investigation should use AR 27-20 procedures, if applicable. If not, AR 15-6 administrative investigation procedures should be used.

## **G. PRIORITY AND SHARING OF INFORMATION (PARA. 3-24 THRU 3-27)**

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 investigators (MPI) or Criminal Investigation Division (CID). The safety investigation may obtain all information collected by the legal or criminal investigation. Safety Accident Investigation Reports will not be enclosed in any other report unless the sole purpose of the report

is accident prevention. Only factual information may be possibly obtained by the legal (AR 15-6) investigation from the safety investigation.

Information that will not be given to the collateral investigation include (punitive): witness summaries taken by safety board members under a promise of confidentiality; preliminary or final, findings, analysis, and recommendations; voice recordings of intra-cockpit communications without Cdr, U.S. Army Combat Readiness/Safety Center authorization. See AR 385-10, para. 3-28 for a complete list of what information can be shared by the safety board.

## **H. RELEASE OF INFORMATION FROM ACCIDENT INVESTIGATION REPORTS (PARA. 3-28 AND 3-29)**

AR 385-10 makes unauthorized disclosure of privileged safety information punishable under Article 92, UCMJ. Freedom of Information Act requests for safety accident investigation reports must be referred to the U.S. Army Combat Readiness/Safety Center.



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# Line of Duty Investigations

## A. REFERENCE

- AR 600-8-4, Line of Duty Policy, Procedures, and Investigations, 15 March 2019

## B. APPLICABILITY

Applies to the Active Army, the Army National Guard, the U.S. Army Reserve, ROTC Simultaneous Membership Program Cadets, U.S. Military Academy Cadets, Senior ROTC Cadets, and applicants for enrollment while engaged in a flight or flight instruction or while performing authorized travel to or from or while attending training or a practice cruise.

### 1. Purpose

Prescribes procedures governing line of duty determinations of Soldiers whose service is interrupted by death, or certain injuries, diseases, or illnesses.

### 2. Function of an AR 600-8-4 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.

### 3. When Investigation is Required (Para. 2-2)

An LOD investigation must be conducted for all Soldiers, regardless of Component if the Soldier experiences a loss of duty time for a period of more than 24 hours and:

- The injury, illness, or disease is of lasting significance (to be determined by a physician, physician's assistant, or nurse practitioner);
- There is a likelihood that the injury, illness, or disease will result in a permanent disability; or
- If a Reserve Component (RC) Soldier requires follow-on care for an injury, illness, or disease incurred during a period of active duty.

### 4. Possible Outcomes (Para. 2-5)

The possible outcomes are the following:

- **In Line of Duty (ILD):** The injury, illness, disease, or death did not occur while the Soldier was AWOL and was not due to the Soldier's own misconduct or gross negligence. For USAR/ARNG Soldiers, the injury, illness, disease, or death occurred while the Soldier was in a duty status, as defined in AR 638-8 or direct travel status. This finding also applies in suicide cases when Soldiers are AWOL and considered mentally unsound at both

the inception of AWOL and at time of death (mental soundness can only be determined by a behavioral health expert).

- **Not in Line of Duty-Not Due to Own Misconduct (NLD-NDOM):** A formal investigation with supporting evidence, that the injury, illness, disease, or death occurred during a period when a Soldier was AWOL, was mentally sound at the inception of AWOL, and which was not directly caused by Soldier's own misconduct or gross negligence. Conditions that existed prior to service (EPTS) typically fall under this determination.
- **Not in Line of Duty-Due to Own Misconduct (NLD-DMO):** A formal investigation determined that the Soldier's injury, illness, disease, or death was proximately caused by the Soldier's own misconduct or gross negligence.
- **In Line of Duty-EPTS-Service Aggravated (ILD-EPTS-SA):** This finding is made when there is clear and unmistakable evidence the Soldier's injury, illness, or disease existed prior to service and the condition has been service aggravated. Aggravation will be determined by an appropriate provider in accordance with DODI 1332.18.
- **Not in Line of Duty-EPTS-Not Service Aggravated (NLD-EPTS-NSA):** This finding is made when there is clear and unmistakable evidence the member's injury, illness, or disease EPTS and the condition has not been service aggravated. Aggravation will be determined by an appropriate provider in accordance with DODI 1332.18.
- **In Line of Duty-This Episode Only (ILD-This Episode Only):** This determination relates to a one-time event, where no serious injury or illness has occurred, but warranted the Soldier be attended to by a medical physician. This incident occurred while the Soldier was in an authorized duty status at the time of the episode. Treatment should be limited for this particular episode only. A Reserve Component Soldier is not authorized military treatment if episode occurs while not in an authorized duty status. A Formal LOD should be conducted to determine the cause of episode.
- **Presumptive in Line of Duty (PILD):** HRC uses this determination in cases of hostile action, death of natural causes, or death of passengers in a commercial carrier or military vehicles (see para 2–2c). Specific Reserve Component personnel (specified in the Delegation of Authority memorandum from the TAG) can use this determination in cases of Soldiers transferring between components with the proper medical documentation. (See paragraph 2–2c for eligible RC personnel and who is responsible within the RC and guidelines for issuing a PILD finding).

## 5. Benefits Affected by Line of Duty Investigations

- **Extension of enlistment.** An enlisted Soldier who is unable to perform duties for more than one day because of his or her intemperate use of drugs or alcohol or because of disease or injury resulting from the Soldier's misconduct is liable after returning to duty to serve for a period that, when added to the period that he or she served before the absence from duty, amounts to the term for which he or she was enlisted or inducted.
- **Longevity and retirement multiplier.** Eligibility for increases in pay because of longevity and the amount of retirement pay to which a Soldier may be entitled depends on the



Soldier's cumulative years of creditable service. An enlisted Soldier who is unable to perform duties for more than one day because of his or her intemperate use of drugs or alcohol or because of disease or injury resulting from misconduct is not entitled to include such periods in computing creditable service, in accordance with the DOD Financial Management Regulation.

- **Forfeiture of pay.** Pay is forfeited for any Soldier on active duty who is absent from regular duties for a continuous period of more than one day because of disease that is directly caused by and immediately following his or her intemperate use of drugs or alcohol. Pay is not forfeited for absence from duty caused by injuries or a disease not directly caused by and immediately following the intemperate use of drugs and alcohol. Forward, in a timely manner, pay adjustment document(s) to the Soldier's supporting military pay office. NOTE: pay only forfeited for intemperate use of drugs or alcohol, but not misconduct and/or gross negligence.

- **Disability retirement and severance pay.** Soldiers who sustain permanent disabilities while on active duty must meet requirements of the applicable statutes to be eligible to receive certain retirement and severance pay benefits. One of these requirements is that the disability must not have resulted from the Soldier's misconduct or gross negligence and must not have been incurred during a period of AWOL.

- **Medical and dental care for Soldiers on duty other than active duty.** A Soldier of the ARNG/USAR is entitled to hospital benefits, pensions, and other compensation, similar to that for Soldiers of the Regular Army for injury, illness, or disease incurred ILD, under the following conditions prescribed by law:

- While performing active duty for a period of 30 days or less;
- While performing inactive duty training;
- While performing duty or service on funeral honors duty;
- While traveling directly to or from the place at which that Soldier is to perform or has performed any of the above;
- While remaining overnight immediately before the commencement of inactive duty training, or while remaining overnight, between successive periods of inactive duty training, at, or in the vicinity of the site of the inactive duty training; or
- While remaining overnight immediately before serving on funeral honors duty at or in the vicinity of the place at which the Soldier was to serve, if the place is outside reasonable commuting distance from the Soldier's residence.

- **Benefits administered by the Department of Veteran Affairs.** In determining whether a veteran or his or her survivors or Family members are eligible for certain benefits, the Veterans Administration will make an independent decision with respect to benefit eligibility.

## 6. Analysis

### *a. Did the Soldier's intentional misconduct or gross negligence proximately cause the injury, illness, or death?*

Injury, illness, or death caused by Soldiers own misconduct can never be in line of duty. Violation of a regulation by itself is not misconduct, it is simple negligence. Regulatory violations should be considered in the analysis, however.

### *b. What was the Soldier's status?*

Duty status refers to an authorized duty status – on leave, on pass, present for duty, versus unauthorized status – AWOL, deserter, DFR. It does not refer to worker's compensation or claim's theories of "performing military duties" or "job-related."

### *c. Did the injury, illness, or disease exist prior to service?*

A medical evaluation solely to determine if the condition, which causes injury, illness, disease, or death, existed prior to service is required to determine service aggravation or service connection.

*Example of Soldier found to be 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.

*Example of Soldier found 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: NLD-NDOM may also be based on an Existing- Prior-To-Service (EPTS) condition, not aggravated by service.

*Example of Soldier found 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 proximately caused the accident, the Soldier is considered to be not in the line of duty due to own misconduct.

## 7. Procedures

Presumptive Finding of In Line of Duty – No investigation is required when a disease does not involve a factor cited at subparagraph b below; injury is the result of enemy action or terrorist attack; or death by natural causes or death occurs while a passenger on a common commercial carrier or military vehicle or aircraft. NOTE: only HRC (or delegee) can determine if conditions satisfy presumptive findings of ILD.

### *a. Informal Investigation*

An informal investigation is conducted when no misconduct is suspected, no negligence is suspected, and a formal investigation is not required. At a minimum, the Medical Treatment

Facility (MTF) representative and commander must sign a DA Form 2173. Supporting exhibits should be attached.

A special court-martial convening authority (SPCMCA) is appointing and approving authority (National Guard appointing authority is the commander of at least battalion or squadron size unit). SPCMCA should approve informal investigation in writing “By Authority of the Secretary of the Army.”

**NOTE: Informal investigation can only result in an ILD determination except in the case where the MTF finds that a EPTS. In that event, the status would be NLD-NDOM.**

### *b. Formal Investigation*

For a formal investigation, the appointing Authority is the SPCMCA. Final approving authority is the General Court-Martial Convening Authority (GCMCA).

The investigating officer must be senior in grade to the individual investigated. May be a commissioned officer, warrant officer, or commissioned officer of another U.S. military service in joint activities where Army has been designated as the executive agent.

Formal investigations are required when any of the following factors are present: strange or doubtful circumstances; injury or death involving alcohol or drug abuse; self-inflicted injuries or suicide; injury or death incurred while AWOL; training death of a USAR/ARNG Soldier; Injury or death of a USAR or ARNG member while traveling to or from authorized training or duty; injury or death occurring while en route to final acceptance in the Army; USAR/ARNG Soldier serving active duty tour of 30 days or less is disabled by disease, in connection with an appeal of an unfavorable finding of alcohol or drug abuse; or a valid request for formal investigation is made (e.g., requested by the Physical Disability Agency).

## **8. Evidentiary standards and presumptions**

Soldier is presumed ILD UNLESS rebutted by a preponderance of evidence contained in the investigation. This means the Investigating Officer has to overcome that presumption and show appropriate evidence that the Soldier was NLD. A finding or determination must be supported by a greater weight of evidence than supports a contrary conclusion.

## **9. Timeline for Active Component Soldiers**

- Informal: 60 calendar days after incident.
- Formal: 180 calendar days after incident.

**NOTE: updates required every 30 days (see DODI 1300.18)**

## **10. Procedural Due Process Requirements**

During Evidence Collection: Soldier is 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 her right not to make statement, or is forced to make statement, the statement cannot be used in making the LOD determination (10 USC § 1219).

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.

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. 3-6 & 4-5)

## **11. Final Approving Authority (GCMCA or Field Grade Designee) Decision**

Final approving authority either approves or disapproves the finding under the authority of the Secretary of the Army. The report must be forwarded to the service member through his command. The transmittal letter must notify the service member of his right not to make a statement against interest and of his appellate rights.

## **12. Appellate Rights (Para. 4-17)**

The service member may appeal in writing within 30 days after receipt of the notice of adverse finding. The service member's appeal is to the final approving authority. The final approving authority may only change the finding to "in line of duty," based on new evidence. Surviving family members may appeal NLD decisions.

## **13. Special Considerations**

Always consult the Rules Governing Line of Duty and Misconduct Determinations at Appendix D, AR 600-8-4.

The regulation also discusses and provides direction regarding pregnancies, venereal disease, conditions existing prior to service, intoxication and drug use, etc. throughout chapter 4.

Mental responsibility, emotional disorder, suicide, and suicide attempts. 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 LD unless they existed prior to service.

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.

## C. PROCEDURES FOR SOLDIERS OF THE U.S. ARMY RESERVES AND ARMY NATIONAL GUARD

### 1. General

Commanders, Medical Officers, S1s, SJAs, UA, Personnel NCOs, and RC Soldiers who learn of a Soldier's illness, injury, disease or death that occurred under circumstances that warrant a LOD investigation / determination shall take an active role in ensuring that an investigation/ determination is initiated, completed, and uploaded into the LOD module in a timely manner.

### 2. Important Notes:

- Casualty Assistance Centers are responsible for completing and forwarding LOD Investigations in all cases involving death when a Soldier is in an authorized duty status.
- RC Soldiers will not be separated or retired without their consent while a LOD determination is pending.
- Medical Evaluation Board (MEB) / Physical Evaluation Board (PEB) will also be completed prior to separation or retirement of the Soldier.
- A formal LOD is required for any illness, injury, disease or death incurred while performing AT, IDT, or ordered to active duty for less than 30 days.

**Refer to AR 600-8-4, Chapter 5 to ensure the RC Soldier is being processed by the proper command, the correct procedures are followed, and the timelines are met.**



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# Fatal Training / Operational Accident Presentations to Next of Kin

**This chapter provides an OVERVIEW of procedures for conducting fatal training, Operational and/or friendly fire accident or suicide presentations to next of kin.**

## **A. APPLICABILITY: ACTIVE ARMY, ARMY NATIONAL GUARD, AND ARMY RESERVE**

### **1. Purpose**

Prescribes mandated tasks that govern collateral (AR 15-6) investigations, as they apply to fatal training, operational and/or friendly fire accidents, and suicides and provides guidance and direction for preparing and delivering primary next of kin presentations. This regulation implements guidance published in DODI 1300.18.

### **2. Function of an AR 638-34 Family Presentation**

To provide a thorough explanation of releasable investigative results of fatal training, operational and/or friendly fire accidents and suicides to the deceased's primary next of kin; 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.

## **B. CONGRESSIONAL REQUIREMENT**

Pub. L. 102-484, § 1072, Oct. 23, 1992, 106 Stat. 2508 (10 U.S.C. § 113, note) requires the Service Secretaries to ensure that fatality reports and records pertaining to members of the Armed Forces who die in the line of duty are made available to family members.

Within a reasonable period of time after the family members are notified of the death, but not more than 30 days after the date of notification, the Secretary must:

- In any case under investigation, inform the family members of the names of the agencies conducting the investigation and of the existence of any reports by such agencies that have been or will be issued; and
- Furnish, if the family members desire, a copy of any completed investigative report (normally the AR 15-6) to the extent such reports may be furnished consistent with the Privacy Act and the Freedom of Information Act.

## C. ARMY IMPLEMENTATION

### 1. Key definitions

- **Training-related death:** A death 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.
- **Friendly fire:** A circumstance in which members of the U.S. or friendly military forces are mistakenly, or accidentally, killed or injured in action by the U.S. or friendly forces activity while engaged with an enemy, or while firing at a hostile force, or what is thought to be a hostile force.
- **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 Military Operations Other Than War, contributing directly or indirectly to the death.
- **Primary Next of Kin (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

Collateral (AR 15-6) investigations are required for all on-duty Class A accidents resulting in a Soldier's death, anticipated litigation for or against the Government or Government contractor, anticipated disciplinary or adverse action against any individual, probable high public interest, and all suspected cases of friendly fire.

### 3. Presentations to PNOK

Presentations are required to be offered for all fatal training, operational and/or friendly fire accidents and suicides investigated under AR 15-6, AR 385-10, and AR 638-34; special interest cases or cases in which there is probable high public interest, as determined by The Adjutant General; all suspected cases of Friendly Fire; and in general, fatal accidents that are hostile, but do not occur as a result of engagement with the enemy.

### 4. Updates to PNOK

Releasable information will be provided to the PNOK and other family members designated by the PNOK while the AR 15-6 death investigation is ongoing. These updates are intended to share information concerning the progress of the investigation.

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.

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

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.”

The command is ultimately responsible to provide an O6 to present the briefing as the CMAOC does not provide briefing teams.

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

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. 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.

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.

**NOTE: The Army is prohibited from putting conditions or limitations upon those the family wishes to invite to the presentation.**

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

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:

An explanation of the unit’s mission which highlights the Soldier’s significant contributions to the mission and the Army; 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; actions taken at the unit level to correct any deficiencies.

The briefer should be prepared to answer questions related to benefits, entitlements, internment, and delivery of personal effects.

The preferred choice for the presentation is the PNOK’s home.

## 8. Style of Presentation

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.

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.

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.

## **9. 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.

## **10. SJA Requirements**

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.

The SJA or legal advisor must provide a non-redacted copy of the collateral investigation report to CMAOC.

The regulation is not intended to provide the PNOK with information not otherwise releasable under the Privacy Act or the Freedom of Information Act.

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.

The SJA also must prepare a letter to accompany the redacted version of the report delivered to the family and will explain, in general terms, the reasons for the redactions.

## **11. Release of the Collateral Investigation**

The investigation will be released in the following order: Interested offices within DOD and DA; PNOK and other family members designated by the PNOK; Members of Congress, upon request; and Members of the public and media.

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# Financial Liability Investigations (FLIPL)

**This chapter provides an OVERVIEW of procedures for financial liability investigations.**

## A. REFERENCES

- AR 735-5, Property Accountability Policies, 9 November 2016.
- DA Pam 735-5, Property Accountability Procedures and Financial Liability Officer's Guide, 23 March 2016.

## B. FINANCIAL LIABILITY INVESTIGATIONS OF PROPERTY LOSS (FLIPL)

### 1. Applicability

Applies to the Active Army, the Army National Guard, and the US Army Reserve.

#### *a. Purpose*

Prescribes the basic policies and procedures in accounting for Army property.

#### *b. Tools*

Financial liability officers should use DA Pam 735-5, Property Accountability Procedures and Financial Liability Officer's Guide, during their investigation. Units must use DA Form 7531, Checklist and Tracking Document for Financial Liability Investigations of Property Loss, to track investigations.

### 2. Function of an AR 735-5 Financial Liability Investigation of Property Loss

A FLIPL is used to document the circumstances concerning the loss, damage, destruction, or theft (LDDT) 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.

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 LDDT of Government property.

## C. ALTERNATIVES TO FINANCIAL LIABILITY INVESTIGATIONS

- **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)
- **Cash sales** of hand tools and organizational clothing and individual equipment.
- Unit level commanders may **adjust losses** of durable hand tools up to \$500 per incident, if no negligence or misconduct is involved.
- **Abandonment order** (by O6 or higher) may be used in combat, large-scale field exercises simulating combat, military advisor activities, or to meet other military requirements.
- **Damage statement.** Approval authority may sign damage statement when there is no evidence of negligence or misconduct.
- **Recovery of property** unlawfully held by civilians is authorized — show proof it is U.S. property and do not breach the peace.
- **AR 15-6 investigations** and other collateral investigations can be used in conjunction with the DD Form 200 (replaced DA Form 4697) to supplement the FLIPL.

## D. MANDATORY FLIPLS (PARA. 13-3). A UNIT MUST INITIATE TO ACCOUNT FOR LDDT OF GOVERNMENT EQUIPMENT WHEN:

- An individual refuses to admit liability and negligence or misconduct is suspected.
- Property is lost by an outgoing accountable officer, unless voluntary reimbursement is made for the full value of the loss.
- The amount of loss or damage exceeds an individual's monthly base pay, even if liability is admitted.
- The damage to government quarters or furnishings exceeds one month's base pay.
- The loss involves certain bulk petroleum products totaling more than \$1,000.
- A specified type of controlled item is lost or destroyed (requires AR 15-6 investigation).
- A higher authority or other DA regulation directs a financial liability investigation.
- Loss involves public funds or other negotiable instruments greater than \$750, or any such loss and the individual does not voluntarily reimburse Army.
- Loss or damage involves GSA vehicle with damage more than \$1,000.
- Loss resulted from fire, theft, or natural disaster.
- Loss involves certain recoverable items.
- Certain ammunition losses require AR 15-6 investigation (See AR 190-11, Appendix E).

## **E. JOINT FINANCIAL LIABILITY INVESTIGATIONS**

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.

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.

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.

Financial liability investigations that find contractors liable should be processed by the contracting office IAW the applicable contract.

## **F. INITIATING THE FLIPL (PARA. 13-7 AND 13-8)**

Upon discovering the LDDT of Government equipment, the hand receipt holder, accountable officer, or person with most knowledge of the incident will initiate a FLIPL within: Active Army: 15 calendar days; Army Reserve and National Guard: 75 calendar days.

Certain losses (certain controlled items identified in para. 13-25) 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.

Initiation of a FLIPL is complete when forwarded to the appointing/approving authority for appointment of a financial liability officer (investigating officer).

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. For final LDDT less than or equal to \$5,000, the first O5 if the rating chain is the approval authority (if delegated by the O6 approval authority in writing and the item is not a sensitive item, is not communications security, and does not contain personal identifiable information). For final LDDT less than \$100,000 the first colonel (O6) or supervisory GS-15 in the rating chain is the approval authority. 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.

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 (05) (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.

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.

In order for the financial liability officer to be qualified, he/she must be senior to the person subject to possible financial liability, "except when impractical due to military exigencies." The financial liability officer can be an Army commissioned officer; warrant officer; or enlisted Soldier in the rank of Sergeant First Class (E7), 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 com- missioned or warrant officer or non-commissioned officer E7 or above assigned to the activity or command can be the financial liability officer.

## **G. CONDUCTING THE INVESTIGATION**

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.

The financial liability officer must seek out all the facts that surround the LDDT and conduct a thorough and impartial investigation; physically examine damaged property and release it for turn- in or repair; interview and obtain statements from individuals with useful information; re- solve conflicting statements and confirm self-serving statements; organize investigation in accordance with the regulation; determine the cause and value of the LDDT of Government property and determine if assessment of financial liability is warranted.

## **H. ASSESSMENT OF FINANCIAL LIABILITY (PARA. 13-29)**

Individuals may be held financially liable for the LDDT of Government property if they were negligent or have committed willful misconduct, and their negligence or willful misconduct is the proximate cause of that LDDT. Before a person may be held liable, the facts must show that a loss to the Government occurred. There are two types of losses which can result in financial liability:

- (1) Actual loss. Physical loss, damage, destruction, or theft of the property; and
- (2) Loss of accountability (where it is impossible to determine if there has been actual physical loss, damage, or destruction because it is impossible to account for the property).

The actual value at the time of the loss is the preferred method of valuing the loss. Determine the item's condition item at the time of the loss or damage. Determine a price value for similar property in similar condition sold in the commercial market within the last 6 months.

Depreciation is the least preferred method of determining the loss to the government. Compute charges according to AR 735-5, App. B, para. B-2b.

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.

**Command Responsibility:** The commander has an obligation to insure proper use, care, custody, and safekeeping of government property within his or her command. Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at any level.

**Supervisory Responsibility:** 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. If supervisory responsibility is involved, also consider the following factors: the nature and complexity of the activity and how it affected the ability to maintain close supervision; the adequacy of supervisory measures used to monitor the activity of subordinates; the extent supervisory duties were hampered by other duties or the lack of qualified assistants.

**Direct Responsibility:** The obligation to ensure the proper use, care, custody, and safekeeping of all government property for which the person has received. Direct responsibility is closely related to custodial responsibility (discussed below).

**Custodial Responsibility:** 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. 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. Responsibilities include: ensuring the security of all property stored within the supply room and storage annexes belonging to the supply room or SSA is adequate; observing subordinates to ensure they properly care for and safeguard property; enforcing security, safety and accounting requirements; if unable to enforce any of these, reporting the problems to their immediate supervisor.

**Personal Responsibility:** An individual's obligations to properly use, care, and keep safe government property in their possession, with or without a receipt.

A person can only be held liable if the facts show that she acted negligently or engaged in willful misconduct.

**Simple negligence** is the failure to act as a reasonably prudent person would have acted under similar circumstances. Remember, a reasonably prudent person is an average person, not a perfect person. Also consider: What could be expected of the person considering their age, experience, and special qualifications? The type of responsibility involved. The type and nature of the property. More complex or sensitive property normally requires a greater degree of care. The nature, complexity, level of danger, or urgency of the activity ongoing at the time of the LDDT of the property.

Examples of simple negligence are failure to do required maintenance checks, leaving weapon leaning against a tree while attending to other duties, driving too fast for road or weather conditions, or failing to maintain proper hand receipts.

**Gross negligence** is 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. Reckless, deliberate, or wanton. These elements can be express or implied. Does not include thoughtlessness, inadvertence, or errors in judgment.

Examples of gross negligence are: Soldier drives a vehicle at a speed in excess of 40 mph of the posted speed limit. Intentionally tries to make a sharp curve without slowing down. Soldier lives in family quarters and has a child who likes to play with matches. Soldier leaves matches out where child can reach them.

**Willful misconduct** is any intentional or unlawful act. Willfulness can be express or implied. Includes violations of law and regulations such as theft and misappropriation of government property. A violation of law or regulation is not negligence per se.

Examples of willful misconduct. A violation of law or regulation is not negligence per se. 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. 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.

Before a person can be held liable, the facts must clearly show that a person's conduct was the proximate cause of the LDDT. Proximate cause is based upon whether the LDDT was foreseeable. If the LDDT of property was a reasonably foreseeable consequence of the respondent's misconduct or negligence, and LDDT to property actually occurred, then that misconduct or negligence is the proximate cause of the LDDT.

**Proximate Cause.** 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.

Foreseeable consequences do not require actual knowledge of actual results. You do not need to foresee the particular loss or damage that occurs, but you must foresee that some loss or damage may occur.

Examples of proximate cause are the following: 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.

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.

Independent intervening cause is 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.



## I. CONCLUDING THE INVESTIGATION

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. But keep in mind that negative findings—that no one should be liable—must also be supported by evidence.

If the approving authority concurs and does not assess liability, the investigation is complete.

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).

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. The financial liability officer will notify the respondent by memorandum of the proposed recommendation of financial responsibility. The notification includes:

- The right to inspect and copy the report of investigation. A copy of the investigation is normally sent with the notification.
- The right to obtain free legal advice (military and DA civilians).
- The right to submit a statement and other evidence in rebuttal to the recommendation.

Time limits for submitting rebuttal evidence to the financial liability officer are as follows:

- 7 calendar days when investigation is hand delivered to the respondent;
- 15 calendar days when respondent is unavailable but in the same country and the investigation is mailed or e-mailed;
- 30 calendar days when respondent is unavailable and in a different country and the investigation is mailed or e-mailed.

The financial liability officer must consider the respondent's rebuttal. 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.

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.

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.

When the approving authority decides to impose liability, the approval authority must notify the respondent of 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:

- The right to inspect and copy the file.
- The right to legal advice.
- The right to request reconsideration based on legal error.
- The right to a hearing (for DOD civilians only).
- The right to request remission of indebtedness. Is available for enlisted Soldiers only. Only to avoid extreme hardship. Only unpaid portions can be remitted. Suspend collection action long enough for the Soldier to submit his request for remission of the debt. Must request reconsideration before submitting request for remission of indebtedness.
- The right to request extension of collection time.
- 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).
- Civilian employees may avail themselves of the grievance/arbitration procedures. Request for reconsideration, a hearing, or remission or cancellation of debt stops all collection action pending outcome of request.

Before the approving authority approves a recommendation of liability, a judge advocate MUST review the FLIPL for legal sufficiency of the evidence and propriety of the findings and recommendations. The financial liability officer's recommendations do not bind the approving authority, but the approving authority cannot assess liability if the findings and recommendations are found to be legally insufficient (para. 13-39).

## **J. DECISION BY APPROVING AUTHORITY WITHOUT INVESTIGATION (SHORT FLIPL) (PARA. 13-22 & 13-23)**

When initial information indicates there was no negligence involved in the LDDT of Government property, the approving authority may relieve all individuals from liability.

When initial information indicates that negligence or willful misconduct was the proximate cause of the LDDT of Government property, the approving authority may assess liability by:

- 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.
- The approving official must consider the rebuttal if submitted and make a determination.
- The information and rebuttal must receive a legal review.
- The approving authority makes a final decision and notifies the respondent accordingly.

## **K. RELIEF FROM LIABILITY**

Request for reconsideration & appeal must be submitted within 30 days of liability notification and can only be based on legal error.

Submitted to approving authority. If approving authority does not reverse the decision, the request becomes an appeal, which is forwarded to the appeal authority by the approving authority.

Appeal authority is the next higher commander or DA civilian in the chain of command or supervision. The decision of appeal authority is final. Only further recourse is application to ABCMR. The investigation must receive a legal review by a legal advisor prior to appeal authority action.

Reopening financial liability investigations is not an appeal. The authority to reopen rests with the approval authority. It may occur as part of an appeal of the assessment of financial liability; when a response is submitted to the surveying officer from the person charged subsequent to the approving authority having assessed liability; when a subordinate headquarters recommends reopening based upon new evidence; when the property is recovered; or when the approving authority becomes aware that an injustice has occurred.

## **L. LIMITS ON FINANCIAL LIABILITY**

The general rule is that an individual will not be charged more than one month's base pay.

The amount charged is based upon the Soldier's base pay at the time of the loss.

For ARNG and USAR personnel, base pay is the amount they would receive if they were on active duty.

For civilian employees it is 1/12 of their annual pay.

Exceptions to the general rule are when there are times when personnel are liable for the full amount of the loss. AR 735-5, para. 13-41a. Any Soldier is liable for the full loss to the Government (less depreciation) when they lose, damage, or destroy personal arms or equipment. Any person is liable for the full loss of public funds. Accountable officers will be liable for the full amount of the loss. Any person assigned government quarters is liable for the full amount of the loss to the quarters, furnishings, or equipment as a result of gross negligence or willful misconduct of the responsible individual, his guests, dependents, or pets.

Collective financial liability: Two or more persons may be held liable for the same loss. There is no comparative negligence. 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 respondents' pay is totaled. 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.

## **M. TOTAL PROCESSING TIME**

The Active Army Component: 75 days.

The U.S. Army Reserve Component: 240 days.

The Army NG Component: 150 days.



**Standards of**



**Ethical  
Conduct**



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# Standards of Ethical Conduct in the Army

## A. INTRODUCTION

This chapter contains the most common guidelines, rules, restrictions, and prohibitions contained in frequently used ethics authorities, to include statutes, the Code of Federal Regulations, and the Joint Ethics Regulation. It is not all inclusive. Exercise caution when applying these rules. Because many ethical constraints involve making fine distinctions, Commanders should contact their supporting judge advocate or ethics counselor when issues in the categories detailed in this chapter arise.

## B. GIFTS

### 1. General

Federal regulations and the Department of Defense (DoD) Joint Ethics Regulation (JER) restrict DoD employees when it comes to soliciting and accepting gifts. However, several exceptions and exclusions authorize DoD employees to personally accept gifts.

### 2. Gift Exclusions

A gift is defined as any gratuity, favor, discount, entertainment, hospitality, or any other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodging and meals. It does not include, among others:

- Coffee, donuts & modest non-alcoholic refreshments not intended as a meal;
- Greeting cards, plaques, trophies, and other items with little intrinsic value intended primarily for presentation;
- Rewards & prizes for contests open to public;
- Commercial discounts available to the public or military; or
- Anything for which an employee pays market value.

### 3. Rules and Exceptions for Gifts Between Employees

In general, a DoD employee may not accept a gift from a lower paid employee or solicit for or give a gift to a superior. Two major exceptions allow employees to accept gifts from fellow employees.

First, an employee may accept a gift on a traditional gift-giving occasion as long as the gift is valued at \$10.00 or less (no cash). Examples would include birthdays or holidays. This exception also authorizes DoD members to accept the unsolicited gift of personal hospitality at

someone's home (of a type customarily provided to personal friends) or host/hostess gifts (of a type and value given on such occasions).

Second, an employee may accept a gift on a special, infrequent occasion. Examples of a special, infrequent occasion would include marriage, illnesses, change of command, PCS, or retirement. When accepting a gift based on a special, infrequent occasion, the following rules apply.

- The gift must be valued at \$300.00 or less per donating group;
- If any employee donates to more than one donating group, the value of the gifts becomes aggregated;
- If the gift exceeds \$300, the employee may not “buy down” the value of the gift;
- Employees may solicit for contributions for the gift as long as the solicitation does not exceed \$10.00 (although the employees may contribute more than \$10.00). Solicitation must be free from coercion;
- All contributions must be voluntary.

#### 4. Rules for Gifts from Foreign Governments

Members of the military may personally accept a gift from a foreign government (federal, state, or local government) that is valued at \$390.00 or less. The General Services Administration periodically adjusts this amount. The value of the gift must be based on its fair market value in the United States, not the market value in the donor nation. A gift from a foreign government to your spouse is treated as a gift to you.

#### 5. Rules for Gifts from Outside Sources

DoD employees are prohibited from accepting gifts from a prohibited source. In addition, DoD employees cannot accept a gift offered because of the employee's official position. However, there are thirteen general exceptions, including the following:

- **\$20/\$50 Rule.** A DoD employee can accept a gift from an outside source valued at \$20 or less, per source, per occasion, not to exceed \$50 in a calendar year.
- **Personal Relationship.** Gifts from outside sources based on a preexisting personal relationship.
- **Widely Attended Gathering.** For information about the possibility of accepting a gift of free attendance at a widely attended gathering consult your ethics counselor.

#### 6. Declining and Disposing of Gifts

DoD employees' actions should always promote the public's trust. For this reason, a DoD employee should consider declining otherwise permissible gifts if he or she believes that a reasonable person with knowledge of the relevant facts would question the employee's integrity or impartiality as a result of accepting the gift.



Generally, a DoD employee who receives a prohibited gift may dispose of it by promptly returning it to the donor or paying the donor its market value. For other possible dispositions options, consult your ethics counselor.

## **C. TRAVEL**

Chapter 4 of the JER and the Secretary of the Army Policy for Travel by Department of the Army Officials contains the key rules associated with travel benefits.

### **1. Air Travel**

Service members should not wear their uniforms when traveling in any class of travel above coach. Consult AR 670-1 for updated guidance in this area.

### **2. Frequent Flyer Miles**

Frequent flyer miles accrued during official travel belong to the traveler. Travelers can use frequent flyer miles to upgrade a government purchased ticket or for any other purpose.

### **3. On-the-Spot Upgrades**

Travelers may accept an unsolicited offer from the airline to upgrade their government ticket to a premium class of travel even if they are in uniform. However, senior officers must always consider the potential appearance of impropriety and it may be prudent to decline the upgrade if traveling in uniform.

### **4. Airline “Bump” Rules**

You may not volunteer to take a later flight in exchange for travel benefits offered by the airline if it will interfere with your mission. If there is no impact on the mission and no additional cost to the government, you may accept the travel benefits offered by the airline in exchange for taking a later flight.

An involuntarily bumped traveler is “awaiting transportation” for per diem and miscellaneous expense reimbursement; therefore, any monetary compensation from the airline (including meal and/or lodging vouchers) for the denied seat belongs to the government. The service member must turn in all such items with the travel voucher.

## **D. USE OF NON-TACTICAL VEHICLES**

### **1. Domicile to Duty**

Army Regulation 58-1 and federal law provide extremely narrow exceptions for the use of a non-tactical vehicle (NTV) between the place of duty and private domicile. Commanders should consult with an ethics counselor prior to using their NTV to travel to or from their domicile.

## **2. Travel to Commercial Air Terminals**

Army Regulation 58-1, paragraphs 2-3 and 4-6, limit the circumstances under which a commander can use an NTV to travel to a commercial air terminal. Because each situation is fact-specific, consult with your ethics counselor.

## **3. Spousal NTV Travel**

Spouses may travel in an NTV to an official function as long as space is available, the spouse's presence does not bump a member of the official party, and the spouse's presence does not require a larger vehicle.

## **E. USE OF GOVERNMENT RESOURCES**

Government resources shall be for official use and authorized purposes only. Official use is any use necessary to accomplish the mission. Under the following limited circumstances, a commander can authorize government resources for personal use:

- The use has no adverse effect on duty performance;
- Is of reasonable duration and frequency;
- Serves a legitimate public interest;
- Does not reflect adversely on the DoD;
- Does not overburden government communications; and
- Creates no significant additional cost.

Examples of acceptable personal use of a government resource would be short (local) phone calls home, limited personal use of the internet, or making a few personal photocopies. Government resources may never be used to operate a private business. Additionally, personnel and NTVs may never be used for personal use.

## **F. FINANCIAL DISCLOSURE**

The DoD currently uses two different financial disclosure forms, the OGE 450 and the OGE 278. Which form an individual must use depends on the rank or grade and responsibilities of that individual; therefore, commanders should contact their servicing judge advocate or ethics counselor to determine whether they are required to file a financial disclosure form.

### **1. Confidential Financial Disclosure Report (OGE 450)**

Persons required to file this form include military members (O-6 and below) and civilian employees (GS/GM-15 and below) when the official position of such members or employees requires them to participate personally and substantially in taking an official action for contracting or procurement, or if the supervisor of such member or employee determines the position requires such a report to avoid an actual or apparent conflict of interest.

## **2. Public Financial Disclosure Report (OGE 278)**

Persons required to file this form include regular and reserve officers whose grade is O-7 or above (the requirement begins when a reserve general officer reaches sixty active duty days in a calendar year); members of the Senior Executive Service; and civilian employees whose positions are classified above GS/GM-15 or whose rate of basic pay is fixed at or above 120% of the minimum rate of basic pay for a GS/GM-15.

## **G. CONFLICTS OF INTEREST**

Under federal law and the JER, personnel shall not engage in any personal business or professional activity that places them in a position of conflict between their private interests and the public interest of the U.S. In order to preserve the public confidence in the Army, even the appearance of a conflict of interest must be avoided. The following general rules apply:

### **1. Inside Information**

Army personnel shall not use inside information to further a private gain for themselves or others if that information was obtained by reason of their position and is not generally available to the public.

### **2. Commercial Solicitation**

Active duty members shall not engage in commercial solicitations or solicited sales to DoD personnel junior in rank at any time.

### **3. Fundraising**

Although there are exceptions for the Combined Federal Campaign and the Army Emergency Relief Fund, fundraising is not allowed in the federal workplace. For rules and exceptions on fundraising see AR 600-29 and consult your ethics counselor.

### **4. Endorsement**

DoD employees are prohibited from using their grades, titles or positions in connection with any commercial enterprise or for endorsing a commercial product. DoD employees must not use their official capacities and titles, positions, or organization names to suggest official endorsement or preferential treatment of any non-Federal entity.

### **5. Outside Employment**

DoD employees are prohibited from accepting employment outside of the Army if it interferes with or is not compatible with the performance of government duties, or if it might discredit the government. Commanders typically approve outside employment.

There are several service restrictions that apply when a DoD employee is presented with an offer to speak at an event, lecture, or write on a particular topic. Commanders are highly encouraged to consult with their servicing judge advocate or ethics counselor prior to accepting an offer to teach, speak, or write.



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# Commander's Coins

## A. REFERENCES

- 10 U.S.C. § 1125
- DoD Instruction 1348.19, Award of Medals, Trophies, Badges, and Similar Honors in Recognition of Accomplishments
- AR 37-47, Official Representation Funds of the Secretary of the Army, 21 June 18
- AR 215-1, Military Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities
- AR 600-8-22, Military Awards

## B. OVERVIEW

Commanders must recognize fiscal rules that affect their purchase and distribution of coins. Coins may be purchased, depending on circumstances, using appropriated funds (APF), non-appropriated funds (NAF), official representation funds (ORF), or private funds. Many Army Commands and Army Service Component Commands either place dollar limits or create formulas based upon the number of Soldiers in a unit, to limit the purchase of commander's coins.

### 1. Purchase with Appropriated Funds

Commanders may present coins purchased with APF only to reward Soldiers and DA civilians for outstanding duty performance or to recognize unique achievements. Commanders may not present coins purchased with APF as merely gifts, mementos, or tokens of appreciation (e.g., as a "farewell" gift or during a visit to a unit). Coins purchased with APF may not be presented to contractor employees, family members, members of a private organization (PO), or to Soldiers as an award for participating in a PO activity. While some individual commands may require it, commanders presenting coins purchased with APFs should keep a register detailing the circumstances of each presentation.

### 2. Purchase with Non-Appropriated Funds

Commanders may present coins purchased with NAF only to award Soldiers and DoD civilians for excellence in athletic or nonathletic competitions, proficiency in recreational programs, or unusual accomplishment in supporting special events.

### **3. Private Funds**

Commanders wishing to present coins to anyone for any reason may purchase them with their own private funds. Commanders should keep receipts for all such purchases. It is prudent to ensure coins purchased with private funds are distinct from those purchased with APF, NAF, or ORF.

# Support to Non-Federal Entities

## A. REFERENCES

- 5 C.F.R. §§ 2635.704, 2635.705, 2635.808
- DoD Regulation 5500.07-R (Joint Ethics Regulation)
- DoD Directive 5410.18, Public Affairs Community Relations Policy
- DoD Instruction 1000.15, Procedures and Support for Non-Federal Entities Authorized to Operate on DoD Installations
- DoD Instruction 5410.19, Public Affairs Community Relations Policy Implementation
- • Under Secretary of Defense (Personnel and Readiness) Memo, subject: Change to Policy Regarding Officers Serving on Boards of Directors, dtd 30 Nov 12
- AR 360-1, The Army Public Affairs Program

## B. BASIC ETHICS PRINCIPLES REGARDING OFFICIAL SUPPORT TO NON-FEDERAL ENTITIES (NFES)

### 1. Use Government Property Only for Authorized Purposes

The government's performance of services for most NFEs is an improper use of funds and resources. This applies even if the NFE provides compensation or reimbursement. Federal law entitles some NFEs to particular types of support (e.g., CFC, Red Cross, USO, etc.).

Official communications channels may be used to notify DoD personnel of NFE-sponsored events of common interest that support the goal of enhancing morale, welfare, or professional education.

Logistical support and DoD speakers may be provided to NFE-sponsored events (other than fundraisers) if the support:

- Does not interfere with official duties;
- Serves community relations, public affairs, or military training interests;
- Is appropriate for DoD association;
- Benefits the DoD or the local community;
- Does not offer preferential treatment—the command is able and willing to provide the same support to comparable events sponsored by similar organizations;
- Does not violate federal law or regulations; and
- Has no admission fee, has an admission fee that is not beyond the reasonable costs of sponsoring the event, or DoD support to the event is incidental.

## **2. No NFE may Receive Preferential Treatment.**

In an official capacity, DoD personnel may not solicit for an NFE, endorse an NFE, or fundraise for an NFE. In addition to any ethical concerns, prior to supporting any NFE event, commanders must also consider whether any current policy or fiscal guidance would limit their ability to support an NFE event. For example, current Army conference policies impose specific requirements on Soldiers attending or supporting a conference.

## **C. MANAGEMENT OF NFEs IN AN OFFICIAL CAPACITY**

Management in an official capacity is limited to “designated” organizations only:

- Army Emergency Relief.
- Air Force Aid Society.
- Navy-Marine Corps Relief Society.
- Coast Guard Mutual Assistance.
- Entities regulating and supporting service academy athletics programs.
- Entities regulating international athletic competitions.
- Entities accrediting service academies and other DoD schools.
- Entities regulating military health care, including health care associations and professional societies.

DoD personnel serving in a “management” position may not participate in the internal management or day-to-day operations of the NFE. Compensation is not permitted.

## **D. PERSONAL PARTICIPATION IN NFEs**

Generally, management may be done only in a personal capacity and DoD personnel may not serve in a personal capacity if the position was offered because of the DoD employee’s official position. Also:

### **1. Active Duty**

General officers may not serve on the boards of directors of companies or other entities that do business with the DoD or focus their business principally on military personnel.

Regular component officers in the grade of O-6 and below and regular component enlisted personnel in the grade of E-9 who serve in a leadership position that spans an entire installation may not serve on the boards of directors of companies or other entities that do business with the DoD or focus their business principally on military personnel unless they receive an exception.

### **2. Reserve Component**

Reserve component officers in the grades of O-10 and O-9 may not serve on the boards of directors of companies or other entities that do business with the DoD or focus their business principally on military personnel.



Reserve component officers in the grades of O-8 and O-7 who serve more than 179 days (need not be consecutive) during the immediately preceding period of 365 consecutive days on active-duty, and who serve on the board of a company or other entity that focuses its business principally on military personnel, must resign from such a board. Reserve officers in this situation should consult with their ethics counselor immediately.

Reserve component officers in the grades of O-8 and O-7 who serve more than 179 days (need not be consecutive) during the immediately preceding period of 365 consecutive days on active-duty, and who serve on the boards of directors of companies or other entities that do business with the DoD, may be permitted to continue service on such board, but must seek an ethics determination by an appropriate ethics counselor.

### **3. Personnel Personally Participating in NFEs may not:**

- Take official action on matters involving those NFEs.
- Solicit funds from their subordinates.
- Use their official titles or positions to endorse an NFE.
- Use government resources and time in support of personal participation in NFEs (generally).



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# Government Motor Vehicle Transportation

## A. REFERENCES

- DoD Regulation 5500.7-R (Joint Ethics Regulation)
- Joint Travel Regulations
- DoD Manual 4500.36, DoD Acquisition, Management, and Use of Non-Tactical Vehicles
- DoD Administrative Instruction 109, Use of Motor Transportation and Scheduled DoD Shuttle Service in the Pentagon Area
- AR 58-1, Management, Acquisition, and Use of Motor Vehicles

## B. GOVERNMENT MOTOR VEHICLE TRANSPORTATION

### 1. The Use of Army Motor Vehicles is Restricted to Official Purposes Only

Changes of command, promotions, retirements, unit activations/deactivations are considered official business internal to the Army community. Attendance by the Army community is encouraged. For that reason, the use of a GOV or GOVs to attend such activities should be managed and not discouraged. However, transportation will begin and end at the transported individual's normal place of duty, not a personal residence or domicile.

Official non-DoD persons invited to take part in an Army function may be provided free transportation between commercial transportation terminals and residence or visitation points.

Non-tactical vehicles owned or otherwise controlled by the DoD may be used for trips between domiciles or places of employment and commercial or military terminals only when at least one of the following conditions is met:

- Used to transport official non-DoD visitors invited to participate in DoD activities, provided that this use does not impede other primary mission activities;
- Used by individuals authorized domicile-to-duty (D-T-D) transportation, for example, the Secretary of the Army or the Chief of Staff, Army;
- Necessary because of emergency situations or to meet security requirements;
- Terminals are located in areas where other means of transportation are not available or cannot meet mission requirements in a responsive manner;
- Authorized in the Pentagon Area by DoD Administrative Instruction Number 109.

## **2. Domicile-To-Duty Transportation**

Except for certain extremely limited exceptions prescribed by statute, D-T-D transportation is not transportation for official purposes, and use of government vehicles for this purpose is prohibited.

Authorized exceptions to the D-T-D prohibition are outlined in AR 58-1, paragraph 4-3. Note that all exemptions require Secretary of the Army approval except subparagraph 4-3e pertaining to overnight retention of a government vehicle for next day departure pursuant to temporary duty orders.

## **3. Official After-Hours Functions**

Transportation to official after-hours functions will be treated as an exception to policy for which prior approval is required. All transportation to after-hours functions will begin and end at the individual's normal place of duty.

Official motor vehicle transportation requirements do not include transportation to private social functions; personal errands or side trips for unofficial purposes; transportation of dependents or visitors without an accompanying official; or in support of non-DoD activities unless specifically approved under the provisions of Army regulations.

# Accompanying Spouse Travel

## A. REFERENCES

- Joint Travel Regulations, Chapter 3
- DoD Directive 4500.56, DoD Policy on the Use of Government Aircraft and Air Travel
- DoD Instruction 4515.13, Air Transportation Eligibility
- Army Directive 2017-05, Secretary of the Army Policy for Travel by Department of the Army Senior Officials, dtd 18 Jan 17 (hereinafter “SA Travel Policy”)
- AR 1-50, Army Conference Policy
- AR 58-1, Management, Acquisition, and Use of Motor Vehicles

## B. OVERVIEW

As a general rule, spouses or other family members of an authorized traveler may not accompany Army personnel, either military or civilian, on official business at government expense. Rather, spouse travel on either military or commercial aircraft is accomplished as an exception to policy. These exceptions are limited to the spouses. Other family members or dependents are not permitted to travel at government expense.

- Accompanying spouses traveling on commercial aircraft at government expense will fly coach-class unless otherwise authorized in accordance with SA Travel Policy, paragraph 10, Accompanying Spouse Travel.
- Accompanying spouses traveling on military aircraft (MILAIR) will travel in a noninterference (nonreimbursable) status. MILAIR must be independently authorized in accordance with SA Travel Policy, paragraph 5.
- Spouses traveling in an accompanied status are typically in a representational role and are not authorized per diem.

## C. EXCEPTIONS TO POLICY

As an exception to policy, spouses may accompany their sponsors on military or commercial aircraft at government expense only when:

- The spouse travels to a function where their sponsor is participating in his or her official capacity and where the spouse is to address those assembled or otherwise play a significant active and visible part.
- When the spouse travels to a function where their sponsor is participating in his or her official capacity and a substantial portion of those present are military Families or the focus is on matters of particular concern to military Families.

- When the spouse's presence at an official function is deemed to be in the national interest because of a diplomatic benefit to the United States. Simply stated, when the spouse and sponsor are meeting with high-level foreign dignitaries and their spouses, the spouse's travel may be justified on MILAIR or commercial aircraft at government expense.
- When the spouse's presence at an official function is deemed to be in the national interest because of a public relations benefit to the United States.

## **D. APPROVAL AUTHORITIES**

Each occurrence of spouse travel is approved on a case-by-case basis. Blanket travel orders for spouses are not permitted. All requests will be reviewed by the servicing legal counsel prior to submission for approval through the normal chain of command. The SA Travel Policy contains approval authority levels for travel requests. Each request will include the following supporting documentation, and will be retained by the requesting organization for two years:

- Request signed by the sponsor;
- Name, grade, and position/title of the sponsor;
- Purpose of the spouse's travel;
- Travel date and destination;
- Agenda or itinerary for spouse that defines the focus and audience of the spouse's participation and identifies the tangible benefit to be derived from the participation; and
- A copy of any invitation made by a DoD, Federal, or non-DoD entity where a spouse's presence is requested.

## **E. OTHER SPOUSE TRAVEL**

Travel by spouses is usually accomplished in an unofficial accompanying status as provided for above. However, this guidance does not prevent spouses from traveling in an official capacity when their travel is unrelated to their sponsors' travel and is authorized in accordance with applicable policies. The authorizing official may authorize transportation, per diem, and/or actual expense allowances if the individual's travel is unquestionably mission essential and benefits DoD beyond fulfilling a representational role (see the JTR, Chapter 3). The legal review will specifically address the independent authority for the spouse. Such travel will be accomplished pursuant to invitational travel authorization and per diem is authorized. Examples of independent authority include instances when:

- The spouse is a volunteer in accordance with 10 U.S.C. § 1588 and the travel is within the scope of the volunteer agreement; is unrelated to a program or command supervised by the sponsor; and is in strict compliance with the JTR, Chapter 3.
- The spouse is to attend a Service-endorsed training course and provide subsequent volunteer service incident to the training (for example, the Fort Leavenworth Pre-Command course) as specified by the HQDA DCS, G-3/5/7 Training Directorate.
- The spouse will confer with DoD officials on DoD matters as a subject matter expert. In this instance, the individual's status as a spouse is incidental to his or her status as a subject

matter expert, and the circumstances of travel are not to be confused with accompanying spouse travel. Under this authority, the spouse may be issued an authorization through normal procedures if a sufficient case has been made to qualify the individual as a subject matter expert. However, Army policy is that spouses traveling to participate in discussions on Army Family programs or quality of life issues must travel in an accompanying spouse status (per diem not authorized) in accordance with SA Travel Policy, paragraph 10.

## **F. MOTOR VEHICLE TRANSPORTATION**

Spouses of DA officials may be authorized transportation in government vehicles only when accompanying their Army sponsor, the use of the vehicle has already been authorized to accomplish official business, and there is space available. Such transportation must be provided at no additional cost to the government, and the spouse's presence may not require a larger vehicle than that already authorized.





# Soldier and Family Readiness Groups

## A. REFERENCES

- AR 608-1, Army Community Service Center, Appendix J, 19 Oct 17
- AR 600-20, Army Command Policy, 6 Nov 14
- AR 210-22, Private Organizations on Department of the Army Installations, 22 Oct 01
- AR 600-29, Fund-Raising Within the Department of the Army, 7 June 10

## B. OVERVIEW

A Soldier and Family Readiness Group (SFRG) is a command-sponsored organization created to foster a climate of mutual support within the unit. SFRG goals include supporting the military mission through provision of support, outreach, and information to family members. In accordance with Army Directive 2019-17, "The primary goals and expectations of SFRGs are to:

- (1) act as an extension of the unit command in providing official and accurate command information to Soldiers and their Families,
- (2) connect Soldiers and Families to the chain of command and provide support between the command and SFRG members,
- (3) connect SFRG members to available on- and off-post community resources, and
- (4) offer a network of mutual support."

## C. FUNDRAISING

### 1. Establishment of an SFRG Fund

SFRG mission-essential activities are supported using a unit's appropriated funds (APF). Therefore, SFRG mission-essential activities may not be augmented with private money, and any such augmentation may violate the Anti-Deficiency Act. Army Regulation 608-1, paragraph J-7a, allows commanders to authorize their SFRG to maintain one informal fund in accordance with AR 600-20. Informal funds are private funds generated by SFRG members that are used to benefit the SFRG membership as a whole. Currently an informal fund may not exceed more than \$10,000 in annual gross receipts during a calendar year with limited exceptions that may be granted by Brigade Commanders. For instructions on how to handle a situation where your SFRG exceeds the \$10,000 cap, commanders should consult their servicing judge advocate or ethics counselor. The SFRG informal fund must have a Standard Operating Procedure (SOP) memorializing the SFRG members' determination of the purpose of the SFRG informal fund. The following statement must be included in the SFRG informal fund SOP: "This [S]FRG

informal fund is for the benefit of the [S]FRG members only and is established exclusively for charitable purposes and to provide support to Soldiers and Family members as the Soldiers and Families adapt to Army life. It is not a business being run to generate profits. It is not an instrumentality of the United States Government.” The SFRG SOP must be approved by the unit commander and a majority of the SFRG members.

Informal funds may not be deposited or mixed with APF, unit funds MWR funds, unit cup and flower funds, or personal funds. Use of informal funds is limited to expenses consistent with the purpose and function of the fund and the fund’s SOP, and must benefit the SFRG membership as a whole. Examples include using informal funds to support SFRG newsletters that contain mostly unofficial information, parties, social outings, volunteer recognition, and picnics.

## **2. Pre-Approval Requirements for Fund Raisers**

Joint Ethics Regulation (JER), paragraph 3-210a(6), exempts organizations composed primarily of DoD employees or their dependents from the general prohibition against fundraising when the organization is fundraising among their own members for the benefit of welfare funds for their own members or their dependents. The fundraising must be pre-approved by the head of the command or organization after consultation with the ethics counselor.

Therefore, an SFRG may conduct a fundraiser on an installation, from its own community members or dependents, and from all persons benefiting from the SFRG, if:

- The commander approves of the fundraising effort after consultation with the commander’s servicing Staff Judge Advocate (SJA) or ethics official (See Army Directive 2019-17 for specific approval authority);
- The fundraising purpose is consistent with the approved SOP; and
- The manner of fundraising is consistent with the JER and AR 600-29.

Approval by the appropriate authority is required before conducting a fundraiser. The approval authority is dependent on installation policy and where the fundraiser will be held, but can range from company commander to installation commander. Additionally, coordination with other agencies may be necessary. For example, if food is sold, local policy may require prior coordination with preventive medicine. Additionally, fundraising within the Army Reserve must apply with applicable Army Reserve regulations.

## **3. Taxes**

SFRGs must comply with all Federal, State, and local tax laws, including state excise taxes. SFRGs must seek private counsel or contact proper tax officials to ensure compliance with all tax laws.

## **4. Insurance**

SFRGs often overlook liability for injuries or even death caused by their fundraising activities. Finding insurance coverage may be difficult. Nevertheless, SFRGs and their members face the possibility of personal liability for damages caused by their activities. The best course is to select safe activities and, in some cases, to include Army safety experts in the planning

process. Insist that private vendors, who may assist you with a fundraiser, carry appropriate insurance coverage.

## **5. Raffles, Lotteries, & Games of Chance**

Raffles and lotteries are subject to State law, local installation policy, and AR 600-29.

## **6. Money Accountability**

Money raised by SFRGs must be guarded carefully. The fund custodian and the alternate custodian are responsible for maintaining, accounting for, and documenting expenditures. This does not mean that only one signature is required to spend money, however. Custodians of SFRG money are liable to the SFRG if they lose it. The custodian should open a noninterest-bearing checking account (interest-bearing accounts may be liable for local, State, or Federal taxes, and responsible to file tax returns). Although SFRGs may qualify for exemption from Federal income tax, pursuant to Section 501 of the Internal Revenue Code, the savings to be achieved may not equal the time and effort required to obtain an exemption.

The informal fund custodian will provide informal fund reports to the unit commander monthly and as requested. An annual report on the SFRG informal fund activity will be provided to the first colonel (O-6) commander or designee in the unit's chain of command no later than 30 days after the end of the calendar year. Reports are also required when a change of command or change of custodian occurs. Detailed records should be maintained on how money is raised and how it is spent. The SFRG membership should make spending decisions. The SFRG membership should determine the amount of money the SFRG leadership may spend without consulting the entire membership. Commanders must review SFRG financial records annually in accordance with local installation policy. Fidelity bonding should be purchased by an organization for members or employees handling monthly cash flows exceeding \$500 (bonding will equal the normal maximum amount of cash handled.)

## **7. How SFRG's May Spend Money**

SFRG funds should be used for activities that support the entire group rather than for specific individuals. Thus, inviting third party representatives for the purpose of sales, such as Tupperware or LuLaRoe, does not support the entire group or the broad goals of an SFRG. The use of funds should not duplicate what other agencies provide (i.e., establishing a loan fund or emergency food locker when other agencies such as ACS and AER already have programs established). Finally, SFRG monies may not be spent in a way that appears improper or contrary to Army interests.

## **D. AUTHORIZED SUPPORT**

Appendix J of AR 608-1 outlines the types of support authorized to SFRGs. They include the following:

## **1. Official Mail**

The requirements are that it must be for an official, mission-related purpose and be approved by the commander. Official mail cannot be used to support private organization activities, fundraisers, or commercial ventures.

## **2. SFRG Newsletters**

Newsletters can be printed with APF provided that the information is considered official and approved by the commander. To qualify for use of APF, the newsletter cannot contain any personal or social information, or information regarding private organizations, fundraisers or commercial ventures.

## **3. Use of Government Facilities**

SFRG volunteers may use government facilities to include dedicated office space, desks, equipment, supplies, and telephones needed to accomplish their assigned duties.

## **4. Use of Military Vehicles**

Requirements for the use of military vehicles are outlined in AR 58-1. Government vehicles may also be used when several criteria are met, as provided for in AR 608-1, paragraph J-3.

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# Annual Filing of Financial Disclosure Forms

## A. REFERENCES

- DoD Regulation 5500.07-R (Joint Ethics Regulation)
- Website: [www.fdm.army.mil](http://www.fdm.army.mil)

## B. CONFIDENTIAL FINANCIAL DISCLOSURE – OGE FORM 450

### 1. Purpose of Filing

OGE Form 450s are filed in order to ensure DoD employees do not engage in official financial transactions or decision-making in which, due to their private interests, they may have a conflict of interest.

### 2. Who Must File

Personnel in “covered positions” including:

- All Army installation commanders, unless they are an OGE 278 filer.
- Special Government Employees (SGE) defined at 18 U.S.C. § 202(a), generally defined as employees performing temporary duty for 130 days or less in any 365 day period. Consult with an ethics counselor to determine whether an SGE, including a U.S. Army Reserve or National Guard members, are required to file.
- Civilian employees at grade GS-15 and below, and military personnel below grade O-7, when they participate personally and substantially in taking official action for:
  - Contracting or procurement,
  - Administering or monitoring grants, subsidies, licenses, or other Federal benefits,
  - Activities in which the final decision may have a direct and substantial economic impact on the interests of a non-Federal entity,
  - Regulation or auditing of non-Federal entities, or
  - Administering or monitoring grants, subsidies, licenses, or other federal benefits.

### 3. Who is Excluded from Filing

Personnel not employed in contracting or procurement positions, who have authority to make purchases of less than \$2,500 per purchase, and less than \$20,000 cumulatively per year.

Pursuant to a memorandum signed by the Secretary of the Army on 11 October 2001, the following personnel are presumptively excluded from filing:

- Officers in the grade of O-3 and below, enlisted Soldiers in the grade of E-6 and below, and civilians in the grade of GS-6 and below. Warrant officers are not included in this category. These exclusions do not extend to officers in the Acquisition Corps.
- Government purchase card holders with authority up to the simplified acquisition threshold.
- None of these exclusions preclude supervisors from requiring subordinates to file the form when, in the supervisor's judgment, the subordinate has duties involving the exercise of significant independent judgment over matters that will have a substantial impact on the integrity of Army operations and relationships with non-Federal parties. Further, these exclusions do not apply to individuals who hold contracting warrants, or otherwise fall within categories defined in the Code of Federal Regulations or the Joint Ethics Regulation. Commanders are advised to consult with an ethics counselor before granting an exclusion.

In addition, personnel may be excluded by the head of an agency because:

- The possibility that the employee will be involved in a real or apparent conflict of interest is remote.
- The effect on the integrity of the federal government is inconsequential.
- There is a substantial degree of supervision and review.

#### **4. When Must One File?**

The OGE 450s are due by 15 February of each year. Personnel who move into a "covered" position must file a new entrant report within 30 days of doing so. If that person filed an annual OGE 450 as part of their previous duty position, a new entrant report is not required.

## **C. PUBLIC FINANCIAL DISCLOSURE – OGE 278**

### **1. Purpose of Filing**

To report the personal financial holdings of DoD employees holding certain status.

### **2. Who Must File**

Military personnel in the grade of O-7 or higher. This does not include "frocked" O-7s, who wear the rank but do not receive the pay. Reserve Component General Officers are required to file upon reaching 60 active duty days in a calendar year.

### **3. Filing and Reporting Requirements**

Contact your ethics counselor for assistance in determining what assets, liabilities, and outside activities must be disclosed on the OGE 278 and OGE 278-T. The OGE 278-T is a periodic transaction report which must be submitted within 30 days of certain transactions.

#### **4. When Must One File?**

The OGE 278 is due by 15 May of each year. If it is more than 30 days overdue, a \$200 fine is assessed to the filer. New entrants must file within 30 days of assuming a new position.

#### **5. The OGE 278 is Subject to Disclosure under the Freedom of Information Act**

Given that the OGE 278 may be made publicly available, filers are encouraged to protect their personally identifiable information (PII). Ethics counselors can assist filers in protecting their PII to the maximum extent allowable under law and regulation.

### **D. FINANCIAL DISCLOSURE ONLINE**

All financial disclosure statements, both OGE 450 and OGE 278, are now filed online at [www.fdm.army.mil](http://www.fdm.army.mil).





# Administrative Law



# & Personnel Actions



# Administrative Reprimands

## A. REFERENCE

- AR 600-37, Unfavorable Information
- AR 600-8-104, Army Military Human Resource Records Management

## B. OVERVIEW

Administrative reprimands are an adverse administrative action used to rehabilitate a Soldier and/or document unfavorable information related to a Soldier. While reprimands may be adjudged as punishment from a court-martial or nonjudicial proceedings, an *administrative* reprimand is not a punitive action under the Uniform Code of Military Justice. An administrative reprimand issued by a general officer is referred to as a general officer memorandum of reprimand (GOMOR).

An administrative reprimand filed in a Soldier's Army Military Human Resources Record (AMHRR) can significantly impact a Soldier's career and may result in non-selection for promotion, removal from a selection list, bar to continued service, administrative separation, or other adverse action. For example, in accordance with a Chief of Army Reserve memorandum dated 23 June 2017, U.S. Army Reserve officers who have GOMORs filed in their AMHRR must be processed for possible involuntary separation.

## C. ISSUING AND FILING AUTHORITIES (LOCAL FILE AND AMHRR)

### 1. Authority to Issue and Direct Filing in a Local File

Authority to issue and file an administrative reprimand in an enlisted Soldier's local file is restricted to commanders in the recipient's chain of command; school commandants; any general officer (to include those who are frocked); or any officer exercising general court-martial convening authority (GCMCA) over the recipient. While immediate supervisors of enlisted personnel may issue reprimands, they may only direct filing in the Soldier's local file if they are also in one of the above positions. Otherwise, the immediate supervisor must send the reprimand to one of the above officials for decision on whether to file the reprimand locally.

Authority to issue and file an administrative reprimand in an officer's local file is restricted to commanders in the recipient's chain of command who are senior in grade or date of rank to the recipient; the recipient's designated rater, intermediate rater, or senior rater under the officer evaluation system; any general officer (to include those who are frocked) who is senior to the recipient; or the GCMCA over the recipient or the GCMCA's designee.

Reprimands may only be locally filed for up to 18 months or until reassignment of the recipient to another general court-martial jurisdiction, whichever is sooner. The reprimand or

document memorializing the filing decision must state the length of time the reprimand is to remain in the local file, and provide a point of contact for the Soldier to contact after the expiration date to ensure removal. Both the Soldier and unit are equally responsible for removing the reprimand from the local file once the designated removal date is reached.

## **2. Authority to Issue and Direct Filing in the AMHRR**

Any official with authority to issue an administrative reprimand in a Soldier's local file may also issue an administrative reprimand with the intent to request that the reprimand be filed in the Soldier's AMHRR. However, regardless of issuing authority, only certain general officers may direct filing in the Soldier's AMHRR. These include, among others, a general officer exercising GCMCA over the recipient or the GCMCA's designee or delegate; a general officer commander over the recipient; the Commander, Human Resources Command; any HQDA staff principal; a State Adjutant General or designee; or the chief of any designated special branch pursuant to 10 U.S.C. § 3064 or their designee (i.e. Judge Advocate General's Corps, Chaplains, or Corps of the Army Medical Department).

Permanently filed reprimands will be filed in the performance portion of the AMHRR. Commanders may not file reprimands in the restricted portion of the AMHRR.

## **D. PROCESS**

Administrative reprimands require inclusion of specific language and strict adherence to the process outlined in AR 600-37. Additionally, there are special processing requirements for reprimands resulting from sex-related offenses and many commands have local withholding policies based on a recipient's rank or position. As a result, commanders considering issuing a reprimand, especially if they intend to file the reprimand in a Soldier's AMHRR, should consult with their servicing judge advocate. AR 600-8-2 requires commanders to flag Soldiers until final decision on the filing of the reprimand.

### **1. Referral**

Reprimands must be referred to the recipient concerned for comment. This referral will include and list applicable portions of investigations, reports, and other documents that serve, in part or in whole, as the basis for the reprimand.

### **2. Submission of Matters**

Once referred, recipients will be provided 7 calendar days or, if not on active duty, 30 calendar days to provide a statement or other material that rebuts, explains, or mitigates the unfavorable information. Traditionally, local Legal Assistance or, in certain cases, Trial Defense Service offices provide Soldiers assistance in submitting matters.

### **3. Review and Decision**

Statements and other evidence furnished by the recipient will be reviewed and considered by the officer authorized to direct filing in the AMHRR (or local file). The statements and/or material submitted by the recipient will be attached as enclosures to the reprimand along with

the recipient's acknowledgment of referral. The filing authority should receive recommendations from the recipient's chain of command in writing. A filing authority should only forward a reprimand for inclusion in the AMHRR after considering the circumstances and alternative measures. Minor behavior infractions or developmental mistakes will not normally be recorded in a Soldier's AMHRR. However, once placed in the AMHRR, such information will be permanently filed, unless removed through the appeals process. Appropriate filing authorities may direct filing in the AMHRR or local file or return the document to the issuing authority. If also the issuing authority, the filing authority may withdraw/rescind the reprimand. Decisions by the issuing/filing authority must be memorialized in an endorsement or addendum to the reprimand.

## **E. APPEALS PROCESS**

The Department of the Army Suitability Evaluation Board (DASEB) at the Army Review Boards Agency is the sole appeal authority for reprimands filed in a Soldier's AMHRR. However, like all military records, if a recipient is unsuccessful at the DASEB and has exhausted all other administrative remedies, the recipient may further appeal to the Army Board for Correction of Military Records. Appeals may be made for removal of the reprimand from the AMHRR or transfer of the reprimand to the restricted portion of the AMHRR (see AR 600-8-104 and Army Directive 2016-26 for when the restricted portion of the AMHRR is accessed by boards or other personnel). The DASEB will normally only consider appeals from Soldiers in the grade of E-6 and above.

### **1. Appeals for Removal from the AMHRR**

To remove the reprimand from the AMHRR, recipients must show, by clear and convincing evidence, that the document is either untrue or unjust, in whole or in part. Evidence submitted in support of the appeal may include, but is not limited to, an official investigation showing the initial investigation was untrue or unjust; decisions made by an authority above the imposing authority overturning the basis for the adverse documents; notarized witness statements; historical records; official documents; and/or legal opinions.

### **2. Appeals for Transfer to Restricted Portion of the AMHRR**

To transfer the reprimand to the restricted portion of the AMHRR, recipients must provide substantial evidence that the intended purpose of the reprimand has been served and indicate how transfer would be in the best interest of the Army. Such evidence may include, but is not limited to, statements of support from the imposing authority, the Soldier's current chain of command, the Soldier's chain of command at the time of imposition, and/or other memoranda of support; subsequent evaluation reports (other than academic); notarized witness statements; official documents; court documents; statements of remorse; documents demonstrating rehabilitation; other documents proving the intended purpose of the reprimand has been served; and legal documents. Recipients may not initiate this appeal until they have received at least one evaluation (other than academic) since imposition.

### **3. Appeals from Local Filing**

Recipients of locally filed reprimands may appeal to have the reprimand removed prior to the designated removal date by providing substantive evidence justifying removal to the original filing authority or a higher-level commander in the chain of command.

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# “Flagging” Soldiers from Favorable Personnel Actions

## A. REFERENCES

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

## B. FLAG MANAGEMENT ISSUE

Command teams may face challenges with flag management. Poor flag management is detrimental to the Army’s morale and negatively impacts the Army’s collective ability to manage the force by making timely and informed decisions.

### 1. Initiate Immediately

Do not take a “wait and see” approach before imposing flags. A flag will be initiated immediately when a Soldier’s status changes from favorable to unfavorable.

### 2. Mandatory Flag

Suspension of favorable personnel actions is mandatory if an investigation is initiated on a Soldier by military or civilian authorities. This is required for all command investigations—commander’s inquiry, AR 15-6 preliminary investigation, or AR 15-6 administrative investigation. Regardless of the reason for an arrest, an arrested Soldier also must be immediately flagged. The regulation defines “investigation” broadly and suspension of favorable actions on a Soldier is mandatory when military or civilian authorities initiate any investigation or inquiry that may potentially result in disciplinary action, adverse administrative action, or other loss to the Soldier’s rank, pay, or privileges. However, the initiation of a DD Form 200 (Financial Liability Investigation of Property Loss), in and of itself, will not result in the initiation of a flag. AR 600-8-2, paragraphs 2-1e and 2-2a.

### 3. Flag Code

The circumstances requiring initiation of a flag should accurately be reflected on the DA Form 268 using the proper reason/flag code. AR 600-8-2, paragraphs 2-2 and 2-3, and table 2-1.

### 4. Effective Date

The effective date of the flag is the date that the circumstance(s) requiring the flag occurred, not the date the flag was initiated. AR 600-8-2, paragraph 2-4.

## 5. Removal of Flag

A flag based on an arrest, investigation, court-martial, or Article 15 will not be removed until the Soldier is acquitted at court-martial or civilian trial and no other adverse action arising from the incident or charges is contemplated; when UCMJ action is closed or dropped without action; or when punishment (confinement, probation, restriction, extra duty, etc.) from court-martial, civilian trial, or nonjudicial punishment is completed (including any term of suspension). A flag for a Soldier on a HQDA promotion list may only be removed by Commander, HRC (for active and USAR Soldiers), or by Director, Army National Guard (for ARNG or ARNGUS Soldiers). Additionally, flags must be reviewed until removed. They must be reviewed at least monthly by unit level commanders, and reviewed and validated monthly at the battalion level if the report contains flags over 6 months old. AR 600-8-2, paragraphs 1-9, 2-9, and 2-10.



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# Enlisted Separations

## A. REFERENCES

- DoD Instruction 1332.14, Enlisted Administrative Separations
- DoD Instruction 1332.29, Involuntary Separation Pay
- AR 15-6, Procedures for Administrative Investigations and Boards of Officers
- AR 135-178, Enlisted Administrative Separations
- AR 600-8-2, Suspension of Favorable Personnel Actions
- AR 600-9, The Army Body Composition Program
- AR 600-20, Army Command Policy
- AR 600-85, Army Substance Abuse Program
- AR 635-200, Active Duty Enlisted Administrative Separations
- NGR 600-200, Enlisted Personnel Management
- U.S. Army Reserve Command (USARC) Memorandum, subject: Delegation of Separation Authority #18, Separation Authority Under AR 135-178, dtd 6 Mar 17

## B. INTRODUCTION

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 commanders, including unique issues when the separation involves Reserve Component Soldiers.

When analyzing enlisted administrative separations, consider:

### 1. What is the Reason for the Separation Action? Is the Separation Voluntary or Involuntary?

The various bases for enlisted administrative separations are generally found in AR 635-200, AR 135-178 for U.S. Army Reserve (USAR) personnel, and NGR 600-200 for Army National Guard (ARNG) personnel under different chapter headings (e.g., Ch. 14, AR 635, 200 covers misconduct separations for active duty Soldiers). Hence, separation actions are often called "chapters." These chapters cover both voluntary and involuntary separations.

## **2. Who has the Authority to Approve the Separation?**

Only certain commanders can direct or approve separations. These authorities are identified in the applicable separation regulation and can be impacted by separate delegations or withholdings of authority.

## **3. What Type of Discharge is Possible?**

There are different types of administrative discharges (also known as characterizations of service), 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. Consequently, the contemplated characterization of service may dictate whether the Soldier is entitled to an administrative separation board.

## **4. 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.

# **C. THE AUTHORITY TO ORDER SEPARATIONS**

**NOTE: Citations without reference to a regulation will be to AR 635-200. Regulations applicable to the USAR and ARNG have similar, though not identical, provisions under different chapters. Separation authorities for active duty (AD) Soldiers are discussed in paragraph 1-19, AR 635-200.**

## **1. Secretary of the Army (SA)**

The SA has virtually unlimited authority to separate an enlisted Soldier. This authority is explained in paragraph 5-3.

## **2. General Court-Martial Convening Authority (GCMCA)**

GCMCAs may approve all separations in AR 635-200, 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. 14-1a and d, and 14-9a), and early release from AD of Reserve Component personnel serving Active Guard Reserve (AGR) tours under Title 10 (para. 5-15).

## **3. General Officer (GO) in Command with a Legal Advisor**

Has the same separation authority as a GCMCA except lack of jurisdiction (para. 5-9) and discharge in lieu of court-martial (Ch. 10). Additionally, only a GCMCA may serve as the separation authority for cases involving Soldiers who filed an unrestricted report of sexual assault within 24 months or for Chapter 7 and Chapter 14 cases where a medical evaluation board is also being processed.

The USARC Commanding General has delegated authority to take final action on enlisted separations to USARC General Officer Commanders who have a judge advocate or legal advisor. Please see current USARC delegations of authority for further guidance.

#### **4. 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 other action under the following chapters:

- Ch. 5, Convenience of the Government (except para. 5-9, Lack of Jurisdiction);
- Ch. 6, Dependency or Hardship;
- Ch. 7, Defective Enlistments, Reenlistments, and Extensions;
- Ch. 8, Pregnancy;
- Ch. 9, Alcohol or Other Drug Abuse Rehabilitation Failure;
- Ch. 10, Discharge in Lieu of Court-Martial (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);
- Ch. 11, Entry Level Performance and Conduct;
- Ch. 12, Retirement;
- Ch. 13, Unsatisfactory Performance;
- Ch. 14, Misconduct;
- Ch. 16, Selected Changes in Service Obligations; and
- Ch. 18, Failure to Meet Body Fat Standards.

#### **5. Lieutenant Colonel (LTC)-Level Commander with a Legal Advisor**

This authority includes promotable MAJs assigned to LTC-level command positions, but not MAJs or promotable MAJs who are acting commanders. 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:

- Ch. 5, Separation of Personnel Who Did Not Meet Procurement Medical Fitness Standards (para. 5-11);
- Ch. 8, Separation of Enlisted Women-Pregnancy;
- Ch. 9, Alcohol or Other Drug Abuse Rehabilitation Failure;
- Ch. 11, Entry Level Performance and Conduct;
- Ch. 13, Separation for Unsatisfactory Performance (if notification procedure is used);
- Ch. 16, Selected Changes in Service Obligations (paras. 16-4 through 16-10); and

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

## **6. Commander, Human Resources Command**

May order the separation of enlisted Soldiers serving in an Individual Mobilization Augmentee, Individual Ready Reserve, Standby Reserve, or Ready Reserve status.

## **7. Headquarters, Department of the Army (HQDA)**

Only HQDA may involuntarily discharge a Soldier with 18 or more years of active federal service. Only the SA or his designee may order the involuntary separation of a USAR Soldier with more than 18, but fewer than 20 years of qualifying service for retired pay.

## **8. Separation Authority's Determinations**

In making their decision, the separation authority must consider (para. 2-3):

- Is there sufficient evidence? Government's burden, not the Soldier's (or "respondent"). Preponderance of evidence is the standard (i.e., a greater weight of evidence than that which supports a contrary conclusion).
- Retain or separate?
- If separate, what type of discharge (character of service) is appropriate?

## **9. Waivers of Boards**

A Soldier entitled to an administrative board may submit a conditional waiver to a hearing by a board after a reasonable opportunity to consult with counsel (para. 2-5). The conditional waiver is a memorandum submitted by a Soldier waiving the right to a hearing by a board on the condition that characterization of service on separation will be more favorable than the least favorable characterization or description of service authorized for the basis of the separation reason listed in the notification memorandum. The separation authority will be the same as if the Soldier had not submitted the conditional waiver.

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 GCMCA or GO in command with a legal advisor. 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. When the Soldier waives his or her right to separation board, the separation will be processed under the Notification Procedure discussed below.

## **D. CHARACTERIZATION OF SERVICE OR TYPE OF DISCHARGE**

*Characterization at separation will be based upon the quality of the Soldier's service, including the reason for separation . . . subject to the limitation under the various reasons for separation. (1) The quality of service will be determined according to standards of acceptable personal conduct and performance of duty for military personnel. (2) 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

## 1. Honorable Discharge

*“The honorable characterization is appropriate when the quality of the Soldier’s service generally has met the standards of acceptable conduct and performance of duty for Army personnel . . . .” (para. 3-7a).*

- If the Soldier is separated for a reason where an honorable discharge is discretionary, conditions such as the extent and seriousness of infractions and whether the behavior is a pattern or isolated incident should be considered.
- Soldier receives DD Form 256A, Honorable Discharge Certificate.
- This discharge is usually required if the Government introduces limited use information from the Army Substance Abuse Program (ASAP) during discharge proceedings under Chapter 14, Misconduct.

## 2. General Discharge (Under Honorable Conditions)

*A general discharge is “issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge” (para. 3-7b(1)).*

- Only permitted if the reasons for separation (chapter) specifically allow such characterization, and is not permitted for expiration of term of service (ETS).
- Soldier receives DD Form 257A, General Discharge Certificate.
- Impact on benefits:
  - No civil service retirement credit for time spent on active duty.
  - No education benefits. Money paid in to Montgomery GI Bill is forfeited (subject to vesting of the benefit due to previous honorable discharge).
  - Many states will not pay unemployment compensation.
  - “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.
- Upgrading requires application to the Army Board for Correction of Military Records (ABCMR) or the Army Discharge Review Board (ADRB) and this is not automatic.

### **3. Under Other Than Honorable (OTH) Conditions Discharge**

*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 Soldiers . . . ." (para. 3-7c(1)).*

- Board hearing is generally required, unless waived by the Soldier or the separation is voluntary (i.e., Ch. 10).
- No discharge certificate is issued, but Soldier still receives DD Form 214 with characterization of service annotated.
- When approved by a separation authority, automatically reduces an enlisted Soldier to Private, E-1, by operation of law.
- There are additional impacts on benefits beyond that of a general discharge. Again, there is no automatic upgrading of the discharge; upgrading requires application to the ABCMR or the ADRB.

### **4. Entry-Level Status (Uncharacterized) Separation**

- Service will be described as uncharacterized if separation processing is initiated while a Soldier is in an entry-level status.
- For AD Soldiers, entry-level status is the first 180 days of continuous AD or the first 180 days of continuous AD following a break of more than 92 days of active military service.
- Counseling and rehabilitation is essential before separation.
- 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.

### **5. Order of Release from Custody and Control of the Army**

- Usually no characterization of service because the person never acquired military status. There is an exception for constructive enlistment.
- Very rare, used only for void enlistments.
- Since no "service," no veteran's benefits.

### **6. Punitive Discharges**

Dishonorable and Bad Conduct discharges may only result from an approved court-martial sentence, not an administrative separation. A common mistake by leaders conducting counseling for misconduct or unsatisfactory performance is the threat of a punitive discharge if the behavior continues. Such counseling is ineffective and fails to meet the counseling requirements of AR 635-200, Chapter 17. The servicing judge advocate or paralegal can provide a template for counseling that includes the lawful characterizations of service a Soldier could receive for various misconduct or unsatisfactory performance.

## **E. PROCEDURAL REQUIREMENTS AND ADMINISTRATIVE CONSIDERATIONS**

### **1. Counseling**

Counseling and rehabilitative transfer requirements apply to many separations. Commanders must make reasonable efforts to identify Soldiers who may be candidates for separation as early as possible, in order to improve their chances for retention. In accordance with paragraph 1-16, counseling is always required for:

- Involuntary separation due to parenthood,
- Personality disorder,
- Other designated physical or mental conditions,
- Entry-level performance and conduct,
- Unsatisfactory performance,
- Minor disciplinary infractions or a pattern of misconduct, and
- Failure to meet Army body composition standards

Additionally, a rehabilitative transfer is generally required under Chapters 11 (entry-level performance and conduct), 13 (unsatisfactory performance), 14-12a (minor disciplinary infractions), and 14-12b (a pattern of misconduct). Trainees should be recycled between companies or platoons at least once. Soldiers other than trainees should be recycled between battalion-sized units or larger at least once, with at least 3 months at each unit. Permanent Change of Station (PCS) is only for “meritorious cases” where the Soldier is a “distinct asset” to the Army. Waiver is authorized if transfer would serve no useful purpose, would not produce a quality Soldier, or is not in the best interest of the Army.

### **2. Medical Examination**

Commanders will ensure that Soldiers initiated for separation who are required to obtain a physical examination per 10 U.S.C. § 1145 obtain such. Among others, this applies to all AD involuntary separations. Physical examinations and mental health evaluations will comply with AR 40-501 and other policy guidance issued by the Surgeon General and U.S. Army Medical Command. In addition to medical examinations, mental status evaluations conducted by a psychologist, or master-level, licensed clinical social worker, are required for Soldiers being processed for separation under Chapters 13 or 14.

### **3. Medical Examination for Soldiers Processed with an OTH**

Commanders will ensure that Soldiers pending separation under conditions other than honorable (to include cases under Chapter 10, In Lieu of Trial by Court-Martial) obtain a medical examination to determine whether post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) was a factor in the Soldier’s misconduct per 10 U.S.C. § 1177 under the following conditions:

- Any Soldier who has been deployed overseas in support of a contingency operation within the previous 24 months and has been diagnosed with, or reasonably alleges, influence of PTSD/TBI based on such deployment; or
- Any Soldier who reported having been sexually assaulted within the previous 24 months and has been diagnosed with, or reasonably alleges, influence of PTSD/TBI based on such sexual assault.

#### **4. Written Notification**

The Commander notifies the Soldier in writing that separation is recommended. The Soldier must sign acknowledgment of receipt. Notice will include: specific allegations and provisions of regulation that authorize separation; least favorable characterization of service the Soldier could receive; the type of discharge recommended by the initiating commander; the right to consult with counsel; the right to submit statements; the right to obtain copies of all matters going to separation authority; and the right to a hearing if the Soldier has 6 years or more of combined active and reserve service on date separation is initiated (para. 2-2).

#### **5. Soldier May Consult with Counsel**

Soldiers may consult with counsel from the Trial Defense Service within a reasonable time. Soldiers may also consult with civilian counsel at their own expense. Soldiers may submit matters within 7 duty days (or request an extension justified with good cause). Different timelines apply to USAR and ARNG Soldiers not on active duty. For example, these Soldiers must submit matters within 30 calendar days rather than 7 duty days. See AR 135-178 and NGR 600-200 and consult your servicing judge advocate for specific timelines.

#### **6. Separation Authority Action**

Once the Soldier's matters are submitted, the action is forwarded through command channels to the separation authority for final action.

#### **7. Legal review**

There is no requirement for legal review unless limited use evidence is involved (as defined in AR 600-85, paragraph 10-12). 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.

### **F. NOTIFICATION PROCEDURE**

#### **1. Notification Procedure Alone May be Used When:**

- The Soldier has fewer than 6 years of combined active and reserve service on date separation is initiated, and
- The command does not seek to impose an OTH discharge.



## 2. The Regulation Permits Notification Procedure Under, Among Others:

- Some provisions of Ch. 5, Convenience of the Government;
- Ch. 7, Defective Enlistments/Reenlistments and Extensions;
- Ch. 9, Alcohol or Other Drug Abuse Rehabilitation Failure;
- Ch. 11, Entry Level Performance and Conduct;
- Ch. 13, Unsatisfactory Performance;
- Ch. 14, Misconduct (unless an OTH is warranted); and
- Ch. 18, Failure to Meet Body Fat Standards.

## G. BOARD HEARING CASES

An administrative board hearing is used if required by the governing chapter of the regulation, if the Soldier has 6 or more years of total active and reserve military service and elects a board, or if the command is contemplating discharge with an OTH discharge and the Soldier elects a board.

The Board must be composed of at least three commissioned, warrant, or noncommissioned officers; at least one of the voting commissioned officers must be a reserve officer if the Soldier being separated is in the Reserve Component. Enlisted members of the board must be a SFC or above and senior to the respondent. At least one member of the board must be a MAJ or above, and a majority of the members must be commissioned or warrant officers. See AR 135-178 and NGR 600-200 and consult your servicing judge advocate for the board composition for Soldiers not on active duty, which have additional requirements when an OTH is recommended.

The board is conducted under the provisions of AR 15-6, with the government and respondent (Soldier and/or counsel) presenting evidence, witnesses, and arguments to the board for deliberation. A verbatim record of findings and recommendations is made, as is a summary of the proceedings and testimony for the separation authority's review.

The respondent's rights include testifying on their own behalf to the board, submission of a written or recorded matter, obtaining military counsel to represent them at the board, questioning witnesses at the board, and personal appearance at the board. Failure to invoke these rights, including failure to appear at the board, does not bar the board from meeting and making findings and recommendations.

The board must make a finding as to each allegation mentioned in the notification of separation, as well as a recommendation to either retain or separate the Soldier. If separation is recommended, the board must also recommend a characterization of service. Finally, the board may also recommend suspension of the separation for a period not to exceed 12 months. The separation authority may take action no less favorable than recommended by the board. However, a board recommendation to suspend separation is not binding on the separation authority.

## **H. UNSATISFACTORY PARTICIPATION (RESERVE COMPONENT SOLDIERS)**

One of the most vexing problems facing Reserve Component commanders is the issue of Soldiers failing to meet their Reserve obligations. Under AR 135-91, a Soldier may be deemed an “unsatisfactory participant” if they accrue within a 12-month period a total of nine unexcused absences (nine missed Multiple Unit Training Assembly, or MUTAs) or fail to attend or complete annual training (AT). MUTAs are usually 4-hour blocks of training, with 4 MUTAs comprising a typical weekend battle assembly. Thus, while a Soldier missing three two-day battle assemblies would accrue twelve unexcused absences, any combination of nine MUTAs in a 12-month period, beginning the date of the first absence, could justify separation.

Commanders must ensure every MUTA missed by their Soldiers is documented by their servicing unit administrator or S/G-1. Paragraph 4-15 of AR 135-91 details documentation requirements to substantiate separation, including delivery of a notice of unexcused absence either in person or by first-class mail (with the first notice required to be sent by certified mail, return receipt requested) and the filing of such notices into the Soldier’s personnel file. When separation is based on failure to complete annual training (AT), no notices are required beyond notifying the Soldier via AT orders sent to their address on record. If the Soldier cannot be personally delivered the AT order, the order should be sent via certified mail, return receipt requested.

## I. SUMMARY OF SEPARATION ACTIONS

	<b>SECRETARIAL AUTHORITY</b>	<b>PARENTHOOD</b>	<b>PERSONALITY DISORDER</b>
<b>GROUND FOR ACTION.</b>	Best interest of the Army; may apply to reason not covered by other, more specific provision. See also Army Directive 2013-21 for Soldiers convicted of sex offenses.	Parental obligations interfere with military responsibilities, e.g., repeated absenteeism, late for work, unavailable for field exercises, CQ, SDO, worldwide deployment or assignment.	Long term, deeply ingrained, maladaptive pattern of behavior that interferes with duty performance, diagnosed by psychiatrist or licensed clinical psychologist.
<b>COUNSELING AND REHAB REQUIRED?</b>	No.	Yes.	Yes.
<b>WHO INITIATES?</b>	Soldier or any commander, including separation authority if board recommends retention.	Immediate or any higher commander.	Immediate or any higher commander.
<b>BOARD HEARING?</b>	No. If command initiated, use notification procedure only, even if Soldier has more than 6 years of service.	Use notification procedure. Entitled to board if Soldier has 6 or more years of active and reserve service.	Use notification procedure. Entitled to board if Soldier has 6 or more years of active and reserve service.
<b>REGULATION.</b>	AR 635-200, para. 5-3.	AR 635-200, para. 5-8.	AR 635-200, paras. 5-13 or 5-17.
<b>SEPARATION AUTHORITY.</b>	Secretary of the Army.	SPCMCA.	SPCMCA or GCMCA if Soldier has been in imminent danger pay area.
<b>CHARACTER OF SERVICE</b>	Hon, Gen, or ELS.	Hon, Gen, or ELS.	Hon, Gen, or ELS. See para. 5-13h for General

	<b>PHYSICAL OR MENTAL CONDITIONS</b>	<b>FAILURE TO MEET BODY FAT STANDARDS</b>	<b>RELEASE FOR MINORITY (16 OR YOUNGER)</b>
<b> GROUNDS FOR ACTION</b>	Conditions that potentially interfere with assignment or duty, but not disability or paras. 5-11 or 5-13 conditions. Diagnosed by psychiatrist or licensed clinical psychologist.	Failure to meet body fat standards in AR 600-9. Overweight condition must be only basis for discharge.	Enlisted when under age 17 and still under age 17.
<b>COUNSELING AND REHAB REQUIRED?</b>	Yes.	Comply w/ AR 600-9.	No.
<b>WHO INITIATES?</b>	Immediate or any higher commander.	Immediate or any higher commander.	Immediate or any higher commander.
<b>BOARD HEARING?</b>	Use notification procedure. Entitled to board if Soldier has 6 or more years of active and reserve service.	Use notification procedure. Entitled to board if Soldier has 6 or more years of active and reserve service.	No.
<b>REGULATION</b>	AR 635-200, para. 5-17	AR 635-200, para. 5-18.	AR 635-200, Ch. 7, Sec. II.
<b>SEPARATION AUTHORITY</b>	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.	SPCMCA.
<b>CHARACTER OF SERVICE</b>	Hon, Gen, or ELS. See para. 5-1.	Hon or ELS.	Release from custody & control of the Army.

	<b>RELEASE FOR MINORITY (17 YEARS OLD)</b>	<b>ERRONEOUS ENLISTMENT</b>	<b>DEFECTIVE OR UNFULFILLED ENLISTMENT</b>
<b>GROUNDS FOR ACTION</b>	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 cannot fulfill. Soldier must identify w/ in 30 days of discovery.
<b>COUNSELING AND REHAB REQUIRED?</b>	No.	No.	No.
<b>WHO INITIATES?</b>	Parents w/in 90 days of enlistment.	Immediate or higher commander.	Immediate or higher commander.
<b>BOARD HEARING?</b>	No.	Use notification procedure. Entitled to board if Soldier has 6 or more years of active and reserve service.	No.
<b>REGULATION</b>	AR 635-200, Ch. 7, Sec. II.	AR 635-200, Ch. 7, Sec. III.	AR 635-200, Ch. 7, Sec. III.
<b>SEPARATION AUTHORITY</b>	SPCMCA.	SPCMCA.	SPCMCA.
<b>CHARACTER OF SERVICE</b>	ELS.	Hon, ELS, or release from custody & control of Army.	Hon or ELS.

	<b>FRAUDULENT ENTRY</b>	<b>ALCOHOL OR DRUG ABUSE REHABILITATION FAILURE</b>	<b>IN LIEU OF TRIAL BY COURT-MARTIAL</b>
<b> GROUNDS FOR ACTION</b>	Material misrepresentation, omission, or concealment of information that if known by Army might have resulted in rejection.	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 to adjudge a punitive discharge.
<b>COUNSELING AND REHAB REQUIRED?</b>	No.	No.	No.
<b>WHO INITIATES?</b>	Immediate or higher commander.	Immediate or any higher commander.	Soldier.
<b>BOARD HEARING?</b>	Yes, but may be waived. No board if OTH not warranted and Soldier has fewer than 6 years of active and reserve service.	Use notification procedure. Entitled to board if Soldier has more than 6 years active and reserve service.	No.
<b>REGULATION</b>	AR 635-200, Ch. 7, Sec. IV.	AR 635-200, Ch. 9.	AR 635-200, Ch. 10.
<b>SEPARATION AUTHORITY</b>	GCMCA if OTH warranted; if OTH not warranted and notification procedure used, then SPCMCA.	LTC Cdr (or MAJ(P) in LTC Cmd) if no board; SPCMCA if board used.	GCMCA in most cases.
<b>CHARACTER OF SERVICE</b>	Hon, Gen, OTH, or ELS.	Hon, Gen, or ELS. Hon required if limited use evidence introduced.	Normally OTH. Hon or Gen possible.

	<b>ENTRY LEVEL PERFORMANCE AND CONDUCT</b>	<b>UNSATISFACTORY PERFORMANCE</b>	<b>CONVICTION BY CIVILIAN COURT</b>
<b> GROUNDS FOR ACTION</b>	Unsatisfactory performance or minor disciplinary infractions in first 180 days of service. Inability, lack of effort, failure to adapt, or pregnancy that prevents MOS training.	Unsatisfactory duty performance.	Civilian conviction for offense that authorizes punitive discharge under UCMJ, or any civilian sentence to confinement for more than 6 months.
<b> COUNSELING AND REHAB REQUIRED?</b>	Yes.	Yes.	No.
<b> WHO INITIATES?</b>	Immediate or any higher commander.	Immediate or any higher commander.	Immediate or any higher commander.
<b> BOARD HEARING?</b>	Use notification procedure.	Use notification procedure. Entitled to board if Soldier has more than 6 years active and reserve service.	Yes, but may be waived. No board if OTH not warranted and Soldier has fewer than 6 years of active and reserve service. No appearance if in confinement.
<b> REGULATION</b>	AR 635-200, Ch. 11.	AR 635-200, Ch. 13.	AR 635-200, para. 14-5.
<b> SEPARATION AUTHORITY</b>	LTC Cdr (or MAJ(P) in LTC Cmd).	LTC Cdr (or MAJ(P) in LTC Cmd) if no board; SPCMCA if board used.	GCMCA if OTH warranted; if OTH not warranted and notification procedure used, then SPCMCA.
<b> CHARACTER OF SERVICE</b>	ELS.	Hon or Gen.	Hon, Gen, OTH, or ELS.

	<b>MINOR (MILITARY) DISCIPLINARY INFRACTIONS</b>	<b>PATTERN OF MISCONDUCT</b>	<b>COMMISSION OF A SERIOUS OFFENSE</b>
<b> GROUNDS FOR  ACTION</b>	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 the Manual for Courts-Martial.
<b> COUNSELING  AND REHAB  REQUIRED?</b>	Yes.	Yes.	No.
<b> WHO INITIATES?</b>	Immediate or any higher commander.	Immediate or any higher commander.	Immediate or any higher commander.
<b> BOARD  HEARING?</b>	Yes, but may be waived. No board if OTH not warranted and Soldier has fewer than 6 years of active and reserve service.	Yes, but may be waived. No board if OTH not warranted and Soldier has fewer than 6 years of active and reserve service.	Yes, but may be waived. No board if OTH not warranted and Soldier has fewer than 6 years of active and reserve service.
<b> REGULATION</b>	AR 635-200, para. 14- 12a.	AR 635-200, para. 14- 12b.	AR 635-200, para. 14- 12c.
<b> SEPARATION  AUTHORITY</b>	GCMCA if OTH warranted; if OTH not warranted and notification procedure used, then SPCMCA.	GCMCA if OTH warranted; if OTH not warranted and notification procedure used, then SPCMCA	GCMCA if OTH warranted; if OTH not warranted and notification procedure used, then SPCMCA
<b> CHARACTER OF  SERVICE</b>	Hon, Gen, OTH, or ELS.	Hon, Gen, OTH, or ELS.	Hon, Gen, OTH, or ELS.



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# Officer Separations

## A. REFERENCES

- DoD Instruction 1332.30, Commissioned Officer Separations
- AR 600-8-24, Officer Transfers and Discharges
- AR 135-175, Separation of Officers

## B. OVERVIEW

Numerous conditions may justify the initiation of an administrative separation or elimination action against an officer. The terms separation and elimination are often used interchangeably for officers eliminated from active duty. An “elimination” is a removal from commissioned or warrant officer status in the Army and removal from active duty (AD) and the active duty list. “Separation” is a general term that includes discharge, release from active duty, release from custody and control of the Military Services, transfer to the Individual Ready Reserve, dropped from roles, and similar changes in active or Reserve status. Elimination of “probationary” officers may be expeditious, while “non-probationary” officers are afforded more due process prior to final action. Troop Program Unit (TPU) and Individual Mobilization Augmentee (IMA) officers are separated under AR 135-175. Active Guard Reserve (AGR) officers must be separated under the provisions of AR 600-8-24, the same regulation applicable to AD officers. Army National Guard officers are subject to withdrawal of federal recognition.

## C. REASONS FOR ELIMINATION

Officers may be eliminated for, among other reasons, substandard performance of duty, misconduct, or the existence of adverse or derogatory information in their official records. AR 600-8-24, paragraph 4-2 contains a list of specific, but not all inclusive, reasons that may lead to elimination. See AR 135-175 and consult your servicing judge advocate for similar reasons justifying separation of U.S. Army Reserve officers.

### 1. Substandard Performance of Duty

Officers discharged exclusively for one of the following or similar conditions will be issued an honorable discharge certificate. Given that the characterization of service is limited under this paragraph to the most favorable certificate given to officers leaving the service, commanders should carefully consider the reasons for separation cited in the officer’s notification memorandum. If evidence of misconduct or professional dereliction exists, consider separation under that basis.

- A downward trend in overall performance resulting in an unacceptable record of efficiency, or a consistent record of mediocre service.

- Failure to keep pace or to progress with contemporaries, as demonstrated by a low record of efficiency when compared with other officers in the same grade and competitive category.
- Failure to exercise necessary leadership or command expected of an officer of their grade.
- Failure to absorb technical proficiency required for grade and competitive category.
- Failure to properly perform assignments commensurate with an officer's grade and experience.
- Apathy, defective attitudes, or other character disorders, including inability or unwillingness to expend effort.
- Failure to respond to alcohol or drug problem rehabilitation efforts in a reasonable length of time.
- Failure to conform to prescribed standards of dress, personal appearance, or military deportment.
- Failure to achieve satisfactory progress after enrollment in the Army weight control program or failure to maintain the weight/body fat standards established under the provisions of AR 600-9 after removal from an established weight control program.
- When no medical problems exist, and an officer has two consecutive failures of the APFT.
- Failure of a course at a service school for academic reasons.
- Failure to establish an adequate Family Care Plan in accordance with AR 600-20.

## **2. Misconduct, Moral or Professional Dereliction, or in the Interests of National Security**

Officers discharged for one of the following or similar conditions may be issued an honorable, general (under honorable conditions), or other than honorable discharge.

- Discreditable, intentional failure to meet personal financial obligations.
- Mismanagement of personal affairs that are unfavorably affecting an officer's performance of duty.
- Mismanagement of personal affairs to the discredit of the service.
- Intentional omission or misstatement of facts in official statements or records for the purpose of misrepresentation.
- Acts of personal misconduct (including, but not limited to, acts committed while in a drunken or drug-intoxicated state).
- Intentional neglect or failure to perform assigned duties.
- Conduct unbecoming an officer.
- Conduct or actions that result in the loss of a professional status, such as withdrawal, suspension or abandonment of professional license, endorsement, or certification that is directly.
- The final denial or revocation of an officer's Secret security clearance by appropriate authorities. All active duty officers must hold a security clearance of at least secret, and reserve component officers must hold or be capable of holding a clearance of at least secret.

- Conviction by court martial that did not impose a punitive discharge for a sexually violent offense.

### **3. Derogatory Information**

Officers discharged for one of the following conditions involving derogatory information may be issued an honorable, general (under honorable conditions), or other than honorable discharge.

- Punishment under Article 15, UCMJ.
- Conviction by court-martial.
- The final denial or revocation of an officer's Secret security clearance by appropriate authorities.
- A relief for cause officer evaluation report.
- Adverse information filed in the Army Military Human Resources Record (AMHRR) filed in accordance with AR 600-37.
- Failure of a course at a service school.

## **D. OFFICER ELIMINATION PROCEDURES**

Non-probationary officers have more time in service than probationary officers. Non-probationary officers are commissioned officers with more than 5 years of commissioned service, and warrant officers with more than 3 years of service since their original appointment. They therefore are entitled to more due process prior to final elimination. The specific procedures for eliminating non-probationary officers are contained in AR 600-8-24, Table 4-1.

Elimination actions may be initiated by the Secretary of the Army, the Chief of Staff of the Army, or those official designated by them. Elimination actions may also be and are more commonly initiated by the Commander General, Human Resources Command (CG, HRC); Deputy Chief of Staff, G-1; or a General Officer Show Cause Authority (GOSCA). Commanders exercising general court-martial authority and all general or flag rank officers in command who have a judge advocate or legal advisor available are GOSCA's. While the above personnel may initiate an officer elimination, only the Secretary of the Army may direct discharge. This authority has been delegated to the Assistant Secretary of the Army (Manpower and Reserve Affairs) and further delegated to the Deputy Assistant Secretary of the Army (Review Boards) (DASA-RB).

Commanders should be aware that officer eliminations, particularly eliminations of non-probationary officers, have significant processing times.

### **1. Non-Probationary Officers**

Normally, a GOSCA or the CG, HRC notifies in writing the affected officer of the intent to eliminate him or her. This notification will identify, among other things, the provision under which the officer has been identified for separation, a contemplated characterization of service, and information on obtaining counsel.

The notification memorandum will inform the officer of the right to submit a written statement in his or her behalf, and to tender resignation in lieu of elimination, retire in lieu of elimination, or appear before a board of inquiry (also known as a “show cause” board) that will hear the case and decide whether to recommend separation or retention.

If the officer elects to have his case heard by a board of inquiry, a board consisting of at least two LTCs or above and one COL or above, all senior in grade to the respondent, will convene and recommend whether or not to separate the officer. At this board, the officer will have the right to present matters in his or her behalf and to cross-examine witnesses with the aid of a military defense counsel or the assistance of a civilian attorney (at no cost to the Government). Boards must be completed no later than 90 calendar days from the date that the initiation directs them to convene.

If the board recommends retention, the officer will be advised and the action will be closed. If the board recommends the officer’s separation, the board’s report will be forwarded through command channels to HRC, which ultimately routes the action to the Army Review Boards Agency and to the DASA-RB for final approval authority regarding whether to retain or eliminate the officer.

Officers eliminated from the Army may receive an Honorable, General, or Other Than Honorable Discharge. Officers discharged solely on the basis of substandard duty performance will receive an Honorable Discharge.

## **2. Probationary Officers**

In addition to the other bases for elimination contained in paragraph 4-2 of AR 600-8-24, probationary officers may be eliminated for failing to resign for medical reasons existing at the time of their appointment, or the discovery of other conditions that would have precluded their original appointment if they had been known at the time of appointment, or the discovery of any other condition that indicates the officer’s retention in the Army would not be in the best interest of the United States.

Elimination procedures for probationary officers are contained in AR 600-8-24, Table 4-2. The procedures generally are the same as for non-probationary officers, except that probationary officers are not entitled to have their cases heard by a board of inquiry, unless an other than honorable discharge is recommended.

## **E. SUSPENSION OF FAVORABLE PERSONNEL ACTIONS**

Immediately upon the change of a status from favorable to unfavorable, a flag should be imposed on the officer. This includes initiation administrative separations, and the flag should not be lifted until there is a final determination of retention or the officer has been separated/assigned to a transition point for separation. AR 600-8-2 leaves no room for a commander’s discretion on imposing a flag for elimination.

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# Bars to Continued Service

## A. REFERENCES

- Army Directive 2016-19, Retaining a Quality Noncommissioned Officer Corps
- AR 601-280, Army Retention Program
- AR 140-111, U.S. Army Reserve Reenlistment Program
- NGR 600-200, Enlisted Personnel Management
- NGB-ARH Policy #09-026, Annex A, dtd 13 Aug 09

## B. OVERVIEW

Effective 1 October 2016, the Army redesignated the bar to reenlistment (Regular Army and U.S. Army Reserve (USAR) only) as the bar to continued service. The Army National Guard continues to utilize bars to reenlistment. Bars to continued service are an administrative tool available to commanders to deny a Soldier's reentry into service beyond ETS, or continued service when not in the best interest of the military service. Only Soldiers of high moral character, personal competence, and demonstrated adaptability to the requirements of the professional Soldier's moral code will be authorized continued service. Barred Soldiers are not eligible to reenlist or PCS, and are not candidates for continued service in any Army component. Bars to continued service serve a useful purpose as a "probationary period," enabling a Soldier to show signs of rehabilitation following acts of misconduct or substandard performance that led to the bar. This chapter addresses bars initiated by field commanders (as opposed to HQDA).

## C. DEFICIENCIES TRIGGERING A BAR

### 1. Discretionary Grounds for Imposing Bars

Generally, commanders should consider bars to continued service against Soldiers who are untrainable or unsuited for military service. Acts of misconduct or substandard performance may trigger a bar to continued service. A non-inclusive list of discretionary grounds to initiate bars to continued service can be found in AR 601-280, paragraph 8-4.

### 2. Mandatory Grounds for Initiating Bars

Commanders must initiate bars to continued service for the following grounds:

- Failure to make satisfactory progress in the Army Body Composition Program (AR 600-9);
- Failing two consecutive APFTs (AR 350-1);

- Removed for cause from Noncommissioned Officer Education System courses;
- Loss of primary MOS qualification in accordance with AR 600-8-19 due to fault of the Soldier;
- Commander denied automatic integration onto the sergeant or staff sergeant promotion standing list in accordance with AR 600-8-19;
- An incident involving the use of illegal drugs or alcohol within the current enlistment/reenlistment period resulting in an officially filed reprimand; a finding of guilty under Article 15, UCMJ; a civilian criminal conviction; or a conviction by court-martial;
- Two or more separate proceedings under Article 15, UCMJ, resulting in a finding of guilty by a field grade commander during the Soldier's current enlistment or period of service; and
- Absent without leave more than 96 hours during the current enlistment/reenlistment period.

Although these are mandatory grounds to initiate, the bar may be removed in accordance with AR 601-280, Appendix K, when the Soldier overcomes the deficiency. Additionally, while not listed in AR 601-280, AR 600-20, paragraph 4-22 requires initiation of a bar to continued service for Soldiers with qualifying convictions under the Lautenberg Amendment.

## **D. SPECIAL RULES**

### **1. Guidelines**

Bars to continued service may be initiated when separation action is pending in accordance with AR 635-200, and on Soldiers serving on indefinite reenlistments, now known as the career status program. Specific guidelines for using bars to continued service, including when bars may or must be initiated, are contained in AR 601-280 and AR 140-111.

### **2. Bars Should Not be Initiated**

- Solely because a Soldier refuses to reenlist.
- For Soldiers with an approved retirement.
- For USAR Soldiers, during the last 90 days (30 days for an AGR Soldier) before the Soldier is discharged, transferred from the command, or released from active duty (REFRAD). If initiated during this period, the commander must provide a complete explanation as to why the action was not taken earlier. This explanation will be entered on DA Form 8028 (U.S. Army Reserve Bar to Reenlistment Certificate).

## **E. PROCEDURES FOR INITIATING AND IMPOSING BARS ON AC SOLDIERS**

AR 601-280, Appendix K details procedures for initiating a bar. Commanders should take special note of the following:

## 1. Initiating Commander

Any commander in the Soldier's chain of command may initiate a bar to continued service. Normally, the company-, battery-, troop-, or detachment-level commander will initiate the action by completing DA Form 4126. Bars to continued service are initiated using DA Form 4126. Soldiers will be flagged upon initiation of the bar IAW AR 600-8-2, para 2-2 and 2-3, as applicable.

Soldiers will be afforded an opportunity to respond to the proposed bar, in writing. They will be provided a copy of the commander's recommendation, and given at least 7 days to submit a response. Each commander in the chain of command up to the approval authority (see authorities below) must personally endorse the Soldier's comment.

The commander's recommendation and the Soldier's rebuttal, if submitted, must be forwarded to the next higher commander in the normal chain, up to the proper Approval Authority.

## 2. Approval Authority

Final approval authority must be at least one approval level higher than the initiating commander.

- **Soldiers with Less than 10 Years Active Federal Service at Date of Bar Initiation.**

The approval authority is the first commander in the rank of LTC or above in the Soldier's chain of command, or the commander exercising Special Courts-Martial Convening Authority, whomever is in the most direct line to the Soldier; personal signature is required.

- **Soldiers with 10 or More Years Active Federal Service at Date of Bar Initiation.**

The approval authority is the first brigade-level commander, COL or higher, in the Soldier's chain of command, or the commander exercising General Courts-Martial Convening Authority (GCMCA), whomever is in the most direct line to the Soldier; personal signature is required.

- Commanders do not have the authority to prevent a Soldier's retirement by barring the Soldier once the Soldier attains 18 years or more of active duty in order to prevent the Soldier from attaining retirement eligibility.

## 3. Continued Evaluation of Soldier

After placing an approved certificate in Soldier's local unit file, the unit commander will continue documented evaluation of the Soldier.

## 4. Reviews

Unit commanders will review bars to continued service at least every 3 months after the approval date, and 30 days before the Soldier's scheduled departure from the unit or separation from the Army. Commanders may recommend that the bar remain in effect, or that it be removed.

## 5. Mandatory Initiation of Separation

Commanders will initiate separation proceedings under AR 635-200 upon completion of the second 3-month review, unless a recommendation for removal is submitted and approved by proper authority. Initiation of separation action is not required for Soldiers who, at the time of the second 3-month review, have more than 18 years of active federal service, but less than 20 years (these Soldiers will be required to retire on the last day of the month when retirement eligibility is attained); did not overcome the bar, but time does not permit processing the Soldiers for separation because of ETS (these Soldiers will ETS with the bar in place and be denied continued service in all Army components); or are eligible for retirement with more than 20 years of active Federal service (these Soldiers will be required to retire on the 1st day of the 7th month after the 6-month review).

## F. PROCESSING APPEALS TO BARS TO CONTINUED SERVICE ON AC SOLDIERS

Soldiers may appeal approved bars to continued service within 7 days of notification of the bar. The commander initiating the bar may grant an extension on a case-by-case basis. Commanders should process Soldiers' appeals as follows:

### 1. Endorsements

Each commander (or acting commander) in the chain of command up to the Appeal Authority must personally endorse the appeal, and may include statements in the endorsement regarding whether they recommend approval or disapproval of the appeal.

### 2. Appeal Authorities

Final approval authority must be at least one approval level higher than the original bar approval authority.

- **Soldiers with Less than 10 Years Active Federal Service at Date of Bar Initiation.** The Appeal Authority is the first COL (brigade commander) or first general officer in the Soldier's chain of command, or the commander exercising GCMCA, whomever is in the most direct line to the Soldier. The personal signature of the approving or disapproving authority is required.
- **Soldiers with More than 10 Years Active Federal Service at Date of Bar Initiation.** The Appeal Authority is the first general officer in the Soldier's chain of command.
- **Final disposition** should be accomplished within 30 days after the Soldier submits the appeal. Commanders will counsel Soldiers in writing on the final disposition.

## G. PROCEDURES FOR INITIATING AND IMPOSING BARS ON USAR TPU AND AGR SOLDIERS

AR 140-111, paragraphs 1-27 through 1-36, detail policies and procedures for initiating bars to continued service. The procedures are similar to those used for Regular Army bars to contin-



ued service with the following exceptions. A commander will initiate the action by completing a DA Form 8028 (U.S. Army Reserve Bar to Reenlistment Certificate). The enumerated reasons, both discretionary and mandatory, to bar are not identical to those contained in AR 601-280. Soldiers will be afforded an opportunity to respond to the proposed bar, in writing. If the Soldier is serving on AGR status, he or she will have 7 days to respond. All other Soldiers will have 30 days to respond. The initiating officer may extend the 7- or 30-day period on a case-by-case basis.

The proper unit commander will review approved bars to continued service in 3-month intervals, and 30 days before the Soldier's scheduled departure from the unit, release from active duty (REFRAD), discharge from the USAR for TPU or IMA Soldiers, or reassign to the IRR. The unit commander may submit a recommendation to remove a bar to continued service at any time if he or she believes the Soldier has proven worthy of retention in the USAR or on AGR status. Any time a bar is reviewed and not recommended for removal, the Soldier will be reevaluated for possible REFRAD, discharge, or reassignment to the IRR, as appropriate. Periodic reviews of bars imposed on Soldiers assigned to the IRR or Standby Reserve (Active Status List) are not required.

After the completion of the second 6-month review, unless a recommendation to remove the bar is submitted, the commander will initiate proceedings to discharge a TPU or IMA Soldier from the USAR under AR 135-178 or other appropriate chapters in the regulation; involuntary reassignment of a TPU or IMA Soldier to the IRR will be in accordance with AR 140-10 when discharge under AR 135-178 is not appropriate; or will initiate proceedings to REFRAD or discharge a Soldier serving in AGR status in accordance with the imposed provisions of the bar to continued service certificate and AR 635-200.

From the time he or she is informed that a bar to continued service was approved, a Soldier serving on AGR status will be allowed 7 days to submit an appeal. All other USAR Soldiers will be allowed 30 days to submit an appeal. The initiating officer may grant an extension of the 7- or 30-day appeal period on a case-by-case basis. For Soldiers with more than 10 years of qualifying service for retired pay at ETS, the appeal approval and/or disapproval authority is the Commander, Human Resources Command (HRC). Unless specifically directed by the proper commander, appeals will not be sent through major or area commanders en route to HRC. Bars to continued service approved by the Chief, Army Reserve (CAR) under AR 140-111 may not be appealed.



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# Qualitative Service Program (QSP)

## A. REFERENCE

- AR 635-200, Active Duty Enlisted Administrative Separations
- Army Directive 2016-19, Retaining a Quality Noncommissioned Officer Corps, dtd 26 May 16

## B. OVERVIEW

The QSP consists of a series of centralized enlisted selection board processes designed to support the Army Leader Development Strategy and retain the highest quality noncommissioned officers (NCOs). The program is designed to enhance the quality of the career enlisted force, selectively retain the best qualified Soldiers, deny continued service to nonproductive Soldiers, and encourage Soldiers to maintain their eligibility for further service.

## C. THE THREE BOARDS

### 1. Qualitative Management Program (QMP) Board

In accordance with AR 635-200, Chapter 19, the QMP board considers Senior NCOs (E6 through E9) for denial of continued service whose performance, conduct, and/or potential for advancement may not meet Army standards. This includes NCOs who are not promoted to the next grade because of failure to complete the appropriate level of NCO Education System training within a certain period of time.

### 2. Over-Strength Qualitative Service Program (OS-QSP) Board

In accordance with AR 635-200, paragraph 16-7, the OS-QSP board will consider NCOs for denial of continued service in select MOSs/skill levels where the 12 month operating strength projections exceed its goals.

### 3. Promotion Stagnant Qualitative Service Program (PS-QSP) Board

In accordance with AR 635-200, paragraph 16-7, the PS-QSP board will consider NCOs for denial of continued service who are in select MOSs/skill levels where promotion stagnation exists at NCO levels within a MOS.

## D. THE PROCESSES

Soldiers subject to a QSP or QMP board and possible early separation are notified through command channels by Human Resources Command or the U.S. Army Enlisted Records and Evaluation Center. Soldiers notified are given a number of options, to include electing vol-

untary discharge or voluntary retirement in lieu of separation if otherwise eligible. Soldiers considered for involuntary separation as a result of any QSP board process may submit matters of mitigation or extenuation to the board. The board views the Soldier's Army Military Human Resources Record (AMHRR) and any documents submitted by the Soldier. Soldiers separated under QSP are separated for the convenience of the government and receive honorable discharges. Commanders should keep in mind that these boards are not intended as a substitute, and do not relieve commanders of the responsibility, for initiation of separation proceedings under other chapters of AR 635-200 when required or appropriate.

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# Removal of Enlisted Soldiers from Promotion Lists

## A. REFERENCE

- AR 600-8-19, Enlisted Promotions and Reductions.

## B. OVERVIEW

Removal from a promotion list may be directed either by commanders in the field or at the HQDA level.

## C. REMOVAL FROM SEMI-CENTRALIZED RECOMMENDED LISTS

Semi-centralized recommended lists include those Soldiers recommended for promotion to the ranks of SGT and SSG.

### 1. Mandatory Removal (AR 600-8-19, Paragraph 3-27)

Commanders must immediately request removal of Soldiers from recommended lists when the Soldier:

Is subject to certain adverse actions (as indicated by a flag).

- Fails to qualify, for cause, for the security clearance required for the MOS in which recommended or competing.
- Fails to reenlist or extend to meet a service remaining obligation.
- Exceeds the requirements of the Army Body Composition Program (AR 600-9).
- Is prohibited from reenlisting because of a bar.
- Was mandatorily reclassified as a result of inefficiency or misconduct.
- Is dropped from rolls as a deserter.
- Fails to complete training required for MOS for cause or academic reasons.
- Fails a record APFT or fails to take a record APFT within 12 months.
- Is reduced in grade.

This list is not all-inclusive; other conditions requiring mandatory removal are contained in AR 600-8-19.

### 2. Procedures for Removal Board

AR 600-8-19, Table 3-15, contains the procedures for a removal board. Commanders may conduct removal boards when warranted by a Soldier's substandard performance or inefficien-

cies in accordance with paragraph 3-28. The Soldier must be provided written notification of the removal board at least 15 duty days prior to the date of the board.

## **D. REMOVAL FROM CENTRALIZED SELECTION LISTS**

HQDA selects and recommends enlisted Soldiers for promotion to the ranks of SFC through SGM. HQDA can administratively remove a Soldier's name from the selection list based on information provided by the commander. Commanders may also recommend a Soldier's removal from an HQDA promotion list.

### **1. Administrative Removal**

Commanders must provide to HQDA documentation pertaining to Soldiers on an HQDA selection list who meet any of the following criteria:

- Is reduced.
- Has an approved retirement.
- Is dropped from the rolls as a deserter.
- Is ineligible to reenlist due to AWOL, confinement, local bar, Qualitative Management Program, or court-martial.
- Has their security clearance revoked for cause.
- Has a qualifying conviction under the Lautenberg Amendment.

This list is not all-inclusive; other conditions requiring command notification to HQDA for removal are contained in AR 600-8-19, paragraph 4-15.

### **2. Command Initiated Removal**

Commanders must recommend the removal of Soldiers from HQDA selection lists who are flagged for noncompliance with AR 600-9. The commander must submit a recommendation for removal on a Soldier who has not met the weight requirements within the time prescribed in AR 600-9, provided no underlying or associated disease is found to be the cause of the overweight condition.

Commanders may also recommend that a Soldier's name be removed from an HQDA selection list at any time for substandard performance or any other reason fully documented and justifying removal.

Commanders will, when recommending removal, evaluate circumstances to ensure that all other appropriate actions have been taken (training, supervision, and formal counseling have not helped) or the basis for considering removal is serious enough to warrant denying the Soldier's promotion.

### **3. Removal from Centralized Promotion List by HQDA**

AR 600-8-19, paragraph 4-17, governs procedures for HQDA initiated removals from centralized promotion lists. Human Resourced Command (HRC) will continuously review selection lists against all information available to ensure that no Soldier is promoted where there is

cause to believe that a Soldier is mentally, physically, morally, or professionally unqualified to perform duties of the higher grade. In addition, Soldiers may be referred to a Standby Advisory Board (STAB) for the following, not all-inclusive, reasons:

- Article 15 directed for filing in the Army Military Human Resources Record (AMHRR).
- A memorandum of reprimand placed in the AMHRR.
- Adverse documentation filed in the AMHRR.
- Flagged in accordance with AR 600-8-2 and the Soldier has not met the requirements in the time prescribed by that regulation.
- Relief for cause NCOER.
- Derogatory background information as determined by the U.S. Army Senior Enlisted Review Board in accordance with the Army Personnel Suitability Screening Policy.
- Derogatory information received by HQDA, but not filed in the AMHRR, if it is substantiated, relevant, and might reasonably and materially affect a promotion recommendation.

#### **4. Procedures**

AR 600-8-19, Table 4-4 and paragraph 4-15, governs procedures for initiating removal from HQDA promotion lists. Commanders should include all adverse documentation supporting their recommendation to remove a Soldier. Such documentation includes, for example, records of nonjudicial punishment, reprimands, and reports of law enforcement or other investigations.

The Soldier will be provided a copy of the recommendation for removal, along with all supporting documents, and allowed to respond in writing within 15 days of receipt of the documents. The removal action and all supporting documents will be submitted through command channels to the Soldier's General Court-Martial Convening Authority (GCMCA), or to the first Army General Officer in the chain of command who has a judge advocate on his staff. Either HQDA or a commander at any level of command may disapprove the recommendation to remove a Soldier. Disapprovals will be returned to the originator with the reason for disapproval. Actions not disapproved will be forward to HRC.





# Removal of Commissioned & Warrant Officers from Promotion Lists

## A. REFERENCES

- AR 600-8-29, Officer Promotions
- AR 135-155, Promotion of Commissioned Officers and Warrant Officers Other Than General Officers
- Army Directive 2010-10, Enhancement of the Promotion Review Board Process, dtd 3 Dec 2010
- Army Directive 2016-26, Screening Requirements for Adverse and Reportable Information for Promotion and Federal Recognition to Colonel and Below, dtd 18 Jul 16
- Human Resources Command, Officer Promotions: Frequently Asked Questions for Promotion and Command Review Boards, dtd 1 Feb 19

## B. OVERVIEW

Commanders may recommend the removal of an officer from a HQDA promotion list where there is cause to believe he is mentally, physically, morally, or professionally unqualified or unsuited to perform the duties of the higher grade. A Promotion Review Board (PRB), convened by the Commander, Human Resources Command (HRC), determines whether or not to remove the officer. The Secretary of the Army (SA) is the approval authority for all determinations.

## C. INSTANCES TRIGGERING REFERRAL TO A PRB

Such reasons include, but are not limited, to a referred Officer Evaluation Report (OER) or Academic Evaluation Report (AER); punishment under Article 15, UCMJ; any court-martial conviction; memorandum of reprimand filed in officer's Army Military Human Resources Record (AMHRR); adverse documentation filed in the AMHRR; initiation of an officer elimination; failure to make satisfactory progress in a weight control program (AR 600-9); or other derogatory information received by HQDA, but not filed in the AMHRR, if the referral authority finds that the information is substantiated, relevant, and might reasonably and materially affect a promotion recommendation.

## D. PROCEDURES

AR 600-8-29, Chapter 8, governs the procedures for processing an officer's removal from a promotion list. Commanders should note the following provisions, in particular:

## **1. Submission Through Command Channels**

Commanders should submit all recommendations and accompanying documents through command channels to the Commander, HRC.

## **2. Detailed Justification**

Commanders must indicate whether an OER has been submitted regarding the justification for requesting removal and include detailed justification for the officer's removal from the promotion list.

## **3. Flag from Positive Personnel Actions**

Upon referral of a case to a PRB for review, HQDA will flag the officer concerned, and lift the flag upon SA's determination whether or not to remove the officer from the promotion list.

## **4. Notice to Officer Concerned**

Before the PRB convenes, the officer concerned will be informed of the reason for the action. The officer will be provided copies of all information that the PRB will consider, and be permitted to submit comments within 14 days.

## **E. RESULTS OF PRB**

Officers will be notified in writing, through their chain of command, of the results of PRB determinations and after SA acts on the PRB's recommendation. This notice normally will be within 180 days after HQDA determines that a PRB will consider the officer's case.

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# Security Clearances - Suspension and Revocation

## A. REFERENCE

- DoD Manual 5200.02, Procedures for the DoD Personnel Security Program
- AR 380-67, Personnel Security Program

## B. OVERVIEW

When a commander learns of credible derogatory information about a Soldier, civilian employee, contractor, or consultant in their command who holds a security clearance or has access to classified information, the commander must: (a) report the derogatory information to the central clearance facility (CCF) using a DA Form 5248-R, and (b) decide whether to informally or formally suspend access to classified information in accordance with AR 380-67, paragraphs 8-2 and 8-3. A commander should coordinate suspension and revocation actions with their servicing S-2/security manager/senior intelligence officer.

## C. DEROGATORY INFORMATION

Information that qualifies as derogatory is listed in paragraph 2-4 of AR 380-67 and includes, but is not limited to, incidents of criminal or dishonest conduct; unauthorized disclosure of classified information; and acts that indicate poor judgment, unreliability, or untrustworthiness.

## D. PROCEDURES FOR SUSPENSION

### 1. Informal Procedures

The commander may wish to suspend access on an “informal” basis while gathering information to determine whether formal suspension is warranted. After gathering the required data, the commander may decide to restore access. If the commander does not suspend access, the CCF will review all available information and, if warranted, advise the commander to suspend access under AR 380-67, paragraph 8-3a. An informal suspension could consist of an order from the commander limiting a Soldier’s access or taking away the Soldier’s access to classified repositories.

### 2. Formal Procedures

If the commander decides on formal suspension of access, the Soldier’s certificate of clearance will be removed from his or her personnel file and attached to the DA Form 5248-R reporting the suspension to the CCF. Once this is done, the commander may not restore access until a final favorable determination by the CCF unless certain criteria listed in paragraph 8-3b

of AR 380-67 are met. As a result, while a commander can later restore access if access was informally suspended, he or she cannot do so if it was formally suspended.

### **3. Suspension of Sensitive Compartmented Information**

If the Soldier whose clearance has been suspended was indoctrinated for Sensitive Compartmented Information (SCI), the special security officer must be expeditiously notified. Under certain circumstances, a Soldier's access to SCI may be suspended while allowing a Soldier continued access to collateral information (confidential, secret, or top secret information for which compartmentation is not formally required).

### **4. Documentation**

A commander who suspends access to classified information will ensure that the suspension is documented in the Field Determined Personnel Security Status data field of the Standard Installation/Division Personnel System personnel file.

## **E. PROCEDURES FOR REVOCATION**

Chapter 8 of AR 380-67 governs revocation procedures, and requires providing the subject individual due process before final action is taken to revoke his or her clearance. Only the CCF or those specifically delegated authority may revoke an individual's security clearance. While commanders at any level may suspend, most commanders do not have final authority to revoke a security clearance. With regards to revocation procedures, commanders should be aware of the following:

### **1. Written Statement of Reasons**

The subject individual must receive a written statement of the reasons why the revocation is contemplated.

### **2. Opportunity to Respond**

The subject individual must receive an opportunity to submit a written response regarding the proposed revocation. At least one commander in the subject's chain of command must endorse this response and provide a recommendation and rationale as to whether clearance should be revoked or restored.

### **3. Written Explanation in Response to the Subject Individual's Rebuttal**

The subject individual must receive a written response to his or her own response.

### **4. Opportunity to Appeal**

The subject individual must be afforded an opportunity to appeal to a higher authority any determination against him or her.

# Sexual Harassment

## A. REFERENCES

- • DoD Directive 1350.2, Department of Defense Military Equal Opportunity (MEO) Program
- DoD Instruction 1020.03, Harassment Prevention and Response in the Armed Forces
- AR 600-20, Chapter 7 and Appendix C

## B. SEXUAL HARASSMENT

### 1. Defined

Sexual harassment is conduct that involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive environment; and is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive.

Any use, or any implicit or explicit approval, 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 DoD.

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 DoD.

There is no requirement for concrete psychological harm to the complainant for behavior to constitute sexual harassment. Behavior is sufficient to constitute sexual harassment if it is so severe or pervasive that a reasonable person would perceive, and the complainant does perceive, the environment as hostile or offensive. Sexual harassment can occur through electronic communications, including social media, other forms of communication, and in person.

### 2. Two Types of Sexual Harassment

- ***Quid Pro Quo*** (meaning "this for that") sexual harassment occurs when are conditions placed on a person's career or terms of employment in return for favors. Examples include demanding sexual favors in exchange for a promotion, award, or favorable assignment; disciplining or relieving a subordinate who refuses sexual advances; and threats of poor job evaluation for refusing sexual advances.

- **Hostile environment** occurs when Soldiers or civilians are subjected to offensive, unwanted, and unsolicited comments, or behaviors of a sexual nature. If these behaviors unreasonably interfere with their performance, regardless of whether the harasser and the victim are in the same workplace, then the environment is classified as hostile. A hostile environment brings the topic of sex or gender differences into the workplace in any one of a number of forms. It does not necessarily include the more blatant acts of “quid pro quo”; it normally includes nonviolent, gender-biased sexual behaviors (for example, the use of derogatory gender-biased terms, comments about body parts, suggestive pictures, and explicit jokes).

### 3. Sexual Harassment Complaint Processing System

The sexual harassment complaint processing system is found in Appendix C to AR 600-20 and requires extensive command involvement. It follows the same procedures as outlined for equal opportunity (EO) complaints. Attempts should always be made to solve the problem at the lowest possible level within an organization. Complaints made by civilian personnel alleging discrimination should be handled in accordance with the procedures contained in AR 690–600, or as described in DoD and Department of the Army policy implementing 10 U.S.C. § 1561 (AR 600-20), or as provided for in any applicable collective bargaining agreement. Sexual harassment complaints involving physical contact must be immediately referred to law enforcement (CID).

Those who bring forth allegations of sexual harassment may make the complaint to their command or to an alternative agency such as a high echelon of command, inspector general, chaplain, provost marshal, medical agency personnel, or staff judge advocate. Complainants may also choose to make an informal complaint or formal complaint. Upon receipt of a complaint, the commander is required to identify and rectify sexual harassment.

An ***informal complaint*** is any complaint that the complainant does not wish to file in writing. Informal complaints may be resolved directly by the complainant, with the help of another unit member, the commander, or other person in the complainant’s chain of command. Typically, those issues that can be taken care of informally can be resolved through discussion, problem identification, and clarification of the issues. An informal complaint is not subject to the timeline requirements of formal complaints. Informal complaints that the commanding officer or other person in charge of the organization determines warrants an investigation become formal complaints.

A ***formal complaint*** is one that a complainant files in writing and swears to the accuracy of the information. Formal complaints require specific actions, are subject to timelines, and require documentation of the actions taken. An individual files a formal complaint using a DA Form 7279 (Equal Opportunity Complaint Form). The commander will either conduct an investigation personally or immediately appoint an investigating officer according to the provisions of AR 15–6. All formal complaints will be reported within 3 calendar days to the first General Courts-Martial Convening Authority (GCMCA) in the chain of command. Additionally, the commander will provide a progress report to the GCMCA authority 21 days after the date on which the investigation commenced and 14 days thereafter until completion. Commanders must work closely with their servicing judge advocate and equal opportunity advisor

to ensure compliance with additional procedures and timelines outlined in AR 600-20, Appendix C.

Allegations against a promotable colonel, active or retired general officer, inspector general, member of the Senior Executive Service, or Executive Schedule personnel must be transferred directly to Investigations Division, U.S. Army Inspector General within 5 calendar days.

## **C. SANCTIONS AGAINST HARASSERS**

Regardless of how a complaint is filed, commanders always have an obligation to take reasonable steps to protect people from sexual harassment. Such steps can include no-contact orders, change of workplace location, bars from the installation, as well as other measures. Military members may be subject to adverse administrative action or action under the Uniform Code of Military Justice. At a minimum, officers and noncommissioned officers who have EO or sexual harassment complaints against them substantiated by an AR 15-6 investigation must receive appropriate annotations on their evaluation reports as required by AR 600-20, paragraph 6-11.

Civilian employees may be subject to administrative discipline in accordance with the current Army Table of Penalties (AR 690-700). There is no requirement for victims to file Equal Employment Opportunity complaints. A victim may seek redress or not as he or she sees fit, but the right of the Army to discipline employees who harass or discriminate is not affected in either event.





# Domestic Violence Amendment to the Gun Control Act (Lautenberg Amendment)

## A. REFERENCE

- DOD Instruction 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel
- AR 600-20, Army Command Policy

## B. OVERVIEW

The Domestic Violence Amendment to the Gun Control Act of 1968 (18 U.S.C. § 922), the Lautenberg Amendment, makes it unlawful for any person to transfer, issue, sell, or otherwise dispose of firearms or ammunition to any person whom he or she knows or has reasonable cause to believe has been convicted of a misdemeanor crime of domestic violence. It is also unlawful for any person who has been convicted of a misdemeanor crime of domestic violence to receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce. The Lautenberg Amendment applies to all Soldiers throughout the world, including those in hostile fire areas.

Soldiers with a qualifying conviction will be denied favorable personnel action in accordance with AR 600–8–2. The flag may be removed if the qualifying conviction is expunged or set aside by competent authority.

## C. GENERAL PROVISION AND DEFINITIONS

The Amendment bans the possession of firearms by any person who has been convicted of a misdemeanor crime of domestic violence. Therefore, it is unlawful for any person who has been convicted of a misdemeanor crime of domestic violence to ship, transport, possess, or receive firearms or ammunition. For the purposes of this provision, the following definitions apply:

### 1. Crime of Domestic Violence

An offense that involves the use or attempted use of physical force, or threatened use of a deadly weapon committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or by a person who was similarly situated to a spouse, parent, or guardian of the victim. Persons who are similarly situated to a spouse include two persons who are residing at the same location in an intimate relationship with the intent to make that place their home.

## **2. Qualifying Conviction**

A state or Federal conviction for a misdemeanor crime of domestic violence and any general or special court-martial for an offense that otherwise meets the elements of a crime of domestic violence, even though not classified as a misdemeanor or felony. A qualifying conviction does not include a summary court-martial conviction or the imposition of nonjudicial punishment under UCMJ, Article 15.

By DoD policy, a state or Federal conviction for a felony crime of domestic violence adjudged on or after 27 November 2002, will be considered a qualifying conviction for purposes of AR 600-20 and will be subject to all the restrictions and prohibitions of AR 600-20. A person will not be considered to have a qualifying conviction unless the convicted offender was represented by counsel or knowingly and intelligently waived the right to counsel, and, if entitled to have the case tried by a jury, the case was actually tried by a jury, or the person knowingly and intelligently waived the right to have the case tried by a jury; and, the conviction has not been expunged or set aside, or the convicted offender has not been pardoned for the offense, or had civil rights restored; unless the pardon, expungement, or restoration of civil rights provides that the person may not ship, transport, possess, or receive firearms.

## **3. Major Military Weapons Systems**

The DoD does not construe the Lautenberg Amendment to apply to major military weapon systems or crew-served military weapons or ammunition (e.g., tanks, missiles, aircraft).

## **D. COMMAND RESPONSIBILITIES**

Commanders will ensure that all Soldiers who have a qualifying conviction are notified that it is unlawful to possess, ship, transport, or receive firearms and ammunition. In coordination with HQDA, commanders will also implement a program of instruction to educate all Soldiers on the domestic violence amendment to the Gun Control Act and the policy stated in AR 600-20. In addition to formal instruction, an extract of the AR 600-20 chapter will be prominently displayed outside unit arms rooms and all facilities in which Government firearms or ammunition are stored, issued, disposed, or transported.

Commanders will notify Soldiers that they have an affirmative, continuing obligation to inform commanders or supervisors if they have, or later obtain, a qualifying conviction and that the revised DD Form 2760 (Qualification to Possess Firearms or Ammunition) will be made available to those Soldiers who come forward to report a qualifying conviction in compliance with their obligation to do so. Soldiers will also be notified that neither the information nor evidence gained by filling out the DD Form 2760 may be used against them in any criminal prosecutions for a violation of 18 U.S.C. § 922, including prosecutions under the UCMJ, based on a violation of 18 U.S.C. § 922 for conduct that occurred prior to the completion of the DD Form 2760. Company-level commanders will collect the completed DD Form 2760 and file it in the Soldier's local military personnel file in accordance with AR 600-8-104 and AR 25-400-2.

Commanders will ensure that procedures are implemented to track domestic violence arrests and convictions in the civilian community. This procedure should include regular coordination with local law enforcement and judicial agencies.

## **E. ADVERSE ADMINISTRATIVE ACTION**

Commanders may initiate separation for the conduct that led to the conviction or for the conviction itself or process enlisted Soldiers for involuntary separation under Secretarial plenary authority. Additionally, commanders must bar enlisted Soldiers with qualifying convictions from continued service. However, commanders may take reasonable steps to accommodate Soldiers with qualifying convictions, prior to initiating separation, such as granting a reasonable time (up to one year) to seek expungement or a pardon of the qualifying conviction. Accommodation is discretionary and may be denied based on the facts of the case as outlined in AR 600-20, paragraph 4-22c(8).

## **F. REPORTING TO HQDA**

All Soldiers identified with qualifying convictions are required to be reported to HQDA using the assignment consideration code L9 (Lautenberg Amendment).



# Article 138 Complaints

## A. REFERENCE

- AR 27-10, Military Justice, Chapter 19
- Article 138, Uniform Code of Military Justice

## B. OVERVIEW

A member of the Armed Forces may submit a complaint under UCMJ, Art. 138, for any act or omission by the member's commanding officer that the member believes to be a wrong, and for which the member has requested redress and been refused. Commanders will not restrict the submission of such complaints or retaliate against a Soldier for submitting a complaint.

## C. DEFINITIONS

- **Wrong** – A discretionary act or omission by a commanding officer, under color of Federal military authority, that adversely affects the complainant personally and that is in violation of law or regulation, beyond the legitimate authority of that commander, arbitrary, capricious, an abuse of discretion, or materially unfair.
- **Redress** – Any authorized action by an officer in the complainant's chain-of-command to effect the revocation of a previous official action or otherwise to restore the complainant any rights, privileges, property, or status lost as a result of the wrong.

## D. PROCEDURES

### 1. Request for Redress

Before submitting a complaint under UCMJ, Art. 138, a member of the Armed Forces must make a written request for redress of the wrong (which may be made through electronic message) to the commanding officer the member believes has wronged the member. The request for redress generally should be prepared in memorandum format and must clearly identify the commanding officer against whom it is made, the date and nature of the alleged wrong, and if possible, the specific redress desired.

### 2. Response by the Commanding Officer

A commanding officer receiving a request for redress submitted under this regulation will respond, in writing (which may be made through electronic message), in a timely manner so that the complainant will receive the response within 15 days (or 60 days for reserve component commanders not on active duty). If a final response within 15 days is not possible, an interim

response will be provided that indicates the estimated date of a final response. The regulation defines a failure to respond as a refusal for redress.

### **3. Refusal of Redress and Submission of Article 138 Complaint**

If the commander committing the alleged wrong responds with a refusal to redress, the complainant may now submit an Article 138 complaint. The complainant will deliver the complaint to the complainant's immediate superior commissioned officer within 90 days of the date of complainant's discovery of the wrong, excluding any period during which the request for redress was in the hands of the commander-respondent. A superior commissioned officer who receives a complaint under the provisions of Article 138 will promptly forward it to the General Courts-Martial Convening Authority (GCMCA) exercising jurisdiction over the officer against whom the complaint is made. Any other person receiving a complaint (except the appropriate GCMCA) will forward it to the complainant's immediate superior commissioned officer or to the appropriate GCMCA. The person receiving the complaint, or through whom it is forwarded, may add pertinent material to the file or grant any redress within that person's authority. If either action is taken, it will be noted in the transmittal. Commanders who receive an Article 138 complaint should consult with their servicing judge advocate as soon as possible.

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# Relief from Command

## A. REFERENCE

- AR 600-20, Army Command Policy
- AR 623-3, Evaluation Reporting System
- DA Pam 623-3, Evaluation Reporting System

## B. OVERVIEW

When a senior commander loses confidence in a subordinate commander's ability to command due to misconduct, poor judgment, the subordinate's inability to complete assigned duties, or for other similar reasons, the senior commander has the authority to relieve the subordinate commander.

## C. PROCEDURES

### 1. Formal Counseling

Relief is preceded with formal counseling by the commander or supervisor unless such action is not deemed appropriate or practical under the circumstances.

### 2. General Officer Written Approval

Although any commander may temporarily suspend a subordinate from command, final action to relieve an officer from any command position will not be taken until after written approval by the first general officer (to include one frocked to the grade of brigadier general) in the chain of command of the officer being relieved is obtained. If a general officer (to include one frocked to the grade of brigadier general) is the relieving official, no further approval of the relief action is required; however, AR 623-3 concerning administrative review of relief reports remain applicable.

### 3. Basis for Relief Stems from an AR 15-6 Investigation

If a relief for cause is contemplated on the basis of an investigation under AR 15-6, the referral and comment procedures of that regulation must be followed before initiating or directing the relief. This does not preclude a temporary suspension from assigned duties pending completion of the procedural safeguards contained in AR 15-6.





**Civilian**



**Personnel Law**



# Law of Federal Employment

## A. REFERENCES

- 5 C.F.R. Part 432, Performance Based Reduction in Grade and Removal Actions, 1 January 2018.
- 5 C.F.R. Part 630, Absence and Leave, 1 January 2018.
- 5 C.F.R. Part 752, Adverse Actions, 1 January 2018.
- 28 C.F.R. Part 36, Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 1 July 2018.
- 29 C.F.R. Part 1614, Federal Sector Equal Employment Opportunity, 1 July 2018.
- DoD Instruction (DODI) 1400.25, Vol. 431, DOD Civilian Personnel Management System: Performance Management and Appraisal Program, 4 February 2016.
- Army Regulation (AR) 690-12, Equal Employment Opportunity and Diversity, 22 December 2016.
- AR 690-700, Chapter 751, Table 1-1, Table of Penalties for Various Offenses.
- Equal Employment Opportunity Commission Management Directive 110, Federal Sector Complaints Processing Manual, 5 August 2015.

## B. OVERVIEW

More than half a million civilians are employed by the Department of Defense (DOD); of which, approximately 247,393 civilians work for the Department of the Army (DA). It is critical that a commander understand the importance of managing civilian personnel. This requires a commander to understand (1) the performance management and appraisal program; (2) how to address performance and misconduct issues; (3) how to provide reasonable accommodation to a disabled employee; and (4) management responsibilities to federal labor unions that represent bargaining unit employees within the organization.

## C. DEPARTMENT OF DEFENSE PERFORMANCE MANAGEMENT AND APPRAISAL PROGRAM (DPMAP)

### 1. Implementing New Requirements

In October 2018, the DOD Performance Management and Appraisal Program (DPMAP) became the required management and appraisal tool for most of the federal civilian workforce.

**NOTE: For a full list of exempted personnel see DODI 1400.25, Vol. 431, Appendix 3A.**

There are five key aspects of DPMAP that commanders should be aware of:

- 1) DD Form 2906 is the multi-purpose management and appraisal document that should be used throughout the appraisal process to capture an employee's performance plan, progress review(s), and rating of record;
- 2) DA (not DOD) requires each employee be evaluated by both a supervisor and a higher-level reviewer (HLR);
- 3) A minimum 90-day rating period is required before a rating of record can be provided to evaluate an employee's performance during an appraisal period;
- 4) One appraisal cycle (1 April-31 March) is mandated for all employees subject to DP-MAP; and
- 5) A three-level numerical rating has been established to quantify an employee's performance. An employee receives a "5" for Outstanding performance (range: 4.3-5.0); a "3" for Fully Successful performance (range: 3.0-4.2); and a "1" for Unacceptable performance (range: 2.9 or lower). Any performance element that results in a "1" requires the employee to receive an overall rating of record of "1".

## 2. Four Phases of Performance Management

Under DPMP there are four phases that supervisors and employees must work through: (1) planning, (2) monitoring, (3) evaluating, and (4) rewarding.

### *a. Planning*

An initial counseling is due within the first 30-days of an appraisal period. This counseling session is a supervisor's way to articulate their expectations of the employee during the appraisal period, and receive input from the employee. Collaboratively, the supervisor and employee should develop the employee's performance plan, which consists of (1) performance elements (major duties the employee is expected to perform during the appraisal period) and (2) performance standards (how well the employee is expected to perform each performance element). Note: Early on, supervisors should ensure an employee's duty hours are clearly defined, understood, and adhered to.

An employee's performance plan should contain between three to six performance elements; since the intent of the performance plan is to capture major tasks that the employee is required to perform. The performance plan is directly linked to the day-to-day tasks the employee is required to perform (and evaluated on). Furthermore, the performance plan should clearly demonstrate how the tasks that the employee performs advances the mission. Note: Supervisors are strongly encouraged to review each employee's PD annually to ensure it accurately reflects their duties and responsibilities.

With performance elements established, performance standards must then be written for each corresponding performance element. Each performance standard must be written at a Fully Successful level ("3") to allow for outstanding performance; hence, no standard can require zero-defect, meaning there can be no absolute standards. Furthermore, each performance standard must be written **SMART**, meaning:

**S** – Specific (limited to one task)

**M** – Measurable (against an objective standard)

**A** – Achievable (employee has the requisite skill, education, training to complete)

**R** – Relevant (to the mission of the organization)

**T** – Timely (able to be reasonably completed during the appraisal period)

### *b. Monitoring*

Once the employee’s performance plan has been established (and the DD 2906 signed by the employee, the supervisor, and the HLR), the supervisor begins the process of assessing the employee’s performance. One progress review (ie. mid-term counseling) initiated by the supervisor is required under DPAMP, however performance discussions initiated by either the employee or the supervisor are strongly encouraged throughout the appraisal process. During this phase, the supervisor should evaluate how well the performance elements are written, and modify them if necessary.

### *c. Evaluating*

Upon completion of the appraisal period (or at least 90-days of operating under an approved performance plan), a supervisor can finalize the performance appraisal and assign a rating of record. For any “1” or “5” given, the supervisor should provide a narrative justification. The employee, supervisor, and HLR will sign DD 2906, making the appraisal complete.

### *d. Rewarding*

Recognizing and rewarding fully successful or outstanding performance should occur close in time to when an employee’s performance or act is being rewarded. The supervisor should discuss with the employee what type of reward the employee would prefer to receive; although manage expectations in a way to remind the employee that a reward is not an entitlement.

## **D. ADDRESSING MISCONDUCT AND PERFORMANCE-BASED ADVERSE ACTIONS**

Civilian employees can be disciplined for their actions and behavior both on and off-duty.

**Note:** *In order to take adverse action against an employee for their off-duty misconduct, there must be a nexus between the conduct and the efficiency of the service (similar to a good order and discipline argument). Seek further guidance from the servicing Labor Counselor.*

### **1. Determine if the Employee’s Action/Behavior is Performance or Misconduct**

Action can be taken against a civilian employee for their performance (failing to meet an established performance standard), for misconduct (behavior or actions that adversely affect the efficiency of the service), or for both. How an action is labeled (performance or misconduct) has practical implications and depending on the election made, may require additional steps

(such as a Performance Improvement Plan) be imposed before action can be taken. Regardless of the label that attaches, when a supervisor believes disciplinary action is appropriate, the supervisor should contact the servicing Labor Management-Employee Relations (LMER) Specialist.

## 2. Determine the Appropriate Penalty

There are two types of discipline available—(1) progressive discipline (a graduated scale starting with a counseling, warning or reprimand, and escalating to a suspension, reduction, or ultimately removal) and (2) punitive discipline (the most severe penalty warranted to deter future misconduct). The type of discipline should be tailored to the specific instance(s) and should be reasonable. Suspensions (which are unpaid) for 15 days or greater, a reduction in grade, and removal from federal service are known as adverse actions, which statutorily provides a right of appeal to the Merit Systems Protection Board (MSPB). MSPB appeal rights do not attach to counselings, warnings, reprimands, and suspensions for 14 days or less; however, civilian employees may utilize other avenues of redress (ie. filing a grievance with the command, filing an Equal Employment Opportunity (EEO) complaint of discrimination, filing a claim of a prohibited personnel practice with the Office of Special Counsel, etc.).

## E. PROVIDING REASONABLE ACCOMMODATIONS

In 2017, federal civilian employees filed approximately 27,000 claims of disability discrimination with the EEO offices. With an increase in the number of disabled employees serving in the federal workplace, commanders should be keenly aware of the Reasonable Accommodation (RA) process.

Reasonable accommodation is "any change to the work environment or the way things are customarily done that would enable an individual with a disability to enjoy equal employment opportunity." Typically, a request for RA arises in one of three instances:

- 1) during the hiring process,
- 2) to assist in performing the essential functions of the job, **or**
- 3) to provide equal benefits and privileges of the job.

The RA process is triggered when an individual (current employee or applicant for employment) makes a request. **Note: The request can be made at any time, orally or in writing, and does not need to include any specific "buzz words".** Typically, the request is made to the supervisor. Within two business days of receiving the request, the supervisor (or hiring official) must forward the request to the Disability Program Manager (DPM), generally an EEO Specialist located in the servicing EEO office. The RA request must be approved, modified, or denied within thirty business days of the date the request was received, absent extenuating circumstances. If the request is denied, a legal review must be prepared, maintained, and provided to the requestor, including their right to appeal the decision to the EEO.

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# Labor-Management Relations

## A. REFERENCE

5 USC §§ 7101-7135, Labor Management and Employee Relations.

## B. IDENTIFYING MANAGEMENT RESPONSIBILITIES TO FEDERAL LABOR UNIONS

Approximately 54% of appropriated fund DA civilian employees and 48% of non-appropriated fund DA civilian employees are represented by a federal labor union. As of April 2019, there are 508 bargaining units across the Army.

Commanders should identify how many unions (if any) represent civilian employees in their organizations. Not only should union leadership be identified, but commanders should also become familiar with any Collective Bargaining Agreement that their command is bound to, understand the relationship between the union(s) and the command, and work to establish and sustain positive relationships.

There are three instances where a management official (on behalf of the command) must notify the union (**not** bargaining unit members) of an act that the commander intends to take before implementation occurs:

- 1) ***Change to an employee's condition of employment:*** Management must provide notice to the union of the proposed change and allow union representatives an opportunity to negotiate implementation of the change. Generally, these consist of environmental changes (ie. moving an office, parking space, soda machine) and administrative changes (ie. implementing a new time and attendance policy).
- 2) ***Formal discussion:*** Management must provide notice to the union of the intended formal discussion and allow the union representative(s) an opportunity to attend and participate. Formal discussion is defined as a discussion that is formal in nature between at least one agency representative and at least one bargaining unit employee concerning a grievance, practice, personnel policy, or other general condition of employment.
- 3) ***Investigative Inquiries:*** Whenever an investigation requires an investigating officer (IO) to interview a civilian employee, civilian employees have a right to request union representation if the employee has a reasonable belief that the investigative inquiry by the agency could result in disciplinary action being taken against them. This is known as asserting "Weingarten Rights". An IO is not required to notify the civilian employee being interviewed of their Weingarten Rights prior to the questioning; rather, so long as management has provided an annual notification to all civilian employees of their right to

assert Weingarten Rights, the duty has been met. Note: Notification generally occurs when the servicing HR or LMER Specialist provides an annual email or posting.

Aside from these three statutory rights, management also has a duty to bargain in good faith. This duty is also required of federal labor unions when dealing with management.



# Medical-Legal



# Issues



# Impact of Misconduct on the Integrated Disability Evaluation System Process

## A. REFERENCES

- AR 635-40 (19 JAN 2017), Physical Evaluation for Retention, Retirement, or Separation
- AR 635-200 (19 DEC 2016), Active Duty Enlisted Administrative Separations
- AR 601-280 (01 APR 2016), Army Retention Program
- AR 40-400 (08 JUL 2014), Patient Administration
- AR 40-501 (14 JUN 2017), Standards of Medical Fitness

## B. OVERVIEW OF THE IDES PROCESS AND THE INTERACTION OF IDES WITH ADMINISTRATIVE SEPARATIONS AND MISCONDUCT

### 1. The MEB and Entering the IDES

The Disability Evaluation System (DES) encompasses the entire process from a Soldier sustaining an injury or medical condition, being treated for and rehabilitating from the injury or condition, being referred to the Integrated Disability Evaluation System (IDES) which includes the Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB), and ultimately being medically retired, medically separated, or retained with limitations. Any discussion of the DES throughout this paper refers to the entire disability evaluation process. Reference to the IDES pertains only to the MEB and PEB. The integrated aspect of IDES was set into motion by the Acting Under Secretary of Defense for Personnel and Readiness on December 19, 2011. One goal of IDES is to integrate the VA into the disability evaluation process before a Soldier is separated from the service. Under this model, a Soldier undergoes a medical evaluation by a VA physician during the MEB phase and receives only one disability rating (from the VA). The Army's PEBs no longer provide a rating, which required reconciliation with the VA's separation rating after the Soldier had left the service.

The IDES is comprised of both the MEB and the PEB. A Soldier does not enter the IDES until he has been referred to an MEB. An MEB is officially initiated when the following requirements are met:

- A Physical Profile is completed for the Soldier properly recording medical conditions and/or physical defects, the Soldier receives a permanent "3" or "4" profile, and is signed by two Profiling Officers, AR 40-501, para. 7-11a(3)(i);
- The Soldier must be found to not meet retention standards under Chapter 3 of AR 40-501, para. 7-11a(3)(g).

## 2. Impact of Misconduct on IDES

### *a. Absent Without Leave*

A Soldier who is absent without leave (AWOL) is not eligible to be referred to or continue the MEB, PEB, or final disposition of the Disability Evaluation System (DES). AR 635-40, para. 4-3a.

### *b. Reserve Component Soldiers with Unexcused Absences*

Reserve Component (RC) Soldiers who have nine or more unexcused absences from scheduled inactive duty training (IDT) during a one year period will be considered unsatisfactory participants. They will not be referred to or continue DES processing unless the Soldier has a documented LOD medical condition which fails medical retention standards and which was the direct medical cause or a significant contributing factor to the unexcused absences. AR 635-40, para. 4-3b.

### *c. UCMJ Actions*

Soldiers under investigation or are charged with an offense under the UCMJ that could result in a punitive discharge (dismissal, dishonorable discharge (DD), or bad conduct discharge (BCD)), may be referred to and complete the MEB. These Soldiers are eligible for the PEB when one of the actions listed below occurs. AR 635-40, para. 4-3c. See also AR 635-200, para. 1-33c.

- 1) The investigation ends without charges.
- 2) The officer exercising proper court-martial jurisdiction dismisses the charges.
- 3) An officer submits a resignation for the good of the Service under the provisions of AR 600-8-24 (this includes when the resignation is in lieu of referral to a General Court-Martial).
- 4) The officer exercising proper court-martial jurisdiction refers the charge for trial by summary court-martial.
- 5) Court-martial conviction does not include confinement and discharge or Soldier completes confinement without discharge.

### *d. Civilian Confinement*

Soldiers in the circumstances below as a result of civilian criminal offense are ineligible to continue any phase of the DES:

- 1) Under investigation for or charges with a civil criminal offense (misdemeanor or felony),
- 2) Incarcerated in civilian confinement (pre- or post-trial), or
- 3) Being held pending psychiatric evaluation or treatment.

However, a Soldier may complete the MEB phase if they are on bail and present for duty. The Soldier is eligible to enroll and complete the PEB when they are cleared of the offense or,

after conviction, if the command specifically declines in writing to separate the Soldier on the basis of the conviction. AR 635-40, para. 4-3d.

### *e. Suspended Military Sentences*

Soldiers may not be referred to, or continue in, IDES if under military sentence of dismissal or punitive discharge unless the sentence is suspended. The Soldier may not be discharged through IDES (may not complete the PEB) until the period of suspension has ended and the punitive discharge or dismissal has been disapproved. AR 635-40, para. 4-3e.

### *f. Enlisted Soldiers Pending Administrative Separations*

Priority of Administrative Separation or DES Processing:

#### **1) Discharge in Lieu of Court-Martial Terminates IDES.**

Soldiers approved for Discharge in Lieu of Trial by Court-Martial under Chapter 10 of AR 635-200 are ineligible for referral to the MEB and PEB phases of IDES. If the Soldier is already in IDES, their medical separation will be terminated. AR 635-40, para. 4-3f(1). See also AR 635-200, paras. 1-33a and 1-33c.

#### **2) Dual Processing of Chapter 7 and Chapter 14 Administrative Separations with IDES.**

Soldiers being processed for administrative separation for fraudulent enlistment (Chapter 7 of AR 635-200) or misconduct (Chapter 14 of AR 635-200) are eligible for referral to the MEB. Prior to referral to the PEB, the Soldier's General Court Martial Convening Authority (GCMCA) must determine whether the Soldier will be referred to the PEB or administratively separated. In weighing whether to refer the Soldier to the PEB or administratively separate the Soldier, the GCMCA must consider if the Soldier's medical condition was a direct or substantial contributing cause of the conduct that led to the administrative separation action for Fraudulent Entry or Misconduct, or the circumstances of the individual case must warrant disability processing instead of further processing for administrative separation. Soldiers continue to remain eligible for these administrative separation actions up until the day of their separation or retirement for disability. AR 635-40, para 4-3f(2) and AR 635-200, para. 1-33.

#### **3) IDES Takes Priority over all Other Administrative Separations.**

For all other administrative separation actions other than those described above, referral to and disposition under the DES takes precedence over the administrative separation action. AR 635-40, para. 4-3f(3).

## MISCONDUCT & SEPARATION ACTIONS AND THEIR EFFECT ON IDES PROCESSING

<b><i>MEB and PEB process continue uninterrupted and take precedence over other administrative separation action</i></b>	<ul style="list-style-type: none"> <li>• AR 635-200, Chapter 6 Dependency or Hardship</li> <li>• AR 635-200, Chapter 9 Alcohol Drug rehab/failure</li> <li>• AR 635-200, Chapter 11 Unsatisfactory Performance (Entry Level)</li> <li>• AR 635-200, Chapter 12 Retirement for Length of Service</li> <li>• AR 635-200, Chapter 13 Unsatisfactory Performance</li> <li>• AR 635-200, Chapter 18 Failure to Meet Body Fat Standards</li> </ul>
<b><i>Not eligible for PEB or PEB process stopped</i></b>	<ul style="list-style-type: none"> <li>• Under criminal charges/investigation under the UCMJ that could result in dismissal, dishonorable discharge, or bad conduct discharge</li> <li>• Currently in civilian confinement</li> <li>• AWOL</li> </ul>
<b><i>MEB case is completed, however GCMCA approval is needed for PEB processing</i></b>	<ul style="list-style-type: none"> <li>• AR 635-200, Chapter 7 Fraudulent Enlistment</li> <li>• AR 635-200, Chapter 14 Misconduct</li> </ul>
<b><i>IDES processing terminated</i></b>	<ul style="list-style-type: none"> <li>• Chapter 10 Discharge in Lieu of Trial by Court-Martial</li> </ul>

#### 4) Processing Administrative Separations when Soldiers are Enrolled in DES

Once the MEB has been initiated, the separation authority may not take final action on the administrative separation action until after the MEB makes a final medical retention determination of whether the Soldier either meets retention standards or does not meet retention standards. If the MEB determines the Soldier does not meet retention standards, the MEB will recommend referral of the Soldier to the PEB. The MTF Commander will notify the unit commander of the planned referral of a Soldier to a PEB and obtain from the commander a written statement confirming whether any adverse personnel action is being considered against the Soldier and describing the Soldier's current duty performance. If the MEB determines the Soldier meets retention standards, then the IDES process for that Soldier is complete – thereby allowing final action to be taken with regard to that Soldier's administrative separation action.

When the MEB recommends referral to the PEB and the Soldier is pending separation for Fraudulent Entry or Misconduct, under the provisions of Chapters 7 or 14, respectively, of AR 635-200, the General Court-Martial Convening Authority (GCMCA) must direct, in writing, whether to proceed with the IDES process (i.e. the PEB) or administrative separation. In such cases, it is the duty of the MTF Commander to furnish copies of the approved MEB proceedings to the Soldier's unit commander and GCMCA prior to initiation of the PEB so that the GCMCA can make its determination.

- The authority of the GCMCA to determine whether a case is to be processed through the IDES or under administrative separation provisions will not be delegated.
- For the GCMCA to choose IDES processing rather than administrative separation, the Soldier's medical condition must be a direct or substantial contributing cause of the conduct that led to the administrative separation action for fraudulent entry or misconduct, or the circumstances of the individual case must warrant disability processing instead of further processing for administrative separation.
- If the GCMCA decides to proceed with administrative separation the IDES processing is halted.
- For those Soldiers entered into the PEB, the PEB will make a determination that the Soldier is either physically fit or physically unfit for service. AR 40-501, para. 3-4.
- If the Soldier is found physically fit by the PEB, the pending administrative separation action may be resumed.
- If the Soldier is found physically unfit by the PEB, the pending administrative separation action will be abated and the Soldier will be processed out of the Army under the IDES.

### *g. Officers Pending Administrative Separations*

Officers approved to resign for the good of the Service in lieu of trial by court-martial are ineligible for referral to the MEB or PEB. However, if the officer was referred to the MEB prior to approval of the resignation, the disability evaluation and administrative separation action continue in a dual-processing manner. In these situations, the MEB and PEB must be completed, both the results of the administrative separation and the MEB and PEB proceed through the GCMCA for recommendation, and on to HQDA for determination of whether the officer will be administratively separated or complete disability processing through the DES. AR 635-40, para. 4-3g

- In the case of officers going through physical disability processing and an administrative separation that authorizes a characterization of service Under Other Than Honorable (UOTH) conditions, both processes will continue until the action is processed through the GCMCA and HRC and a final decision is made by the Secretary of the Army.
- If such officers are found unfit because of physical disability by the PEB, they will be processed "simultaneously" for both administrative separation and physical disability (i.e. a physically unfit determination by the PEB does not stop the administrative separation).

## **C. CIRCUMVENTION OF THE IDES PROCESS NOT ALLOWED**

Intentional circumvention of the IDES process is never acceptable. A command attempting to separate a Soldier without allowing the Soldier to complete the IDES process will likely face the scrutiny of Congress, the Inspector General, or a higher command. The IDES process already provides the command an opportunity to separate a Soldier under Chapter 7 or Chapter 14 of AR 635-200 in lieu of completing the PEB. Additionally for Soldiers facing a separation action under AR 635-200 other than Chapter 7 or 14, the command may resume the separation action if the Soldier is found fit by the MEB or retained by the PEB.

Commanders should base their decision on the specific circumstances of the individual case and sound legal advice provided by the Staff Judge Advocate. The decision to administratively separate or to refer a Soldier under the UCMJ should not to be made lightly. Commanders must review the considerations described above when electing to pursue the IDES or the administrative/punitive action. When faced with this decision, obtaining legal advice is essential. The servicing judge advocate will take into consideration Congressional and regulatory intent, as well as any additional factors, to include the potential scrutiny and criticism that may result. They will also ensure that the command has all relevant facts and policies that impact the command's decision ensuring the ultimate determination is supportable and is in the best position to withstand higher level review.

## **D. PRACTICAL EXAMPLES**

### **1. Is the Soldier eligible for the IDES?**

#### ***a. An enlisted Soldier is pending separation under AR 635-200, Chapter 13 (Unsatisfactory Duty Performance).***

**YES.** Once enrolled in the MEB, the Chapter 13 separation action is suspended pending the results of the IDES.

#### ***b. Enlisted Soldier is pending separation for misconduct (AR 635-200, Chapter 14) with a general characterization of service.***

**YES, but only through the MEB.** The Soldier completes the MEB and the command completes the separation action including a separation board, if necessary. The results of both the MEB and the separation action are presented to the GCMCA who decides if the Soldier will proceed to the PEB or be administratively separated. The GCMCA must consider whether the Soldier's medical condition was a direct or substantial contributing cause of the conduct that led to the administrative separation action or the circumstances of the medical condition must warrant disability processing instead of further processing for administrative separation. If the GCMCA allows the Soldier to proceed to the PEB, the separation action is suspended pending the results of the PEB. The misconduct separation will resume if the PEB retains the Soldier.

#### ***c. Soldier assaults his First Sergeant.***

**YES, but only through the MEB.** The Soldier would be under investigation for an offense that could result in a punitive discharge (Bad Conduct Discharge or Dishonorable Discharge). In accordance with AR 635-40, para 4-3c, the Soldier may be referred to and complete the MEB. The Soldier may proceed to the PEB if the investigation ends without charges, the charges are dismissed, the charges are referred to a Summary Court-Martial or Article 15, or the Soldier is convicted but the Soldier's sentence does not include a punitive discharge.

#### ***d. An enlisted Soldier completed the MEB/PEB process and was issued disability retirement orders. While awaiting the retirement***



*date, he commits an action that results in his command initiating Chapter 14 action.*

**YES, the command may initiate this type of administrative separation.** Although the Soldier completed the DES process, the Soldier continues to be eligible for administrative separation or UCMJ actions until the day of their separation or retirement. AR 635-40, para. 4-3f.

## **E. LEGAL REPRESENTATION FOR SOLDIERS**

### **1. Trial Defense Service and Legal Assistance**

A Soldier pending court-martial charges, non-judicial punishment (Article 15), or administrative separation is entitled to free, confidential legal advice or representation from a Trial Defense Service (TDS) attorney. If a Soldier asks to see a TDS attorney, the command must honor that request. Commanders should consult their legal advisor prior to taking any action on a misconduct issue.

If a Soldier is facing an administrative reprimand or any other form of adverse administrative action, he or she is entitled to free, confidential legal advice or representation from a Trial Defense Service (TDS) attorney or a Legal Assistance attorney. If a Soldier asks to see a TDS or Legal Assistance attorney, the command must honor that request.

### **2. Soldiers' MEB Counsel (SMEBC)**

Commanders should encourage all Soldiers enrolled or potentially facing MEB proceedings to contact a Soldiers' MEB Counsel (SMEBC), regardless of whether or not they are potentially facing disciplinary action. Soldiers going through the IDES process are entitled to free, confidential legal advice and representation through the entire IDES process from a SMEBC and other professionals within the Office of Soldiers' Counsel. In virtually every case, Soldiers who are advised by SMEBCs proceed through the IDES system more efficiently and accurately when compared to those who do not.

If a Soldier already has a TDS attorney or Legal Assistance attorney advising him or her, the SMEBC can work with the TDS or Legal Assistance attorney to ensure that the Soldier receives accurate and timely advice in this intersection of two complex areas of the law.

SMEBCs are physically located at most installations. If your installation does not have a SMEBC, one from another installation will be detailed to represent or consult with your Soldier. Your legal advisor will be able to provide you with the SMEBC's name and contact information.

### **3. Soldiers' PEB Counsel (SPEBC)**

Soldiers may request a formal hearing at the PEB. In those situations, the command should advise the Soldier to seek the counsel of the Soldiers' PEB Counsel (SPEBC). SPEBCs are generally co-located with the standing PEBs, and provide advocacy and legal guidance to Soldiers who choose to appear in person at the PEB.



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# Mental Health Evaluations

## A. REFERENCES

- DOD Instruction 6490.04, Requirements for Mental Health Evaluations of Members of the Armed Forces, dtd March 4, 2013

## B. OVERVIEW

DoD Instruction 6490.04 establishes policy, assigns responsibilities, and prescribes procedures for the referral, evaluation, treatment, and medical and command management of Service members who may require assessment for mental health issues, psychiatric hospitalization, and risk of imminent or potential danger to self or others.

## C. APPLICABILITY

DoD Instruction 6490.04, upon which the guidance in this chapter is based, applies to the OSD, the Military Departments (including the Coast Guard at all times), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

### **When the Directive does NOT apply:**

- Voluntary self-referrals.
- Required periodic pre- and post-deployment mental health assessments for Service members deployed in connection with a contingency operation in accordance with DoD Instruction 6490.12.
- Responsibility and competency inquiries conducted in accordance with the guidelines established in the Rule for Courts Martial (RCM) 706 of the Manual for Courts-Martial (MCM).
- Interviews conducted in accordance with guidelines established for the Family Advocacy Program in DoD Directive 6400.01.
- Interviews conducted in accordance with guidelines established for drug or alcohol abuse rehabilitation programs in DoD Instruction 1010.04.
- Clinical referrals requested by other healthcare providers as a matter of clinical judgment and when the Service member consents to the evaluation.
- Evaluations under authorized law enforcement or corrections system procedures.

- Evaluations for special duties or occupational classifications and other evaluations expressly required by applicable DoD issuance or Service regulation that are not subject to commanders' discretion.

## **D. POLICY (SEE PARAGRAPH E BELOW FOR PROCEDURES)**

### **1. Removing Stigma**

It is the responsibility of the DoD to ensure that policy and procedures are implemented in a manner that removes the stigma associated with Service members seeking and receiving mental health services. The use of mental health services is considered, whenever possible, to be comparable to the use of other medical and health services. This extends to policy directed at ensuring fitness for duty, returning injured or ill Service members to full duty status after appropriate treatment, and managing medical conditions that may endanger the Service member, others, or mission accomplishment.

### **2. Authority to Order Evaluation**

Commanders and supervisors who in good faith believe a subordinate Service member may require a mental health evaluation are authorized to direct an evaluation under this instruction or take other actions consistent with DoD Instruction 6490.04, Enclosure 3. In these circumstances, a command directed mental health evaluation (MHE) has the same status any other military order.

### **3. Non-Emergency MHE Referral**

Referral for a command directed evaluation (CDE) of a Service member to a mental health-care provider (MHP) for non-emergency MHE may be initiated only by a commander or supervisor (as defined in the subparagraphs below). Such evaluations may be for a variety of concerns, including fitness for duty, occupational requirements, safety issues, significant changes in performance, or behavior changes that may be attributable to possible mental status changes.

#### ***a. Commander***

Any commissioned officer who exercises command authority over a Service member. The term includes a military member designated in accordance with DoD Instruction 6490.04 to carry out any activity of a commander under DoD Instruction 6490.04.

#### ***b. Supervisor***

A commissioned officer within or out of a Service member's official chain of command, or civilian employee in a grade level comparable to a commissioned officer, who:

- Exercises supervisory authority over the Service member owing to the Service member's current or temporary duty assignment or other circumstances of the Service member's duty assignment; and
- Is authorized due to the impracticality of involving an actual commanding officer in the member's chain of command to direct an MHE.

### *c. Designees:*

#### **1) Senior Enlisted Member.**

A senior enlisted Service member may be designated by the commander or supervisor for ordering an emergency CDE for enlisted Service members.

#### **2) Commissioned Officer Senior to Referred Officer.**

In cases involving a commissioned officer, a commissioned officer of rank senior to the officer to be referred may be designated.

### **4. Emergency MHE Referral**

A commander or supervisor will refer a Service member for an emergency MHE as soon as it is practicable whenever:

Service member, by actions or words, such as actual, attempted, or threatened violence, intends or is likely to cause serious injury to him or herself or others; and

When the facts and circumstances indicate that the Service member's intent to cause such injury is likely; and

When the commanding officer believes that the Service member may be suffering from a severe mental disorder.

### **5. Reprisals**

No one may refer a Service member for an MHE as a reprisal for making or preparing a lawful communication of the type described in 10 U.S.C. §§ 1034 and in DoD Directive 7050.06.

### **6. Voluntary Self-Referrals**

A Service member may initiate a voluntary self-referral for mental health care. When self-initiated, the MHP will follow the policy and procedures of DoD Instruction 6490.08 with regard to both the presumption of non-notification, required notifications, and the extent of disclosure.

### **7. Training**

Training must be provided annually to all Service members by the Military Departments regarding the recognition of personnel who may require MHE for imminent dangerousness, based on the individual's behavior or apparent mental state.

### **8. Non-CDE Assessments of Contingency Operation-Deployed Service Members**

Mental health assessments of Service members deployed in connection with a contingency operation will be conducted, for purposes other than CDEs, in accordance with DoD Instruction 6490.12, "Mental Health Assessments for Service Members Deployed in Connection with a Contingency Operation."

## E. PROCEDURES

### 1. Training

Commanders must ensure that all members of their unit receive instruction on how to recognize Service members who may require mental health evaluation for dangerousness to self, others, or mission based on the Service member's behavior or apparent mental state. Training must be specific to the needs, rank, and level of responsibility and assignment of each Service member. Such training must include:

- The recognition of potentially dangerous behavior.
- Appropriate use of security or civilian police authorities.
- Management of emergencies pending the arrival of security or civilian police.
- Administrative management of such cases.

### 2. Referral of Service Member for Commander or Supervisor Directed MHE

#### *a. Responsibility*

The responsibility for determining whether or not referral for MHE should be made rests with the Service member's commander or supervisor at the time of referral.

- A senior enlisted Service member may be designated by the commander or supervisor for ordering an emergency CDE for enlisted Service members.
- In cases involving a commissioned officer, a commissioned officer of rank senior to the officer to be referred may be designated.

#### *b. Non-emergency MHE*

When a commander or supervisor, in good faith, believes that a Service member may require a non-emergency MHE, he or she will:

- Advise the Service member that there is no stigma associated with obtaining mental health services.
- Refer the Service member to an MHP, providing both name and contact information.
- Tell the Service member the date, time, and place of the scheduled MHE.

**NOTE: There is no longer a requirement to place these required notices into a memorandum. There is also no longer a requirement to outline and inform the service member of his or her right to contact the Inspector General (IG) or an attorney. Furthermore, there is no longer a requirement to provide 2 business days between notice and evaluation.**

### *c. Emergency MHE*

When a commander or supervisor refers a Service member for an emergency MHE owing to concern about potential or imminent danger to self or others, the following principles should be observed:

- **Safety.** When a Service member is exhibiting dangerous behavior, the first priority of the commander or supervisor is to ensure that precautions are taken to protect the safety of the Service member and others, pending arrangements for the transportation of the Service member to the location of the emergency evaluation.
- **Communication.** The commander or supervisor will report to the MHP the circumstances and observations regarding the Service member that led to the emergency referral either prior to or while the Service member is en route to emergency evaluation.

**NOTE: There is no longer a requirement for the commander to draft a memorandum outlining the Service member's rights and reasons for the referral. There is also no longer a requirement to provide a memorandum, as soon as practicable, to the MHP. Oral communications between the commander and MHP suffice.**

### **3. Command Promotion of Care Seeking for the Maintenance of Total Well-Being.**

Commanders or supervisors may make informal, non-mandatory recommendations for Service members under their authority to seek care from an MHP when circumstances do not require a CDE based on safety or mission concerns. Under such circumstances, the commander or supervisor will inform the Service member that he or she is providing a recommendation for voluntary self-referral and not ordering the care.

Commanders and supervisors will demonstrate leadership and direct involvement in development of a culture of total well-being of Service members by providing consistent and ongoing messaging and support for the benefits and value of seeking mental health care and voluntarily-sought substance abuse education.

Commanders and supervisors may educate Service members with respect to additional options for assistance, including confidential counseling from family support, Military OneSource resources, consultation from chaplains, and options for obtaining assistance with financial, legal, childcare, housing, or educational issues.

Commanders and supervisors will not substitute alternative approaches to CDE when there is significant concern regarding a Service member's safety or performance of duty or concern for the safety of others.

### **4. Hospitalization for Psychiatric Evaluation and Treatment**

Pursuant to a referral, only a psychiatrist, or when a psychiatrist is not available, a physician or another MHP with admitting privileges may admit a service member for an inpatient MHE. A Service member may consent to a voluntary inpatient admission, or a qualified MHP may direct an involuntary inpatient admission after following the applicable laws, regulations, and procedures.

**If involuntarily admitted as an inpatient, the Service member will be re-evaluated within 72 hours of admission by an independent privileged psychiatrist or other medical officer if a psychiatrist is not available. The independent medical reviewer will determine whether, based on clear and convincing evidence, continued involuntary hospitalization is clinically appropriate. The Service member will be notified of the results.**

The Service member has the right to contact a relative, friend, chaplain, attorney, any office of Inspector General (IG), and anyone else the member chooses, as soon as the Service member's condition permits, after admission to the hospital.

## **5. Fitness and Suitability for Service**

MHPs will report to commanders or supervisors who make CDEs, but in doing so will make the minimum necessary disclosure and, when applicable, will advise on how the commander or supervisor can assist the Service member's treatment. Additional information may be disclosed consistent with DoD Instruction 6490.08, "Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members," August 17, 2011.

The providers will advise the commander or supervisor of any duty limitations or recommendations for monitoring or additional evaluation, recommendations for treatment, referral of the service member to a Medical Evaluation Board for processing through the Disability Evaluation System in accordance with DoD Instruction 1332.18, "Disability Evaluation system (DES)," May 17, 2018 as amended, or administrative separation of the Service member for personality disorder or unsuitability for continued military service under DoD Instruction 1332.14, "Enlisted Administrative Separations," April 12, 2019. Any referral for consideration of potential separation from Military Service will be in accordance with Military Department procedures.

## **6. Duty to Take Precautions to Protect Others from Harm**

In any case in which a Service member has communicated to a privileged healthcare provider an explicit threat to kill or seriously injure a clearly identified or reasonably identifiable person, or to destroy property under circumstances likely to lead to serious bodily injury or death, and the Service member has the apparent intent and ability to carry out the threat, the responsible healthcare provider will make a good faith effort to take precautions against the threatened injury. Such precautions include, but are not limited to:

### ***a. Notifications***

Privileged healthcare providers will notify:

- The service member's commander or supervisor that the Service member is imminently or potentially dangerous.
- Military or civilian law enforcement authorities where the threatened injury may occur.
- Law enforcement of specifically named or identified potential victim(s).
- The service member's commander or supervisor and any identifiable individuals who had been harmed or threatened harm by the Service member immediately before hospitalization about the Service member's pending discharge from inpatient status.



### *b. Recommendations and Referrals*

The MHP will recommend as appropriate:

- Appropriate precautions to the Service member's commander or supervisor.
- Referral of the Service member's case to the Service's physical evaluation board.
- Admission of the Service member to an inpatient psychiatric or medical unit for evaluation and treatment.
- Administrative separation of the Service member to the commander or supervisor. The provider will inform the Service member and document in the medical record that precautions have been taken.

## **7. Complaints of Reprisal for Protected Communication**

Any service member who believes a CDE is a reprisal for the Service member having made a protected communication may file a complaint with the DoD IG Hotline or a Military Department IG in accordance with the applicable rules and regulations, to include DoD Directive 7050.06, "Military Whistleblower Protection," April 17, 2015



# Command Access to Soldiers' Protected Health Information (HIPAA)

## A. REFERENCES

- DoD 6025.18, Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DoD Health Care programs, 13 March 2019
- DoD Instruction 6490.04, Mental Health Evaluations of Members of the Military Services, 4 March 2013
- DoD Instruction 6490.08, Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members, 17 August 2011
- DoD Instruction 6490.10, Continuity of Behavioral Health Care for Transferring and Transitioning Service Members , 26 March 2012
- Army Regulation 40-66, Medical Record Administration and Healthcare Documentation, RAR 4 January 2010
- MEDCOM Regulation 40-38, Commander-Directed Mental Health Evaluations, 21 September 2011

## B. OVERVIEW

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its Privacy Rule requires everyone in the Military Health System to safeguard and keep confidential a patient's health information. Healthcare information is confidential and will not be released to third parties without either an authorization from the patient or an exception to HIPAA. However, HIPAA provides a limited exception for access to Protected Health Information (PHI) for command officials when the patient is a Soldier.

## C. COMMAND ACCESS TO PROTECTED HEALTH INFORMATION (PHI) – “THE MILITARY COMMAND EXCEPTION”

### 1. Communication is Key

The key to success with HIPAA and medical information-related issues is good communication between the command, the healthcare provider, the military treatment facility (MTF), and the servicing judge advocates.

#### *a. Military Healthcare Providers and Military Treatment Facilities (MTFs)*

Commanders and their designees have a specific exception to receive a Soldier's PHI in certain situations to assure the proper execution of the military mission. Healthcare providers

may provide information to the command pursuant to this exception without the Soldier's consent. If a commander believes that he or she needs to know about a Soldier's PHI, the commander should immediately contact the healthcare provider. Commanders must understand, however, that this exception is limited. Commanders do not have unrestricted access to a Soldier's PHI. Military Treatment Facilities and healthcare providers will provide timely and accurate information to support a commander's decisions regarding a Soldier's health risk, medical fitness, and readiness. To access a Soldier's PHI, a commander (or the commander's proper designee) must have a need to access the Soldier's PHI in order to carry out an activity under the authority of the commander. This exception applies only to Soldiers and does NOT apply to dependent family members, retirees, or civilians.

### ***b. Civilian Medical Facilities***

In circumstances where a Soldier's treatment was provided by a civilian healthcare provider, and if the commander needs the PHI for an official purpose, a commander may request the Soldier's PHI from the civilian healthcare provider. However, HIPAA provides that it is within the civilian healthcare provider's discretion whether to disclose the relevant PHI since disclosure is generally permissible, but not required. Commanders having difficulty obtaining PHI from civilian healthcare providers should seek the assistance of the MTF's Patient Administration Division (PAD) and their servicing judge advocate.

## **2. The Minimum Necessary Rule**

The HIPAA Privacy Rule requires covered entities, such as MTFs and Unit Surgeons, to take reasonable steps to limit the use or disclosure of, and requests for, PHI to the minimum necessary to accomplish the intended purpose. In most cases, commanders who request PHI pursuant to the military exception will typically not receive all of the Soldier's PHI, since all of the Soldier's PHI is not necessary to accomplish the specific intended purpose. Disclosure may include: the Soldier's diagnosis; a description of the treatment prescribed or planned; impact on duty or mission; recommended/applicable duty restrictions; the prognosis; and implications for the safety of self or others.

## **3. Common Uses of the "The Military Command Exception" to HIPAA**

### ***a. Determine a Soldier's Fitness for Duty.***

A commander may obtain PHI to determine a Soldier's fitness for duty, including, but not limited to, the member's compliance with standards and activities carried out under the Army Body Composition Program (AR 600-9), Disability Evaluation for Retention, Retirement, or Separation (AR 635-40), or Standards of Medical Fitness (AR 40-501).

### ***b. Determine a Soldier's fitness to perform a particular mission***

A commander may obtain PHI to determine a Soldier's fitness to perform a particular mission, assignment, order, or duty, including compliance with any actions required as a precondition to performance of such mission, assignment, order, or duty. Common examples are profiles and notice that a Soldier is taking a particular medication that interferes with the performance of duty, such as driving or carrying a weapon.

*c. Report on casualties in any military operation.*

*d. Carry out any other activity necessary to the proper execution of the mission of the Armed Forces. Common examples include:*

- To coordinate sick call, routine and emergency care, quarters, hospitalization, and care from civilian providers IAW Medical Record Administration and Healthcare Documentation (AR 40-66) and Patient Administration (AR 40-400);
- To report command-directed mental health evaluations IAW Command-Directed Mental Health Evaluations (MEDCOM Regulation 40-38);
- To initiate determinations and to assist investigating officers IAW, Line of Duty Policy, Procedures, and Investigations (AR 600-8-4);
- Most medical appointment reminders concerning Soldiers may be disclosed to Command Authorities (but see Section E below);
- To report a Soldier's dental classification IAW Medical Dental, and Veterinary Care (AR 40-3);
- To carry out the Soldier Readiness Program and mobilization processing requirements IAW Personnel Processing Procedures (DA Pam 600-8-101);
- To provide initial and follow-up reports IAW the Army Family Advocacy Program (AR 608-18);
- To complete records IAW the Exceptional Family Member Program (AR 608-75);
- IAW AR 15-6 investigations (but not including Quality Assurance information);
- To review and report Human Immunodeficiency Virus (HIV) IAW Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (AR 600-110);
- To carry out any other activity necessary to the proper execution of the mission of the Army.

**4. Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members (DoDI 6490.08, August 17, 2011).**

*a. General Information*

There is guidance related to the release of information pertaining to a Soldier's involvement in mental health care and substance abuse education (distinguished from substance abuse treatment). Healthcare providers follow a presumption that they are not to notify a Soldier's commander when the Soldier obtains mental health care or substance abuse education services. However, this presumption can be overcome through one of the following notification standards.

## ***b. Notification Standards***

Command notification by healthcare providers will not be required for self-referrals and referrals for mental health care or substance misuse education unless one of the reasons listed below apply. Healthcare providers shall notify the commander concerned when a Soldier meets the criteria for one of the following mental health and/or substance misuse conditions or related circumstances:

- ***Harm to Self.*** The provider believes there is a serious risk of self-harm by the Soldier either as a result of the condition itself or medical treatment of the condition.
- ***Harm to Others.*** The provider believes there is a serious risk of harm to others either as a result of the condition itself or medical treatment of the condition. This includes any disclosures concerning child abuse or domestic violence consistent with DoDI 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel.
- ***Harm to Mission.*** The provider believes there is a serious risk of harm to a specific military operational mission. Such serious risk may include disorders that significantly impact impulsivity, insight, reliability, and judgment.
- ***Special Personnel.*** Soldiers in the Personnel Reliability Program as described in DoDI 5210.42, DoD Nuclear Weapons Personnel Reliability Assurance, or in positions identified by service regulation or the command as having mission responsibilities of such potential sensitivity or urgency that normal notification standards would significantly risk mission accomplishment.
- ***Inpatient Care.*** The Soldier is admitted or discharged from any inpatient mental health or substance abuse treatment facility. These are considered critical points in treatment and support nationally recognized patient standards.
- ***Acute Medical Conditions Interfering With Duty.*** The Soldier is experiencing an acute mental health condition or is engaged in an acute medical treatment regimen that impairs the Soldier's ability to perform assigned duties.
- ***Substance Abuse Treatment Program.*** Consistent with DoDI 1010.04, Problematic Substance Use by DoD Personnel, the Soldier has entered into, or is being discharged from a formal outpatient or inpatient treatment program for the treatment of substance abuse or dependence.
- ***Command-Directed Mental Health Evaluation.*** The mental health services are obtained as a result of a command-directed mental health evaluation IAW DoDI 6490.04, Mental Health Evaluations of Members of the Military Services.
- ***Other Special Circumstances.*** The notification is based on other special circumstances in which proper execution of the military mission outweighs the interests served by avoiding notification, as determined on a case-by-case basis by a healthcare provider (or other authorized official of the MTF involved) at the O-6 or equivalent level or above or a commanding officer at the O-6 level or above.

## **D. BEHAVIORAL HEALTH EVALUATIONS**

### **1. Command-Directed**

While a commander may inquire into the general nature of a Soldier's status, if a commander has a question about a Soldier's mental ability to perform his or her duty, the commander should immediately initiate a command-directed mental status evaluation. Commanders will be provided a copy of the command-directed mental health evaluation.

### **2. Self-Referral**

If a Soldier initiates the mental health evaluation (self-referral), the PHI regarding the medical conditions that do not affect the Soldier's fitness for duty or fitness to perform a particular mission will not be provided to the unit. Should the Soldier need to be hospitalized or prescribed medications that limit his or her ability to perform their duty, the healthcare provider has an affirmative duty to notify the unit of this change or limitation of duty status. As outlined above, MTFs and military healthcare providers will proactively inform command authorities of conditions that impair a Soldier's performance of duty. Examples include: to avert a serious and imminent threat to health or safety of a person, such as suicide or homicide; if the Soldier's medical condition could impair his or her ability to perform a specific mission; or if the Soldier's injury indicates a safety problem or battlefield trend.

## **E. MECHANICS OF A REQUEST FOR PHI**

### **1. General Information**

A commander or their proper designee can typically obtain information regarding a Soldier's general health status, adherence to scheduled appointments, profile status, and medical readiness requirements. Commanders can ask for this type of information over the phone after the commander's identity is authenticated and they may also submit these requests in writing. The requests should clearly state the purpose for which specific medical information is sought.

### **2. Medical Records**

Requests for medical records should be in writing through a DA Form 4254, Request for Private Medical Information, to the MTF's Patient Administrative Division. The servicing judge advocate can assist with such requests.

### **3. Authorized Designees**

If anyone other than the commander is to use the PHI, the commander must designate the authorized command official in writing. Commanders must use such delegations judiciously, and instruct each authorized designee about the importance of not further releasing the information without appropriate justification.

## **4. Disagreements**

Contact your servicing judge advocate immediately if there is a disagreement regarding the release of PHI. Servicing judge advocates can serve as intermediaries between commanders and the military treatment providers in such situations.

## **F. WARRIOR TRANSITION UNITS**

Due to the unique nature of a Warrior Transition Unit, WTU commanders typically have access to a Soldier's PHI without requiring patient authorization. Warrior Transition Unit commanders should contact their servicing judge advocate regarding HIPAA-related questions.

## **G. ADDITIONAL COMMANDER RESPONSIBILITIES**

### **1. Safeguarding PHI**

Once medical information is released from the MTF to a commander, it is no longer covered by HIPAA. However, commanders have an important responsibility to safeguard the information received and limit any further disclosure in accordance with the Privacy Act and other applicable rules and regulations. Commanders have the same duty as healthcare providers to safeguard PHI. Information provided shall be restricted to personnel with a specific need to know; that is, access to the information must be necessary for the conduct of official duties. Unauthorized release of PHI not only potentially increases stigma and creates barriers to care, but also exposes the commander, the command, and the Department of the Army to the consequences of a Privacy Act violation. Commanders with questions about the further use of PHI should contact their servicing judge advocate.

### **2. Reduce the Stigma of Mental Health Treatment**

It is DoD policy that the DoD shall foster a culture of support in the provisions of mental health care and voluntarily sought substance abuse and education to military personnel in order to dispel the stigma of seeking mental health care and/or substance misuse education services. Commanders must reduce stigma through positive regard for those who seek mental health assistance in order to restore and maintain their mission readiness, just as they would view someone seeking treatment for any other medical issue.

### **3. Transferring and Transitioning Service Members**

In conjunction with healthcare providers, commanders shall notify gaining commanders when adherence to an ongoing treatment plan is deemed necessary to ensure mission readiness and/or safety. In all situations, to include Soldiers transitioning out of the military service, commanders and healthcare providers should ensure that Soldiers who require continued behavioral health care, medical addiction treatment, or follow-up care are properly transferred to prevent a break in care or treatment.



## **H. OTHER HIPAA EXCEPTIONS**

There are numerous other exceptions to HIPAA that are not covered in this section. Additionally, laws, regulations, and guidance frequently changes. Commanders should contact their servicing judge advocates with any questions or concerns regarding medical information.



**Individual**



**Soldier Rights**



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# Tattoo, Branding, Body Mutilation, & Jewelry Policy

## A. REFERENCE

- AR 670-1, Wear and Appearance of Army Uniforms and Insignia, dtd 25 May 2017

## B. TATTOO POLICY

### 1. Overview

AR 670-1 requires Soldiers to wear their uniforms in a fashion that does not detract from overall military appearance. The regulation references both tattoos and brands. Soldiers are prohibited from having tattoos or brands on the head, face (except for permanent makeup), neck (anything above the t-shirt neck line to include on/inside the eyelids, mouth, and ears), wrists, hands, except Soldiers may have one ring tattoo on each hand, below the joint of the bottom segment of the finger.

### 2. Soldierly Appearance

Tattoos or brands that violate DA policy regardless of their location on the body are those that are extremist, indecent, sexist, or racist. Such tattoos are prejudicial to good order and discipline and call for an immediate command response.

- **Extremist:** Affiliated with, depicting, or symbolizing extremist philosophies, organizations, or activities.
- **Indecent:** Are grossly offensive to modesty, decency, propriety, or professionalism.
- **Sexist:** Advocate a philosophy that degrades or demeans a person based on gender.
- **Racist:** Advocate a philosophy that degrades or demeans a person based on race, ethnicity, or national origin.

### 3. Command Responses to Violations of Tattoo Policy

Commanders will ensure that Soldiers understand the tattoo policy and comply with the requirement to document their tattoos. If a Soldier has any tattoo or brand that is prohibited, has any tattoo or brand that is not grandfathered, or acquires any new tattoo or brand in violation of policy, his/her Commander will:

#### a. Counsel

The Soldier will be counseled in writing. The DA Form 4856 (Developmental Counseling Form) will state that the Soldier is not in compliance with AR 670–1, paragraph 3–3, and will explain how the tattoo or brand violates the specific prohibition in the policy (for example, the

tattoo is extremist because it is a known symbol for a specific hate group; or the new tattoo is in a prohibited location).

### ***b. Provide Time***

The Soldier will receive no less than a period of 15 calendar days to seek medical and/or legal advice, fully consider all available options, and respond to the counseling, in writing, by informing the commander that he/she will appeal the finding that the tattoo or brand is in violation of policy, pursue medical procedure(s) to have the tattoo or brand removed, or not have the tattoo or brand removed.

### ***c. Soldier Decides***

If the Soldier elects to appeal the finding that the tattoo or brand is in violation of policy, the Commander will forward the matter to the first O-6 commander in the chain of command for a final determination.

If the Soldier elects to have the tattoo or brand removed, the Commander will counsel the Soldier on a plan for scheduling the medical procedure(s). Soldiers will receive a reasonable amount of time to schedule the necessary medical procedure(s) and pay for such procedure(s) (if not available at a military treatment facility). Commanders must also determine if operational requirements will delay the medical procedure(s).

If the Soldier declines to have the tattoo or brand removed, the Commander will counsel the Soldier in writing. The DA Form 4856 will state that the Soldier's refusal to remove extremist, indecent, sexist, or racist tattoos or brands anywhere on the body, or refusal to remove any unauthorized tattoo or brand that was not grandfathered constitutes a violation of a lawful order and will result in adverse action. The Commander will then initiate administrative separation proceedings.

## **C. MUTILATION POLICY**

Soldiers are prohibited from willful mutilation of the body or any body parts in any manner. Examples include, but are not limited to, tongue bifurcation (splitting of the tongue) or ear gauging (enlarged holes in the lobe of the ear, which are greater than 1.6mm). Soldiers who entered the Army before 31 March 2014 with approved body mutilation may request an exception from Deputy Chief of Staff, G1.

## **D. JEWELRY POLICY**

AR 670-1 requires Soldiers to uphold a certain military appearance on and off duty. Both the wear of piercings and earrings while in uniform detracts from a soldierly appearance.

### **1. Soldierly Appearance**

Attaching, affixing or displaying objects, articles, jewelry, or ornamentation to, through, or under their skin, tongue, or any other body part is prohibited. Females may wear earrings with the service, dress, mess, and evening mess uniforms as well as in civilian clothes on duty consistent with AR 670-1. (The term "skin" is not confined to external skin but includes the

tongue, lips, inside the mouth, and other surfaces of the body not readily visible.). When male and female Soldiers are not in uniform and off duty, earring wear is not restricted as long as the earring wear does not create or support gauging.

## **2. Tooth Ornamentation**

The use of gold caps, platinum caps, or caps of any unnatural color or texture (permanent or removable) for purposes of dental ornamentation is prohibited. Teeth, whether natural, capped, or veneered, will not be decorated with designs, jewels, initials, or similar ornamentation. Unnatural shaping of teeth for nonmedical reasons is prohibited.

Commanders may consider waivers for permanent caps that were applied prior to the effective date of this regulation. Such waivers must be approved by the first O-5 commander in the chain of command and documented in an official memorandum, which must be uploaded to the Soldier's AMHRR. A picture of the permanent caps must be appended as an enclosure to the memorandum.





# Conscientious Objection

## A. REFERENCES

- DoD Instruction 1300.6, Conscientious Objectors, dtd 1 July 2017
- AR 600-43, Conscientious Objection, dtd 21 August 2006

## B. OVERVIEW

Any Soldier with a firm, fixed, and sincere objection to participation in any form of war, or to the bearing of arms because of religious training or belief may apply for separation from the Army as a conscientious objector. Applicants must establish by clear and convincing evidence that the objection is sincere and based on beliefs that either did not exist, or did not become fixed until after entry into the service. Applicants must consent to interviews and to an investigation into their status. Final decisions on many applications are made by HQDA.

## C. CLASSES OF CONSCIENTIOUS OBJECTORS

The two classes of conscientious objectors are detailed below:

### 1. Class 1-A-0:

This class includes Soldiers who, by reason of conscientious objection, sincerely object to participation as combatants in war in any form, but whose convictions permit military service in a non-combatant status.

### 2. Class 1-0:

These Soldiers, by reason of conscientious objection, sincerely object to participation of any kind (whether in a combatant or non-combatant role) in war in any form. Applicants claiming this status will not be granted 1-A-0 status, as a compromise.

## D. PROCEDURES FOR PROCESSING APPLICATIONS

AR 600-43 governs the procedures for processing conscientious objection claims. In particular, commanders should be aware of the provisions detailed below. Additionally, Appendix C of the regulation contains a checklist for processing these applications.

- A military chaplain and psychiatrist must interview applicants.
- The Special Court-Martial Convening Authority (normally, the Soldier's brigade commander) must appoint an officer to investigate the claim.
- The Record of Investigation will be forwarded to the General Court-Martial Convening Authority (GCMCA) and his Staff Judge Advocate for Review.

- Soldiers may withdraw their application at any time prior to final action on the case.

## **E. APPROVAL AUTHORITIES**

The following authorities act as final approval authorities for applications.

### **1. Category 1-A-0:**

Approval authority for applications submitted by Active component, and Reserve component Soldiers on active duty or ADT, is the Active Army commander having GCMCA over the Soldier concerned. If the GCMCA does not approve the application, HQDA acts as the approval authority.

### **2. Category 1-0:**

Approval authority is HQDA (Conscientious Objector Review Board).

## **F. USE AND ASSIGNMENT OF APPLICANTS**

Applicants pending final action on their cases must be retained in their unit and assigned duties providing minimum practicable conflict with their asserted beliefs. Applicants remain subject to all military orders, discipline, and regulations to include those on training. Some training exceptions exist for trainees.

## **G. ADMINISTRATIVE SEPARATION OF CONSCIENTIOUS OBJECTORS:**

Soldiers separated from the Army for conscientious objection are entitled to receive either an Honorable or a General Discharge. Eligibility for VA benefits will typically depend on whether or not the Soldier refused to perform military duties, refused to wear the uniform, or refused to comply with lawful orders. Applying for conscientious objector status alone is not a refusal to perform military duties. If a Soldier performs all duties, wears the uniform, and obeys all orders while his or her conscientious objection application is pending, he or she may maintain eligibility for VA benefits. While an administrative separation for conscientious objection is pending, consult with your legal advisor about the applicant's eligibility for VA benefits, and what steps you can take to preserve those benefits, if appropriate.

Soldiers classified 1-A-0 are not eligible for discharge under AR 600-43. Personnel classified 1-A-0 will be reassigned IAW AR 600-43, paragraph 3-1 to an assignment that qualifies as non-combatant service or training.

# Extremist Organizations and Activities

## A. REFERENCES

- DoD Directive 1325.06, Handling Dissident and Protest Activities Among Members of the Armed Forces, dtd 27 November 2009, Incorporating Change 1, 22 February 2012
- AR 600-20, Army Command Policy, 6 November 2014

## B. OVERVIEW

Commanders must enforce the Army's policy of providing equal opportunity and treatment for all Soldiers without regard to race, color, religion, gender, or national origin. Participation in extremist organizations and activities by Army personnel is inconsistent with the responsibilities of military service and Army policy. The above-cited references provide guidance on prohibited extremist activities. The following basic principles apply in all cases.

## C. EXTREMIST ORGANIZATIONS AND ACTIVITIES

Military personnel must not actively advocate supremacist, extremist, or criminal gang doctrine, ideology, or causes, including those that advance, encourage, or advocate illegal discrimination based on race, creed, color, sex, religion, ethnicity, or national origin or those that advance, encourage, or advocate the use of force, violence, or criminal activity or otherwise advance efforts to deprive individuals of their civil rights.

## D. PROHIBITED ACTIVITIES

Soldiers are prohibited from engaging in the following activities to support extremist organizations:

- Participating in public demonstrations or rallies;
- Attending meetings or activities knowing that the meeting or activity involves an extremist cause when on duty, in uniform, in a foreign country (whether on or off-duty, or in or out of uniform), in breach of law and order, if likely to result in violence, in violation of off-limits sanctions, or in violation of a commander's order;
- Recruiting or training members;
- Fund-raising;
- Creating, organizing, or taking a visible leadership role in such organizations or activities;
- Distributing literature on or off a military installation related to these organizations and that presents a clear and present danger to the loyalty, discipline, or morale of military personnel or that materially interferes with mission accomplishment;

- Receiving financial assistance from a person or organization who advocates terrorism, the unlawful use of force or violence to undermine or disrupt US military operations, subversion, or sedition;
- Browsing or visiting internet websites when on duty, without official sanction, that promote or advocate violence directed against the US or DoD, or that promote international terrorism or terrorism themes.

## **E. COMMAND RESPONSIBILITIES**

Commanders should remain alert for signs of future prohibited activities. They should intervene early, primarily through counseling, when observing such signs even though the signs may not rise to active advocacy or active participation or may not threaten good order and discipline, but only suggest such potential. The goal of early intervention is to minimize the risk of future prohibited activities.

Examples of such signs, which, in the absence of the active advocacy or active participation are not prohibited, could include mere membership in criminal gangs and other such organizations. Signs could also include possession of literature associated with such gangs or organizations, or with related ideology, doctrine, or causes. While mere membership or possession of literature normally is not prohibited, it may merit further investigation and possibly counseling to emphasize the importance of adherence to the Department's values and to ensure that the Service member understands what activities are prohibited.

In any case of apparent Soldier involvement with extremist organizations or activities, commanders must take positive action to educate Soldiers of the potential adverse effects that participation in violation of Army policy may have upon good order and discipline. These actions include, but are not limited to:

### **1. Educating Soldiers**

Commanders will advise Soldiers that extremist organizations' goals are inconsistent with Army goals, beliefs, and values concerning equal opportunity.

### **2. Advising Soldiers**

Commanders must advise Soldiers that participation in extremist organizations or activities:

- Will be considered in evaluating overall duty performance, to include appropriate remarks on evaluation reports.
- Will be considered in selections for positions of leadership and responsibility.
- Will result in removal of security clearances, when appropriate.
- Will result in reclassification actions or bars to reenlistment, when appropriate.
- May result in being reported to law enforcement authorities.

### 3. Command Authority and Options

Commanders have inherent authority to prohibit military personnel from engaging in or participating in any other activities that will adversely affect good order and discipline or morale within the command. This includes, but is not limited to, the authority to order the removal of symbols, flags, posters, or other displays from barracks, to place areas or activities off-limits (when done IAW AR 190-24), or to order Soldiers not to participate in those activities. Commanders' options for addressing a Soldier's violation of prohibited activities include:

- UCMJ Action. Possible violations include:
- Violation or Failure to Obey a Lawful General Order or Regulation (Article 92, UCMJ).
- Riot or Breach of Peace (Article 116, UCMJ).
- Provoking Speeches or Gestures (Article 117, UCMJ).
- Conduct Prejudicial to Good Order and Discipline or Service Discrediting (Article 134, UCMJ: General Article).



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# Political Activities by Members of the Armed Forces

## A. REFERENCES

- DoD Regulation 5500.7-R (Joint Ethics Regulation)
- DoD Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty, dtd 19 February 2008
- AR 600-20, Army Command Policy, 6 November 2014

## B. OVERVIEW

Soldiers are expected to fulfill their obligations as citizens, but are prohibited, while on active duty, from engaging in certain political activities. The above-cited references provide guidance on participation in non-partisan political activities. Reserve Soldiers not on active duty can participate in political activities in their personal capacity. The following basic principles apply in all cases.

## C. PERMISSIBLE ACTIVITIES

The following are examples of permissible activities:

- Registering, voting, and expressing opinions on political candidates and issues – but not as representatives of the Army.
- Providing monetary contributions to political organizations or parties.
- Attending partisan or nonpartisan political meetings or rallies as spectators, when not in uniform.
- Writing letters to the editor of a newspaper in a personal capacity, expressing personal views on public issues or political candidates, as long as this is not part of an organized letter-writing campaign or concerted solicitation of votes for or against a political party, partisan political cause, or candidate.

## D. PROHIBITED ACTIVITIES

- The following are examples of prohibited activities for Soldiers on active duty:
- Be a candidate for civil office in federal, state, or local government, except as authorized by AR 600-20.
- Participation in partisan political management, campaigns, conventions, or fundraising duty.
- Marching or riding in a partisan political campaign (in or out of uniform).

- Speaking before a partisan political gathering.
- Wearing a uniform or using government property or facilities while participating in local nonpartisan political activities. This also applies to Reserve Soldiers not on active duty.
- Engaging in conduct that may imply that the Army has taken an official position on, or is otherwise involved in, a local political campaign or issue. This also applies to Reserve Soldiers not on active duty.
- Display a large political sign, banner, or poster (as distinguished from a bumper sticker) on a private vehicle.
- Display a partisan political sign, poster, banner, or similar device visible to the public at one's residence on a military installation, even if that residence is part of a privatized housing development.



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# Whistleblower Protection

## A. REFERENCES

- Whistleblower Protection Act of 1989 (5 USC § 2302(b)(8)).
- Military Whistleblower Protection Act (10 USC § 1034).
- DoDD 7050.06, Military Whistleblower Protection, 17 April 2015.
- Army Regulation 600-20, Army Command Policy, 6 November 2014.

## B. OVERVIEW

The Whistleblower Protection Acts protect both civilian employees and military service-members from reprisal for having disclosed certain information evidencing wrongdoing.

## C. CIVILIAN EMPLOYEE PROTECTIONS

The Whistleblower Protection Act of 1989 (WPA) protects civilian employees from reprisal for having disclosed certain information evidencing wrongdoing in Agency operations.

### 1. What is Whistleblowing?

“Whistleblowing” is when an employee lawfully discloses information to a Member of Congress, an Inspector General, or agency officials that he or she reasonably believes evidences:

- a violation of any law, rule, or regulation,
- gross mismanagement,
- gross waste of funds,
- an abuse of authority, or
- a substantial and specific danger to public health or safety.

The WPA prohibits retaliation against whistleblowers. It is unlawful for agencies to take an unfavorable personnel action against an employee because he or she lawfully disclosed information in one of the above categories.

### 2. Protections

Under the Civil Service Reform Act, federal agency heads, supervisors, and personnel officials are responsible for preventing prohibited personnel practices, to include reprisal for whistleblowing.

A federal agency violates the WPA if any employee who can take, direct others to take, recommend or approve any personnel action, takes or fails to take (or threatens to take or fail to

take) an unfavorable personnel action with respect to any employee or applicant because of the exercise of any appeal right granted by law, rule, or regulation, or for testifying for or assisting another employee in the exercise of an appeal right.

The WPA provides for an individual right of action before the Merit Systems Protection Board for federal employees and applicants who allege that they were subjected to any personnel action because of whistleblowing.

## D. MILITARY MEMBERS PROTECTIONS

Cannot restrict servicemembers from making a protected communication with a Member of Congress; an IG; a member of a DOD audit, inspection, investigation, or law enforcement organization. A protected communication is— (1) Any lawful communication with a Member of Congress or an IG. (2) A communication in which a servicemember communicates information that he or she reasonably believes evidences a violation of law or regulation (including those prohibiting sexual harassment or unlawful discrimination), gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety. AR 600-20, para. 5-12.

The “Military Whistleblower Protection Act” (MWPA), 10 USC § 1034, protects Soldiers from reprisal for certain lawful communications.

The MWPA prohibits taking (or threatening) an unfavorable personnel action, or withholding (or threatening to) a favorable personnel action, *as a reprisal* against a servicemember *for making or preparing or being perceived as making or preparing any lawful communication* to a Member of Congress or an Inspector General.

The MWPA also prohibits taking (or threatening) an unfavorable personnel action, or withholding (or threatening to) a favorable personnel action, *as a reprisal* against a servicemember for making or preparing a communication to a Member of Congress, an Inspector General, a member of a Department of Defense audit, inspection, investigation, or law enforcement organization, a court-martial proceeding, or any other person or organization (including any person or organization in the chain of command) a Soldier complains of, or discloses information that the member reasonably believes constitutes evidence of:

- a violation of law or regulation (including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct, sexual harassment, or unlawful discrimination),
- gross mismanagement,
- gross waste of funds,
- an abuse of authority,
- a substantial and specific danger to public health or safety, or
- a threat by another servicemember or employee of the federal government that indicates an intent to kill or cause serious bodily injury to servicemembers or civilians or damage to military, Federal, or civilian property.

When a Soldier alleges that his or her military record has suffered as the result of reprisal for whistleblowing, the member can apply to the Army Board for the Correction of Military Records (ABCMR) for redress. If the ABCMR finds that the Soldier was reprised against for whistleblowing, it may recommend to the Secretary of the Army appropriate disciplinary action be taken against the person who committed the prohibited personnel practice.



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# Service Member's Civil Relief Act (SCRA)

## A. OVERVIEW

The SCRA is a federal law that provides economic and civil rights protections to service members. The purpose of the law is to assist service members in meeting non-military obligations, so service members can devote their entire energy to the nation's defense.

## B. CATEGORIES OF ECONOMIC PROTECTIONS

Primary economic protections include:

### 1. Six Percent Interest Rate Cap on Pre-Active Service Debts

Service member must request and provide copy of orders. The creditor may not accelerate principle owed to keep payment amount the same.

### 2. Termination of Residential and Motor Vehicle Leases

Service members may terminate residential, business, and motor vehicle leases after entering active service or after receiving PCS or deployment orders (at least 90 day deployment to terminate residential and business leases, or at least 180 day deployment to terminate motor vehicle leases).

### 3. Tax Protection

A Service member neither loses nor acquires residence for taxation purposes based on absence from or presence in a state based on military orders. Service member spouses are also protected provided they also have the same domicile as their Service member spouses.

### 4. Life and Health Insurance Protection

Several Service member protections exist for life insurance, including limits on an insurer's ability limit coverage for activities required by military service and federal guarantees of premium payments in some cases. Health insurance protections include reinstatement after service, usually without a waiting period or exclusions.

### 5. Termination of Telephone Contracts

A Service member may terminate cell and land line telephone contracts after receiving military orders to relocate for at least 90 days to an area that does not support the contract. Additional protections apply for cellular family plans.

## **C. CATEGORIES OF CIVIL RIGHTS PROTECTIONS**

Primary civil rights protections include:

### **1. Sale, Foreclosure, or Seizure of Property Secured by a Pre-Active Duty Mortgage During or Within Nine Months after Active Service**

The proposed action generally requires a court order; the court may stay the proposed action and adjust the service member's obligation.

### **2. Eviction of a Service member or Family Member Who is Renting**

Eviction requires a court order; the court may stay the eviction and adjust the Service member's obligation.

### **3. Stays of Proceedings in Other Civil Cases**

Civil and administrative cases may be stayed for an unavailable Service member. The Service member must show why duty requirements materially affect his ability to appear, state when the Service member is available, and provide the commander's written verification that there is no leave available to the Soldier (this does not include emergency leave).

### **4. Stays or Vacations of Judgments and Garnishments.**

If a Service member is materially affected by military service in complying with a court order or judgment, the court may stay the execution of the judgment, or vacate or stay a garnishment.

## **D. APPLICABILITY**

The SCRA does not apply to all individuals wearing the uniform at all times. Some SCRA protections have specific status or timing requirements. In order to be applicable, particular SCRA protections:

- May apply to all Title 10 Service member.
- May apply only to pre-active duty service obligations.
- May apply to Service member who receive PCS or deployment orders.
- May require that active service materially affect a Service member's ability to meet financial or legal obligations.
- May apply to Service member spouses or other dependents.
- May apply to certain types of National Guard, Title 32 active duty service.
- Never apply to criminal matters.

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# Religious Accommodation

## A. REFERENCES

- DoDI 1300.17, Accommodation of Religious Practices Within the Military Services (10 February 2009, w/ch.1: 22 Jan 14)
- AR 600-20, Army Command Policy, 6 November 2014
- Army Directive 2016-34, Processing Religious Accommodation Requests Requiring a Waiver to Army Uniform or Grooming Policies, 6 October 2016
- Army Directive 2018-19, Approval, Disapproval, and Elevation of Requests for Religious Accommodation, 8 November 2018

## B. ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY

The DoD places a high value on the rights of members of the Military Services to observe the tenets of their respective religions or to observe no religion at all. It protects the civil liberties of its personnel and the public to the greatest extent possible, consistent with its military requirements. Therefore, unless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline, commanders will accommodate individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs) of Soldiers.

Requests for religious accommodation of wear and appearance of the uniform and personal grooming practices are not typically entertained by unit commanders. The provisions of AR 670-1 apply regarding the uniform and grooming standards and requests for exceptions to policy.

### 1. Four major areas.

#### *a. Worship*

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

#### *b. Diet*

Some faith groups have religious tenets that prohibit the eating of specific foods, or prescribe a certain manner in which food must be prepared. A Soldier with a conflict between the diet provided by the Army and that required by religious practice may request an exception to ration separately. Religious belief is grounds for granting such an exception.

### *c. Wear and appearance*

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 not visible or apparent when in duty uniform is authorized, unless precluded by specific mission related reasons. Wear of religious items that are visible and apparent must be neat, conservative, and discrete. Religious items that are neat, conservative, and discreet are those that meet the wear and appearance of the uniform standards delineated in AR 670-1.

### *d. Medical practices*

A Soldier whose religious tenets involve self-care may request accommodation for non-emergency or non-life threatening illness or injury. However, the unit and MTF commanders will consider the time constraints for the Soldier to recuperate without military medical care when determining whether or not to grant the request for accommodation.

Soldiers who refuse to submit to recommended medical treatment because of religious objections will be referred to an ad hoc committee established by the medical commander. In emergency situations the MTF may order, or the attending physician may take, immediate steps in accordance with local MTF policy to save a Soldier's life regardless of religious practices or objections.

Soldiers may request temporary waivers of immunization requirements through command channels. AR 40-562 grants surgeons general authority to waive immunization requirements in cases of religious objections to immunizations under certain circumstances.

## **2. Common Examples:**

- Soldiers may request relief from routine assigned duties (e.g. staff duty) to attend or observe religious ceremonies or holidays.
- Religious jewelry worn under the duty uniform or copies of religious symbols or writing carried by the individual in wallets or pockets is authorized, unless precluded by specific mission-related reasons.
- Religious items may be worn by Soldiers in uniform while they are present at a worship service, rite, or other ritual distinct to a faith or denominational group. Commanders may, for operational or safety reasons, limit the wear of non-subdued items of religious apparel during services conducted in the field based on military necessity.
- Unless the mission is affected by such, the Jewish yarmulke may be worn with the uniform whenever a military cap, hat, or other headgear is not prescribed. A yarmulke may also be worn underneath military headgear as long as it does not interfere with the proper wearing, functioning, or appearance of the prescribed headgear

## **3. Process.**

Requests 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 or their designee. Soldiers requesting such accommodations must continue to comply with AR 670-1 until the request is approved.



Unit commanders will approve/disapprove requests for accommodation of other 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 be done by means of a memorandum from the Soldier, through each level of command (to specifically include ACOM, ASCC, or DRU) to the Deputy Chief of Staff, G-1, ATTN: DAPE-HR-L, Washington, DC 20310-0300. Mandatory enclosures include a memorandum from the unit chaplain and a legal review (see AR 600-20, para 5-8(i)(5) for complete details).

#### **4. Exceptions: Beard, Hijab, and Turban/Under-Turban.**

A request for a religious accommodation will be approved by a Soldier's GCMCA-level commander when the request is to wear a hijab (head scarf), to wear a beard or to wear a turban and under-turban. The GCMCA will approve these requests unless the commander determines that the request is not based on a sincerely held religious belief, or the commander can identify a specific, concrete hazard that is not addressed in Army Directive 2018-19 and that cannot be mitigated by reasonable measures after coordinating with the branch or MOS proponent.

If the accommodation request is approved, the Soldier will be notified and the GCMCA will forward a copy of the approval memorandum to the DCS, G-1 and Human Resources Command for filing in the Soldier's Army Military Human Resources Record.

Once approved, religious accommodations are subject to GCMCA review at any time for health or safety considerations. The GCMCA of the gaining command will review an approved religious accommodation upon the Soldier's permanent change of station. The GCMCA will review an approved religious accommodation when a Soldier reclassifies into a new or secondary military occupational specialty.

The GCMCA may approve, disapprove, or elevate the final decision to the Secretary of the Army or his designee. Requests elevated for decision must include a recommendation for approval or disapproval with reasons and evidence supporting the recommendation. Before acting on requests, the GCMCA staff must coordinate with Army G-1, OTJAG, the Office of the Chief of Chaplains, and, when applicable, Army Corrections Command.



National



Security Law



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# Rules of Engagement

## A. REFERENCE

Chairman of the Joint Chiefs of Staff Instr. 3121.01B, Standing Rules of Engagement/ Standing Rules for the Use of Force for U.S. Forces (13 June 2005).

## B. INTRODUCTION

Rules of Engagement (ROE) are the commander's tool for regulating the use of force. The legal sources that provide the foundation for ROE are varied and complex; however, they do not stand alone—non-legal issues, such as political objectives and military mission limitations, also are essential to the construction and application of ROE. Ultimately, ROE are the commander's rules that are implemented by the Soldier, Sailor, Airman, or Marine who executes the mission.

This chapter provides an overview of basic ROE concepts and surveys Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, Standing Rules of Engagement/ Standing Rules for the Use of Force for U.S. Forces.

***NOTE: This chapter is NOT intended to be a substitute for the SROE. The SROE are classified SECRET, and important concepts within it may not be reproduced here.***

## C. OVERVIEW

### 1. Definition of ROE

Joint Pub 1-02, Dictionary of Military and Associated Terms: ROE are directives issued by competent military authority that delineate the circumstances and limitations under which U.S. [naval, ground, and air] forces will initiate and/or continue combat engagement with other forces encountered.

### 2. Purposes of ROE

As a practical matter, ROE perform three functions: (1) provide guidance from the President and Secretary of Defense (SECDEF), as well as subordinate commanders, to deployed units on the use of force; (2) act as a control mechanism for the transition from peacetime to combat operations (war); and (3) provide a mechanism to facilitate planning. ROE provide a framework that encompasses national policy goals, mission requirements, and the Law of Armed Conflict (LOAC).

### *a. Political Purposes*

ROE ensure that national policies and objectives are reflected in the actions of commanders in the field, particularly under circumstances in which communication with higher authority is not possible. For example, in reflecting national political and diplomatic purposes, ROE may restrict the engagement of certain targets or the use of particular weapons systems, out of a desire to tilt world opinion in a particular direction, place a positive limit on the escalation of hostilities, or avoid antagonizing the enemy. Falling within the array of political concerns are issues such as the influence of international public opinion (particularly how it is affected by media coverage of a specific operation), the effect of host country law, and the content of international agreements with the United States.

### *b. Military Purposes*

ROE can serve both a permissive and restrictive purpose. ROE can provide positive authority for commanders to use force when conducting offensive operations, but also provide parameters within which the commander must operate to accomplish his or her assigned mission:

- ROE provide implementation guidance on the application of force to accomplish the mission. For example, ROE will often provide authority to conduct offensive operations, designate hostile forces for engagement, and provide other authorities to accomplish the mission.
- ROE also implement limits on operations and ensure that U.S. actions do not trigger undesired escalation, i.e., forcing a potential opponent into a “self-defense” response.
- ROE may regulate a commander’s capability to influence a military action by granting or withholding the authority to use particular weapons systems or tactics.
- ROE may also reemphasize the scope of a mission. Units deployed overseas for training exercises may be limited to use of force only in self-defense, reinforcing the training rather than combat nature of the mission.

### *c. Legal Purposes*

ROE can authorize offensive lethal and non-lethal actions or provide restraints on a commander’s actions, consistent with both domestic and international law. Under certain circumstances, ROE may impose greater restrictions than those required by the law. Accordingly, commanders must be intimately familiar with the legal basis for their mission. Commanders also may issue ROE to reinforce certain principles of LOAC, such as prohibitions on the destruction of religious or cultural property or minimization of injury to civilians and civilian property.

## **D. CJCS STANDING RULES OF ENGAGEMENT**

### **1. Overview**

The current SROE went into effect on 13 June 2005, the result of a review and revision of the previous 2000 and 1994 editions. They provide implementation guidance on the inherent right of self-defense and the application of force for mission accomplishment. They are

designed to provide a common template for development and implementation of ROE for the full range of military operations.

## **2. Applicability**

The SROE establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations and contingencies outside U.S. territory and outside U.S. territorial seas. SROE also apply to air and maritime homeland defense mission conducted within U.S. territory and territorial seas. The Standing Rules for the Use of Force (SRUF) apply to actions taken by U.S. commanders and their forces during all DoD civil support and routine Military Department functions occurring inside U.S. territory or territorial seas. The SRUF also apply to land-based homeland defense missions occurring within U.S. territory and to DoD forces, civilians and contractors performing law enforcement and security duties at all DoD installations.

## **3. Responsibility**

The SECDEF approves the SROE and, through the CJCS, may issue theater, mission, or operation specific ROE. The J3 is responsible for SROE maintenance. Subordinate commanders are free to issue theater, mission, or operation ROE, but must notify the SECDEF through command channels if SECDEF-approved ROE are restricted.

## **4. Purpose**

The purpose of the SROE is twofold: (1) provide implementation guidance on the application of force for mission accomplishment, and (2) ensure the proper exercise of the inherent right of self-defense. The SROE outline the parameters of the inherent right of self-defense in Enclosure A. The rest of the document establishes rules and procedures for implementing supplemental ROE.

## **5. The SROE are divided as follows:**

### ***a. Standing Rules of Engagement***

This unclassified enclosure details the general purpose, intent, and scope of the SROE, emphasizing a commander's right and obligation to use force in self-defense. Critical principles, such as unit, individual, national, and collective self-defense, hostile act and intent, and the determination to declare forces hostile are addressed as foundational elements of all ROE.

### ***b. Key Definitions/Issues***

The 2005 SROE refined the definitions section, combining the definitions of "unit" and "individual" self-defense into the more general definition of "Inherent right of self-defense" to make clear that individual self-defense is not absolute. Note, however, that if a subordinate commander imposes more restrictive ROE, he or she must send notification through command channels, including the CJCS, to SECDEF.

- **Self-Defense.** The SROE do not limit a commander's inherent authority and obligation to take all appropriate action in self-defense of the commander's unit, including other U.S. forces in the vicinity.
  - *Inherent Right of Self-Defense.* Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other U.S. military forces in the vicinity.
  - *National Self-Defense.* The act of defending the United States, U.S. forces, U.S. citizens and their property (in certain circumstances), and U.S. commercial assets from a hostile act, demonstrated hostile intent, or declared hostile force.
  - *Collective Self-Defense.* The act of defending designated non-U.S. citizens, forces, property, and interests from a hostile act or demonstrated hostile intent. Only the President or SECDEF may authorize the exercise of collective self-defense. Collective self-defense is generally implemented during combined operations.
  - *Mission Accomplishment v. Self-Defense.* The SROE distinguish between the right and obligation of self-defense, and the use of force for the accomplishment of an assigned mission. Authority to use force in mission accomplishment may be limited in light of political, military, or legal concerns, but such limitations have NO impact on a commander's right and obligation of self-defense. Further, although commanders may limit individual self-defense, commanders will always retain the inherent right and obligation to exercise unit self-defense. Distinctions between mission, accomplishment, and self-defense, and between offensive and defensive operations, may vary based on the level of command, array of forces, and circumstances on the ground.
- **Declared Hostile Force (DHF).** Any civilian, paramilitary, or military force, or terrorist that has been declared hostile by appropriate U.S. authority. Once a force is declared to be "hostile," U.S. units may engage that force without observing a hostile act or demonstration of hostile intent; i.e., the basis for engagement shifts from conduct to status. Once a force or individual is identified as a DHF, the force or individual may be engaged, unless surrendering (or already detained) or hors de combat due to sickness or wounds. The authority to declare a force hostile is limited and is found in the SROE.
- **Hostile Act.** An attack or other use of force against the United States, U.S. forces, or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.
- **Hostile Intent.** The threat of imminent use of force against the United States, U.S. forces, or other designated persons or property. It also includes the threat of force to preclude or



impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.

- ***Imminent Use of Force.*** The determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.

### *c. Actions in Self-Defense*

Upon commission of a hostile act or demonstration of hostile intent, U.S. forces may use all necessary means available and take all appropriate actions in self-defense. If time and circumstances permit, forces should attempt to deescalate the situation, although de-escalation is not required. When U.S. forces respond to a hostile act or demonstration of hostile intent, the force used in self-defense must be proportional. Force used may exceed that of the hostile act or hostile intent, but the nature, duration, and scope of force should not exceed what is required to respond decisively.

### *d. Enclosures B-H*

These classified enclosures provide general guidance on specific types of operations: Maritime, Air, Land, Space, Information, and Noncombatant Evacuation Operations as well as Counterdrug Support Operations Outside U.S. Territory.

### *e. Supplemental Measures*

Supplemental measures enable a commander to obtain or grant those additional authorities necessary to accomplish an assigned mission. Tables of supplemental measures are divided into those actions requiring President or SECDEF approval; those that require either President or SECDEF approval or Combatant Commander approval; and those that are delegated to subordinate commanders (though the delegation may be withheld by higher authority). The current SROE recognizes a fundamental difference between the two sets of supplemental measures. Measures that are reserved to the President or SECDEF or Combatant Commander are generally permissive; that is, the particular operation, tactic, or weapon is generally restricted, and the President, SECDEF, or Combatant Commander implements the supplemental measure to specifically permit the particular operation, tactic, or weapon. Contrast this with the remainder of the supplemental measures, those delegated to subordinate commanders. These measures are all restrictive in nature. Absent implementation of supplemental measures, commanders are generally allowed to use any weapon or tactic available and to employ reasonable force to accomplish his or her mission, without having to get permission first. Only when enacted will these supplemental measures restrict a particular operation, tactic, or weapon. Finally, note that supplemental ROE relate to mission accomplishment, not self-defense, and never limit a Commander's inherent right and obligation of self-defense. However, as noted above, supplemental measures may be used to limit individual self-defense.

### *f. Rules of Engagement Process*

The current, unclassified enclosure provides guidelines for incorporating ROE development into military planning processes. It introduces the ROE Planning Cell, which may be utilized during the development process.

### *g. Combatant Commanders' Theater-Specific ROE*

Combatant Commanders may augment the SROE as necessary by implementing supplemental measures or by submitting supplemental measures for approval, as appropriate. Theater-specific ROE documents can be found on the Combatant Command's SIPR website, often within or linked to by the SJA portion of the site. If you anticipate an exercise or deployment into any geographic Combatant Commander's AOR, check with the Combatant Commander's SJA for ROE guidance.

### *h. SRUF*

Much like the SROE, the SRUF sets out the basic self-defense posture under the SRUF. Enclosures M-O provide classified guidance on Maritime Operations Within U.S. Territory, Land Contingency and Security-Related Operations Within U.S. Territory, and Counterdrug Support Operations Within U.S. Territory. Enclosures P and Q provide a message process for RUF, as well as RUF references.

## **E. MULTINATIONAL ROE**

U.S. forces will often conduct operations or exercises with coalition partners. When conducting operations as part of a multi-national force (MNF), the MNF ROE will apply for mission accomplishment if authorized by SECDEF order. If not authorized, the CJCS SROE apply. Apparent inconsistencies between the right of self-defense contained in U.S. ROE and multinational force ROE will be submitted through the U.S. chain of command for resolution. While final resolution is pending, U.S. forces will continue to operate under U.S. ROE. In all cases, U.S. forces retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent as defined in the SROE.

## **F. ROE TRAINING**

Commanders are primarily responsible for ensuring that their Soldiers are trained on the ROE. Judge advocates can play a significant role in assisting in the training of Soldiers, the staff, and leaders. ROE training is not a one-time event—it is a series of individual and collective training exercises. This training should provide realistic scenario or vignette driven exercises. Upon receipt of a mission-specific ROE, units should develop a training program and leverage judge advocates to provide individual training for unit leaders. These leaders will incorporate ROE training into the unit's collective training events like situational training exercises and mission readiness exercises. During a deployment to a contingency operation, commanders should continue to conduct refresher training to ensure compliance with the mission-specific ROE. Such refresher training can use realistic vignettes generated from the unit's experiences over the duration of the deployment.

# Law of Armed Conflict

## A. REFERENCES

- Department of Defense Law of War Manual, Jun. 2015, updated December 2016, <http://ogc.osd.mil>.
- Hague IV – Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.
- GC I – [Geneva] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31.
- GC II – [Geneva] Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85.
- GC III – [Geneva] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135.
- GC IV – [Geneva] Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.
- AP I – Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977 (not ratified by the U.S.).
- AP II – Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977 (not ratified by the U.S.).
- CCW – Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1524.
- DoDD 2311.01E, DoD Law of War Program (9 May 2006, Change 1 15 Nov. 2010).
- FM 27-10 – U.S. Army Field Manual 27-10, The Law of Land Warfare (18 July 1956, Change 1, 15 July 1976).
- AR 350-1 – U.S. Army Regulation 350-1, Army Training and Leader Development (0 December 2017, revised 19 April 2019).
- OpLaw Handbook – Operational Law Handbook, International and Operational Law Department, The Judge Advocate General’s Legal Center and School (TJAGLCS), U.S. Army, available at [http://www.loc.gov/rtr/frd/Military\\_Law/operational-law-handbooks.html](http://www.loc.gov/rtr/frd/Military_Law/operational-law-handbooks.html) (an extensive guide to the law of armed conflict and other operational law topics, published annually by TJAGLCS faculty).

## B. INTRODUCTION

This Chapter summarizes for commanders and military personnel key law of armed conflict (LOAC) provisions related to the conduct of operations in both international and non-international armed conflicts. It defines the LOAC and discusses its purposes, sources, implementation, basic principles, obligations and enforcement. For more information on these and related topics, consult the Department of Defense Law of War Manual or an operational law judge advocate.

DoD policy is to comply with LOAC “during all armed conflicts, however such conflicts are characterized, and in all other military operations.” (DoDD 2311.01E, para. 3.2). Every Soldier, Sailor, Airman, Marine, and all others accompanying U.S. forces must comply with the LOAC.

## C. OVERVIEW OF THE LAW OF ARMED CONFLICT

### 1. Definition

The DoD Law of War Manual defines the law of war (LOW) as “that part of international law that regulates the resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States.” It is also referred to as the “law of armed conflict” (LOAC) or “international humanitarian law” (IHL). The LOAC includes ratified treaties and applicable customary international law (CIL) binding on the United States or individual citizens.

### 2. Purposes

The purposes of the LOAC serve both military needs and humanitarian concerns. These purposes include:

- Protecting both combatants and noncombatants from unnecessary suffering
- Safeguarding persons who fall into the hands of the enemy
- Facilitating the restoration of peace
- Ensuring good order and discipline
- Fighting in a disciplined manner consistent with national values
- Maintaining domestic and international public support

### 3. Primary Sources

#### a. *Ratified LOAC Treaties*

When a ratified treaty becomes the law of the United States, it is equal in force to a statute passed by Congress. The U.S. always strives to follow such treaties, including these key LOAC documents:

- *Hague IV (1907)*: Ratified in 1909 by the U.S., this treaty contains regulations requiring belligerents to distinguish themselves from civilians; protect prisoners of war; and limit cer-

tain means and methods of attack. The U.S. follows many of Hague IV's basic restrictions in all types of conflicts.

- **GC I-IV (1949):** Ratified in 1955 by the U.S., these treaties govern international armed conflict (between nations). GC I-IV currently bind all United Nations member nations. The four treaties protect (I) the wounded and sick on land; (II) the wounded/ sick and shipwrecked at sea; (III) prisoners of war; and (IV) civilians in the territory of a state which is a party to the conflict or in occupied territory. They define severe violations of their terms as “grave breaches,” and require nations to train their forces on compliance. GC I-IV also require that in non-international armed conflicts, civilians and the wounded and sick be treated humanely.
- **CCW (1980):** Ratified in 1995 by the U.S., this treaty provides legal framework and dialogue for regulating particular weapons systems through “Protocols,” or supplemental treaties. The U.S. is party to the CCW and all its Protocols: (I) banning non-detectable fragments; as well as regulating use of (II/II Amended) mines, booby-traps, and other remote/timed devices; (III) incendiaries; (IV) lasers; and (V) explosive remnants of war. The U.S. actively promotes the CCW and its standards.

Many other ratified treaties provide additional protections, or prohibit/regulate the use of certain weapons systems. Examples include cultural property protections; recognition of a new “red crystal” symbol for medical personnel, vehicles, and hospitals; prohibitions on asphyxiating or poisonous gases, and biological or chemical weapons; and regulation of nuclear weapons. Consult a judge advocate to determine whether a specialized treaty or other restriction applies to a particular target, tactic, or weapon.

### ***b. Customary International Law***

Even absent a treaty, the United States always follows certain principles. Beyond policy or doctrine, these customs are established by state practice and followed out of a sense of legal obligation in all operations or types of conflict. LOAC includes two main types of customary international law principles:

- **Basic LOAC Principles:** These include Military Necessity, Distinction/Discrimination, Proportionality, and Unnecessary Suffering/Humanity. These principles provide the starting framework for analyzing the legality of military operations. Section D below defines these principles in greater detail.
- **Fundamental Guarantees:** Certain acts are always prohibited by international law. While there is no definitive U.S. list, the following acts are prohibited: genocide, slavery, murder or enforced disappearance, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, rape, or a consistent pattern of gross violations of internationally recognized human rights. These are behaviors beyond the boundaries of honorable combat, and generally accepted as illegal.

## 4. Implementation

### *a. By U.S. Forces*

A variety of statutes, regulations, doctrine, and directives implement LOAC for U.S. forces. Notable examples include the Uniform Code of Military Justice (UCMJ), 10 U.S. Code Section 2441 (the war crimes statute), FM 27-10 (LOAC generally), CJCSI 3121.01B (standing rules of engagement/rules for use of force), JP 3-60 and ATP 3-60 (targeting), AR 190-8 (detainee operations), and numerous other references.

Mission-specific rules of engagement (ROE), tactical directives, and standard operating procedures also implement and must comply with LOAC. These vital documents authorize military action tailored to the overall mission. While ROE change with the mission, LOAC obligations apply in all operations. ROE serve as a Commander's tool to honor those obligations. Chapter 48 discusses ROE in more detail.

### *b. By Coalition Partners*

Other nations may follow additional sources of LOAC. Some are parties to treaties that establish international tribunals, like the International Criminal Court (war crimes) or European Court of Human Rights (regional human rights violations). Some are parties to additional treaties, like the Ottawa Convention (banning antipersonnel land mines) or Convention on Cluster Munitions (banning cluster munitions). Though the U.S. is not bound by these sources, Commanders should be familiar with host and allied nation LOAC commitments and national caveats.

Notably, over 166 nations, including most NATO and other U.S. allies (except Israel and Turkey) follow the 1977 Additional Protocols I and II (AP I and AP II). These treaties extensively supplement GC I-IV. While the U.S. considers many parts of AP I and AP II to reflect customary international law, it has not ratified either treaty. Given their wide acceptance, these treaties can impact operations conducted with or within other nations.

### *c. By Non-Governmental Entities*

Non-Governmental Entities frequently take interest in U.S. operations. A few organizations, like the International Committee of the Red Cross (ICRC), or some United Nations (U.N.) bodies, perform essential oversight missions. They should always be assigned an escort (preferably a judge advocate) and permitted to carry out their duties, subject to essential security needs, mission requirements, and legitimate, practical limitations. Treat other interested entities who lack a legal mandate with courtesy and even-handedness.

## D. BASIC PRINCIPLES OF THE LAW OF ARMED CONFLICT

### 1. Military Necessity

This principle justifies those measures not forbidden by international law that are indispensable for securing the complete submission of the enemy as soon as possible. However, this principle is not applied in a vacuum. It must be applied in conjunction with other law of war

principles. Military necessity generally prohibits the intentional targeting of protected persons (civilians, hostile personnel who have surrendered or are otherwise “out of combat,” etc.) and protected places (objects or places used for purely civilian purposes, such as hospitals, schools, and cultural property that have not been converted to or for military/hostile use) because they do not constitute legitimate military objectives in furtherance of the accomplishment of the mission.

## **2. Distinction/Discrimination**

This principle requires parties to a conflict to distinguish between combatants and the civilian population (i.e. protected persons), and to distinguish between military objectives and civilian objects (i.e. protected property and places). Parties to a conflict must direct their operations only against military objectives. They must also separate their personnel and equipment from civilians and civilian objects. Military objectives are combatants and those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage.

## **3. Proportionality**

This principle prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage expected to be gained. This principle also requires commanders to take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack. Feasible precautions are those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.

## **4. Unnecessary Suffering/Humanity**

This principle forbids the employment of means and methods of warfare calculated to cause unnecessary suffering. This principle acknowledges that combatants’ necessary suffering, which may include severe injury and loss of life, is lawful. This principle largely applies to the legality of weapons and ammunition design, as well as their actual use or any field modifications.

Weapons and ammunition issued by HQDA are reviewed by The Judge Advocate General or his representative for Army-wide use, to ensure compliance with LOAC. However, approved weapons and ammunition also may not be used in a way that will cause unnecessary suffering or injury. A weapon or munition would be deemed to cause unnecessary suffering if, in its normal use, the injury caused by it is disproportionate to the military necessity for it, that is, the military advantage to be gained from its use.

## 5. The Soldier's Rules

AR 350-1, Table F-2, lists these ten LOAC rules as the minimum knowledge required for all Army members:

- 1) Soldiers fight only enemy combatants.
- 2) Soldiers do not harm enemies who surrender. They disarm them and turn them over to their superior.
- 3) Soldiers do not kill or torture any personnel in their custody.
- 4) Soldiers collect and care for the wounded, whether friend or foe.
- 5) Soldiers do not attack medical personnel, facilities, or equipment.
- 6) Soldiers destroy no more than the mission requires.
- 7) Soldiers treat civilians humanely.
- 8) Soldiers do not steal. Soldiers respect private property and possessions.
- 9) Soldiers should do their best to prevent violations of the law of war.
- 10) Soldiers report all violations of the law of war to their superior.

## E. OBLIGATIONS AND ENFORCEMENT

### 1. Always Follow the LOAC

As stated above, DoD policy is to comply with the LOAC “during all armed conflicts, however such conflicts are characterized, and in all other military operations.” (DoDD 2311.01E, para. 4.1). Many rules of the LOAC apply across the entire spectrum of conflict, particularly those requiring humane treatment of detainees and civilians.

Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish. The U.S. reviews commander and subordinate decisions based on information reasonably available at the time an action is planned, authorized, or executed, and not on information that comes to light afterwards.

### 2. Train Soldiers to Follow the LOAC

#### *a. Unit and Soldier Training Requirements in AR 350-1*

Commanders have the primary duty to ensure members of their commands are trained on and do not violate the LOAC. All Soldiers receive Level A LOAC training during initial military training. AR 350-1, Table F-2 requires Level B LOAC training in MTOE units for all unit personnel annually and again prior to deployment when directed. AR 350-1 states, “Commanders will establish specific training objectives; a qualified instructor [a Judge Advocate or certified NCO Paralegal] will conduct training in a structured manner, and evaluate performance using established training conditions and performance standards.”



Per AR 350-1, Level B LOAC training will reinforce the principles set forth in The Soldier's Rules and emphasize proper detainee treatment, to include the 5 S's and T (search, segregate, silence, speed to a safe area, safeguard, and tag). Require Soldiers to perform tasks to standard under realistic conditions. For all unit leaders, stress during training their responsibility to establish adequate supervision and control processes to ensure proper treatment and prevent abuse of detainees.

Design training around current missions and contingency plans (including anticipated geographical areas of deployment or rules of engagement) and include proper personnel (such as MP or MI), as appropriate. Integrate training on the LOAC and detainee operations into other appropriate unit training activities, field training exercises and unit external evaluations at home station, combat training centers and mobilization sites. Apply maximum combat realism to tactical exercises consistent with good safety practices.

### ***b. Officer, Warrant Officer, and Non-Commissioned Officer Training Requirements in AR 350-1***

For officers, WO, and NCOs, AR 350-1 requires Level C training in these three areas:

- 1) Their performance of duties in accordance with the LOAC obligations of the United States.
- 2) LOAC issues in command planning and execution of combat operations.
- 3) Measures for reporting suspected or alleged war crimes committed by or against U.S. or allied personnel.

Level C LOAC training is provided by the Army School System, and should be reinforced during Level B LOAC training for all unit members. The discussion above on LOAC obligations and principles addressed the first two requirements. The discussion below addresses the third: reporting and investigating suspected LOAC violations. Unit leaders should recognize factors which may lead to commission of war crimes, and train subordinate leaders and Soldiers on LOAC standards, compliance, and proper responses to illegal orders.

### ***c. Factors Leading to War Crimes***

Historically, the following factors sometimes led to commission of war crimes. They should be monitored and openly addressed at all levels of command and supervision, and simulated in training scenarios or vignettes:

- High friendly losses.
- High turnover rate in the chain of command.
- Dehumanization of the enemy (derogatory names or epithets).
- Poorly trained or inexperienced troops.
- The lack of a clearly defined enemy.
- Unclear orders.
- High frustration level among the troops.

#### *d. Unclear or Illegal Orders*

Train soldiers not only to follow the rules of LOAC, but also how to respond to unclear or clearly illegal orders. Troops who receive unclear orders must insist, respectfully and tactfully, on clarification. The superior should clarify the order and ensure all understand there is no intent to order a LOAC violation. If troops are comfortable asking for clarification, this indicates a healthy superior-subordinate relationship.

If the superior insists on the illegal order, the Soldier has a duty to disobey that order and report the incident to the next superior commander, military police, CID, nearest judge advocate, or local inspector general. Obedience to orders is not a defense to war crimes. Never retaliate against Soldiers for such reports. If wrong, it signals communication or training deficiencies. If right, it might stop a war crime.

### **3. Report and Address LOAC Violations**

Violations or perceived violations of LOAC can cripple U.S. operations. From execution of civilian villagers (My Lai, Vietnam) to detainee mistreatment (Abu Ghraib prison, Iraq), to killing and cutting off body parts of random citizens (so-called “thrill kills”, Afghanistan), these incidents undermine every purpose for LOAC. Those who violate LOAC, or order or permit others to commit violations, must be held accountable.

#### *a. Reportable Incidents*

DoDD 2311.01E, para. 3.2 defines a “reportable incident” as a “possible, suspected, or alleged violation of the law of war [i.e., LOAC], for which there is 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. Reporting Requirements*

Experience has shown that swift investigation immediately after hearing about an allegation best contributes to good order and discipline. When in doubt, report and investigate!

For reporting, DoDD 2311.01E requires that:

- All reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action. (Para. 4.4).
- All reportable incidents are reported through command channels for ultimate transmission to appropriate U.S. Agencies, allied governments, or other appropriate authorities. (Para. 4.5)
- All military and U.S. civilian employees, contractors, and subcontractors assigned to or accompanying DoD Components shall report reportable incidents through their chain of command. Reports may be made to military police, a judge advocate, or an inspector general. If made to anyone else, reports shall be accepted and immediately forwarded through the recipient’s chain of command. (Para. 6.3)

- Commanders shall immediately forward initial reports through the applicable operational chain of command and Military Department, through the most expeditious means available. (Para. 6.4)
- Higher authorities receiving an initial report must require a formal investigation and forward the initial report up the chain to the Combatant Commander and HQDA. Higher authorities must also file supplemental reports on:
  - (a) any criminal cases, regardless of the allegation, receiving or expected to receive significant media interest, or
  - (b) any cases suspected to involve “friendly fire.” (Para. 6.5).

Additional detail on reporting should be in the OPLAN or OPORD Legal Appendix, and the unit TACSOP or FSOP. Possibly, an OPREP-3 report per CJCSM 3150.03D is also required. The U.S. Army Criminal Investigative Command (CID) normally investigates LOAC violations. Minor violations may alternatively be investigated following AR 15-6 or a commander’s inquiry under Rule for Courts-Martial 303.

### *c. Command Actions*

Commanders have wide discretion in responding to the results of reports. If a training deficiency is noted, correct it immediately at the appropriate level. If misconduct is found, consult with a judge advocate, other appropriate advisors, and the chain of command in selecting administrative and/or disciplinary measures, possibly including criminal prosecution. When conducting an investigation or when considering UCMJ action, consult The Judge Advocate General’s “Law of War Compliance Administrative Investigations and Criminal Law Supplement.” This publication is available through your servicing Judge Advocate, and discusses the legal standards that apply when responding to a battlefield incident. Consider also the overall impact to operations and local national sentiment. Finally, maintain a record of the report so that it can be referenced, if required in the future.

## **F. CONCLUSION**

This chapter reviewed LOAC from a Commander’s perspective. It defined LOAC and discussed its purposes, sources, implementation, basic principles, obligations, training, and enforcement. Our nation’s experience proves that, although the enemy may act otherwise, compliance with LOAC is vital to mission success and discipline, offers the best chance of lasting peace and respect, and is a core command responsibility.



Claims and



Client Services



# Article 139 Claims

## A. REFERENCES

- Manual for Courts-Martial, 2016 Edition
- U.S. Dep't of Army, Reg. 27-20, Claims (8 Feb. 2008)
- U.S. Dep't of Army, Pam. 27-162, Claims Procedures (21 Mar. 2008)

## B. OVERVIEW

Under Article 139, UCMJ, individuals may file claims against Soldiers who willfully take or destroy personal property in violation of one or more punitive articles of the UCMJ. Subject to certain limitations, any individual whose property was taken or destroyed by a Soldier may file an Article 139 claim.

## C. LIMITATIONS ON TYPES OF ARTICLE 139 CLAIMS

Article 139 claims may not be processed for the following types of loss or destruction:

- Breach of contract not involving larceny, forgery, embezzlement, fraud, or misappropriation.
- Property damaged through negligence.
- Personal injury or death.
- Actions or omissions of military personnel acting within the scope of their employment.

## D. LIMITATIONS ON FINANCIAL AMOUNTS OF ARTICLE 139 CLAIMS

Special Courts-Martial Convening Authorities (SPCMCAs) (normally, Brigade or Group Commanders) may approve claims that do not exceed \$5,000 on a single claim. General Courts-Martial Convening Authorities (GCMCAs) may approve claims that do not exceed \$10,000 on a single claim. Only TJAG, DJAG, or the USARCS Commander (or his or her designee) may approve claims in excess of \$10,000.

## E. PROCESSING ARTICLE 139 CLAIMS

AR 27-20, chapter 9, governs the procedures for initiating and processing Article 139 claims. In particular, commanders should be aware of the following provisions.

### 1. Suspense for Filing

Claimants must file claims within 90 days of the incident causing the loss or destruction of property, unless the SPCMCA acting on the claim determines that there is good cause for delay.

## **2. Place for Filing**

Claimants should file claims with their servicing installation's Claims Office. Claimants may do so either verbally or in writing, but if presented orally, the claim must be reduced to writing, signed, and seek a definite sum in U.S. dollars within 10 days after oral presentment.

## **3. Forwarding of Claim**

Claims that are properly filed will be forwarded within two working days to the suspected Soldier's SPCMCA. If the SPCMCA determines the claim is cognizable, he will assign, within four working days of receiving the claim, an Investigating Officer (IO) to examine the allegations and surrounding facts and circumstances.

## **4. Investigation**

The IO's investigation must comply with AR 27-20, chapter 9. In particular, the IO must take the following steps:

### ***a. Notify the Soldier and Provide Soldier Opportunity to Make Restitution***

The IO must notify the Soldier against whom a claim is filed, and if the Soldier wishes to make voluntary restitution, the IO may (with the SPCMCA's approval) delay the proceedings until the end of the next pay period. If the Soldier makes payment to the claimant's full satisfaction, the SPCMCA will dismiss the claim.

### ***b. Continue the Investigation***

If the Soldier refuses to make full restitution or cannot do so, the IO will determine whether the claim is cognizable under AR 27-20 and supported by the evidence. The IO likely will have to obtain written statements and other supporting paperwork, diagrams, or pictures during his investigation.

### ***c. Determination of Meritorious Claim***

If the IO determines that a Soldier should be held financially liable, the IO must submit his written findings and recommendations to the SPCMCA. The SPCMCA must then forward the IO's findings and recommendations to the servicing legal office for a legal review prior to assessment of liability. In cases where the SPCMCA has determined that the claim is not cognizable, the SPCMCA must also forward the claim to the servicing legal office for a legal review.

### ***d. Notification to Liable Soldier***

Soldiers against whom financial liability has been assessed must be notified of the determination and of their right to seek reconsideration. A copy of the IO's findings and recommendations must be enclosed with the notice. Unless the approval authority determines that substantial injustice will result, action to recoup money from the liable Soldier must be suspended for 10 working days, in order to afford him an opportunity to respond to the assessment of liability.



## **5. Disposition of Meritorious Claims**

If after this 10 day period the approving authority determines that assessment is still warranted, the approval authority will direct the appropriate Defense Accounting Office to withhold such amount from the Soldier's pay and award it to the claimant. The Soldier may choose to make voluntary and full restitution at any stage during the claim process, allowing the approval authority to terminate the process.

## **F. RELATED ADMINISTRATIVE AND UCMJ ACTIONS**

Commanders may determine, in appropriate circumstances, that a Soldier's actions resulting in the loss or damage of private property warrant adverse administrative or UCMJ action. Commanders are advised, however, that findings of liability under Article 139 are separate and distinct from findings that may result during other adverse actions. Each type of action requires independent findings.



# Foreign and Deployment Claims

## A. REFERENCES

- U.S. Dep't Of Army, Reg. 27-20, Claims (8 Feb. 2008)
- U.S. Dep't Of Army, Pam. 27-162, Claims Procedures (21 Mar. 2008)
- JAGINST 5890.1A, Administrative Processing and Consideration of Claims on Behalf of and Against the United States (18 June 2005)
- Memorandum, Under Secretary of Defense (Comptroller) (USD(C)) subject: Commanders' Emergency Response Program (CERP) Guidance (18 Dec. 2008)

## B. TYPES OF CLAIMS APPLICABLE DURING A DEPLOYMENT

### 1. Claims Cognizable Under the Personnel Claims Act (PCA).

The PCA applies worldwide. It is limited to claims for loss, damage, or destruction of personal property of military personnel and DoD civilian employees that occur incident to service. Valid PCA claims commonly arising in deployment situations include: loss of equipment and personal items during transportation; certain losses while in garrison quarters; losses suffered in an emergency evacuation; losses due to terrorism directed against the United States; and the loss of clothing and articles worn while performing military duties. No claim may be approved under the PCA when the claimant's negligence caused the loss. Prompt payment of service members' and civilians' PCA claims is essential to maintaining positive morale in the unit.

### 2. Claims Cognizable Under the Military Claims Act (MCA)

The MCA also applies worldwide, however the claimant must be a U.S. resident in order to recover. Overseas, the MCA will apply only when the claim cannot be paid under the PCA or the Foreign Claims Act (FCA) (discussed below). In some circumstances, the MCA may be used to reimburse U.S. contractors and reporters for loss of personal items while serving alongside military members in deployed environments.

### 3. Claims Cognizable Under the Foreign Claims Act (FCA)

The FCA is the most widely-used claims statute in foreign deployments. Under the FCA, meritorious claims for property losses, injury or death caused by service members or the civilian component of the U.S. forces may be settled "[t]o promote and maintain friendly relations" with the receiving state. Only claims resulting from "noncombat activities" or negligent or wrongful acts or omissions are compensable. Categories of claims that may not be allowed include: losses from combat; contractual matters; domestic obligations; and claims that either are not in the best interest of the U.S. to pay, or are contrary to public policy.

#### **4. Claims Cognizable Under International Agreements (SOFA Claims)**

As a general rule, the FCA will not apply in foreign countries where the U.S. has an agreement that “provides for the settlement or adjudication and cost sharing of claims against the United States arising out of the acts or omissions of a member or civilian employee of an armed force of the United States.” For example, if a unit deploys to Korea, Japan, or any NATO or Partnership for Peace country, claims matters will be managed by a command claims service under the applicable status of forces agreement (SOFA).

#### **5. Article 139 Claims**

Claims initiated and processed under Article 139, UCMJ, permit individuals to file claims against Soldiers who willfully and unlawfully take or destroy personal property. Subject to certain limitations, any individual whose property was taken or destroyed by a Soldier may file an Article 139 claim.

#### **6. Alternatives to Claims**

In addition to the many claims provisions listed above, deployed units must also be aware of other sources for payments. Primarily, solatia and Commander’s Emergency Response Program (CERP) funds may be used to make payments under certain circumstances in which a claim is not cognizable. Although these payment sources are NOT a part of the claims program, they may be a suitable alternative to claims in certain circumstances.

#### **7. Solatia Payments**

If a unit deploys to parts of the world where payments in sympathy or recognition of loss are common, Commanders should explore the possibility of making solatia payments to accident victims. Solatia payments are not claims payments. They are payments in money or in-kind to a victim or to a victim’s family as an expression of sympathy or condolence. These payments are immediate and, generally, nominal. The individual or unit involved in the damage has no legal obligation to pay; compensation is simply offered as an expression of sympathy in accordance with local custom. Solatia payments are not paid from claims funds but, rather, from unit operation and maintenance (O&M) budgets. Prompt payment of solatia ensures the goodwill of local national populations, thus allowing the U.S. to maintain positive relations with the host nation. Solatia payments should not be made without prior coordination with the highest levels of command for the deployment area.

#### **8. CERP Condolence Payments**

The Commanders’ Emergency Response Program was originally created to respond to “urgent humanitarian relief and reconstruction requirements,” but not for payments to individuals. However, in 2005, the guidance changed to allow payment of:

“Repair of damage that results from U.S., coalition, or supporting military operations and is not compensable under the Foreign Claims Act”;

“Condolence payments to individual civilians for death, injury, or property damage resulting from U.S., coalition, or supporting military operations.”

# Family Support Obligations

## A. REFERENCES

- U.S. Dep't of Army, Reg. 608-99, Family Support, Child Custody, and Paternity (29 Oct. 2003).

## B. APPLICABILITY

- All members of the Active Army, including cadets at the U.S. Military Academy.
- All members of the U.S. Army Reserve on active duty pursuant to orders for thirty days or more. This includes Active Guard/Reserve Soldiers (AGR).
- All members of the Army National Guard of the United States on active duty for thirty days or more.
- Members of the Army National Guard on active duty for thirty days or more pursuant to orders under Title 32, United States Code, except for the punitive provision.
- Soldiers receiving full or partial pay and allowances while confined at the U.S. Disciplinary Barracks or other confinement facilities.

## C. COMMAND DRIVEN PROGRAM

- The enforcement authority is the military commander.
- The commander must become involved when the parties are unable to agree on a proper method to provide financial support to the family members. The commander's obligation does not arise until a family member or an authorized representative of the family member complains to the command that the Soldier is failing to provide proper support. AR 608-99, para. 2-1b.
- The commander can take punitive action under the UCMJ as well as adverse administrative action against a Soldier for failing to comply with certain obligations imposed by the regulation. AR 608-99, para. 1-6.

## D. INTERIM SUPPORT ONLY (AR 608-99, PARA. 2-6.)

- Where No Court Order Or Support Agreement Exists, The Army Uses BAH II (RC/T) to Determine The Amount Of The Interim Support Obligation. **NOTE: A Soldier's actual receipt of BAH is not a prerequisite to the obligation to pay interim support to family members. AR 608-99, para. 1-7b.**
- Army Regulation 608-99 creates an interim support requirement that applies ONLY when the parties do not have a court order or an agreement concerning support.

- This interim amount is not intended to provide adequate support in all cases, and should not be used as a guideline for civilian agencies or courts in establishing support requirements.
- The purpose of interim support is to provide some family support while the parties seek an agreement or settlement by a court. AR 608-99, para. 1-5d.
- When the Interim Requirement is not enough (or excessive). Family members or Soldiers who believe the interim amount is deficient or excessive must obtain a court order or enter an agreement between themselves to eliminate command involvement in the Soldier's support obligation. Battalion Commanders and Special Court Martial Convening Authorities only have authority to release Soldiers from support requirements in specific, fact-dependent situations. Two such instances may be when: (1) when a Soldier's spouse earns more than the Soldier; and (2) when support has been paid for 18 months. Consult your legal advisor. AR 608-99, paras. 2-14 and 2-15.

## **E. FAMILY MEMBERS**

- Family members, for purposes of AR 608-99, only include:
  - A Soldier's present spouse.
  - A Soldier's minor children from the present marriage.
  - A Soldier's children by any former marriage if the Soldier has a current obligation to provide support to that child (includes adopted children, but not children adopted by another person).
  - Minor children born out of wedlock to—
    - a female Soldier
    - a male Soldier, if evidenced by a court order, or the functional equivalent of a court order, identifying the Soldier as the father, or if the Soldier is providing support to the child under the terms of the regulation.
- Any other person the Soldier is obligated to support by applicable state law (e.g., parent, stepchild).

## **F. ARREARAGES**

- Soldiers cannot fall into arrears without violating AR 608-99.
- Collection of arrearages through court procedures is only possible for violations of a court order or a written support agreement.
- No legal means to collect arrearages based on failure to pay interim support.
- Army policy is to encourage - but not order - payment of arrearages regarding interim support.
- Punishment for failure to pay interim support is based on failure to pay support when due, not for failure to pay arrearages.

## **G. DETERMINING THE AMOUNT OF SUPPORT DUE**

The amount of support due comes directly from the BAH RC/T chart provided by DFAS. You may find the chart for the current year at: <http://www.dfas.mil>. The table is linked to on the front page in PDF form as part of the overall military pay table. The Service member normally owes the “With Dependent” rate based on the Service member’s rank regardless of location.

Special circumstances apply for dual military couples or if family members (dependents) reside in different locations from each other. Consult your legal advisor in these cases and refer to AR 608-99, Appendix B.





# Consumer Protection Law

## A. DEBT AND DEBT COLLECTORS

### 1. Basics

While Soldiers are required to manage their personal affairs satisfactorily and pay their debts promptly, the Army has no legal authority to force Soldiers to pay their debts. In most cases, the Army cannot divert any part of a Soldier's pay even though payment of the debt was decreed by a civil court. Only civil authorities can enforce payment of private debts.

Consumer law problems take valuable time and energy from Soldiers and their supervisors. Many consumer law issues can be avoided with proper training. Commanders should consider incorporating training on consumer law as part of their training regimen.

Commanders must not try to judge or settle disputed debts, or admit or deny whether claims are valid. The Army will not tell claimants whether any adverse action has been taken against a Soldier as a result of a claim.

It is a Soldier's option on how he or she pays a debt. Soldiers cannot be forced or encouraged to pay a debt with an allotment.

Army Regulation 600-15, *Indebtedness of Military Personnel*, 19 March 1986, was rescinded on 9 January 2013. This is the regulation that some creditors used to obtain command assistance in debt processing. There is no longer any regulatory mechanism for a creditor to use to obtain command assistance in enforcing a debt. Debt collectors, which are companies whose principal purpose is to collect debts, or who regularly collect debts owed to someone else, have never been entitled to command assistance.

When a Soldier defaults on a debt, the creditor or debt collector may attempt to contact you to obtain your assistance in collecting the debt. Again, creditors and debt collectors are not entitled to command assistance with debt processing. In fact, debt collectors who contact commanders are likely violating the Fair Debt Collection Practices Act (FDCPA).

Commanders who believe that a Soldier should be punished pursuant to Article 133, UCMJ, or Article 134, UCMJ, for dishonorably failing to pay a debt should consult with their legal advisor prior to taking action. This is a legally complex offense with multiple elements that are not present or provable in many cases. Additionally, formally punishing a Service member with debt issues may only serve to exacerbate the issues present. Financial and other appropriate counseling services are often the first proper step.

### 2. Steps for Commanders Contacted to Assist with Collecting on a Debt

*a) Attempt to get contact information*, such as the caller's name, address, and telephone number. Because of the operation of the FDCPA and other laws and regulations, the caller may not be willing to provide this information. In some cases, the

person will just inform you that he or she needs to discuss “an important matter,” or something along those lines, with the Soldier. At a minimum, note the date and time of the call, and what was said. This information may later benefit your Soldier. Do not make any promises to the caller, to include a promise to assist with or “check into” the matter.

**b) *Contact your legal advisor.*** Provide the information about the phone call to your legal advisor. Ask the legal advisor for advice on how to proceed, particularly if the Soldier is in trouble for other unrelated matters. Because of the recent rescission of Army Regulation 600-15, you are not authorized to assist any creditor in collecting on a debt.

**c) *Counsel the Soldier, as appropriate.*** You may counsel the Soldier to better understand the Soldier’s issue and to help find a solution. Debt issues can be symptomatic of other non debt-related issues. Many forms of counseling services are available from Army Community Services (ACS) and Military OneSource. For financial-related issues, some units have specially-trained Command Financial Advisors (CFAs). If you ever anticipate taking any form of adverse action against the Soldier or are currently doing so, be sure to contact your legal advisor prior to the counseling. If you delegate the responsibility of counseling the Soldier, ensure that the counselor understands his or her obligations under Article 31, UCMJ. In these cases, it is also often good practice to provide the Soldier with the information about the call you received, as the Soldier may be able to use that information to obtain relief.

**d) *Immediately Refer the Soldier to a Legal Assistance Attorney.*** The fact that you received a call may indicate that the Soldier is in financial distress. A legal assistance attorney will be able to represent the Soldier individually and assert any legal rights that the Soldier may have, such as under the FDCPA. The FDCPA has numerous penalty provisions for procedural violations that may help the Soldier eliminate an otherwise valid debt. The legal assistance attorney can also assist the Soldier to set up financial counseling. The referral needs to be quick, as the Soldier may only have a short time to assert particular rights. Have your legal advisor assist you if your Soldier has trouble getting an appointment.

**e) *Contact Your Legal Advisor After Every Subsequent Call.*** It is typically prudent to share information about subsequent calls with the Soldier’s legal assistance attorney or civilian attorney, if applicable. Debt collectors who are repeat violators or who actually attempt to come on the installation to harass Soldiers may be subject to being barred from the installation by the Garrison Commander or other appropriate authority.

## **B. AUTOMOBILES**

### **1. Basics**

Most Soldiers do not purchase an automobile the proper way and automobiles are generally the most valuable asset that junior Soldiers own. Soldiers will often inform a car dealer of the maximum monthly payment that he or she can afford. Many car dealers will then seek to

maximize the profit by implementing a variety of techniques, none of which are advantageous to the Soldier.

Soldiers are also susceptible to what is commonly known as a “Yo-Yo Car Sale.” Dealers who participate in this scam will allow a Soldier to drive a car off of the lot with the understanding that the purchase has been completed. After a few days or weeks, the Soldier is called back into the dealer under some premise, such as “the financing fell through.” At this point, the dealer has already sold the Soldier’s trade-in vehicle. The dealer will then take possession of the new vehicle, and try to force the Soldier into paying a larger down payment or agreeing to a higher interest rate. Soldiers often agree to a new deal out of a fear of embarrassment, a lack of legal knowledge, or simply because the Soldier feels like he or she has no real choice. While each case is different, this type of practice is typically illegal for a variety of reasons.

## **2. Preventive Measures**

Contact your servicing Judge Advocate or Army Community Services (ACS) Financial Planning professional to teach a class on how to properly purchase a car.

Soldiers should shop for 3 things separately when purchasing a car:

- a) The price of the car;
- b) The financing / credit;
- c) The insurance and extras.

Soldiers should walk into a car dealer with several financing quotes. Soldiers can obtain financing quotes from banks, credit unions, and other reputable lenders. When a Soldier is armed with this knowledge, the most common pricing and yo-yo scams are almost impossible for the dealer to implement.

## **3. Curative Measures**

Commanders who believe that a Soldier was ripped off should immediately refer the Soldier to a Legal Assistance Attorney. Have your legal advisor assist you if your Soldier has trouble getting an appointment. Soldiers who may be the victim of a “Yo-Yo” scam need immediate help.



**Government**



**Information  
Practices**



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# Freedom of Information Act (FOIA) Program

## A. REFERENCES

- Title 5, United States Code, Section 552 (5 USC 552), The Freedom of Information Act, as amended
- Title 32, Code of Federal Regulations, Part 286 (32 CFR Part 286), DoD Freedom of Information Act (FOIA) Program, 5 January 2017
- DoD Manual 5400.07, DoD Freedom of Information Act Program, 25 January 2017
- AR 25-55, Army Freedom of Information Act Program. 1 November 1997

## B. OVERVIEW

The basic purpose of the Freedom of Information Act (FOIA) is to provide all persons a statutory right of access to “agency records” that shed light on the operations or activities of the federal government. Information responsive to a proper FOIA request will be withheld only if the agency reasonably foresees that disclosure would harm an interest protected by one or more of the FOIA exemptions, or disclosure is prohibited by law. For purposes of the FOIA, the Department of Defense (DoD) is the agency, and each military department (e.g. Department of the Army) is a component of the agency. If properly requested and not exempt from release, the agency has 20 working days to respond to a FOIA request. Only an Initial Denial Authority (IDA) can deny a request.

## C. AGENCY RECORDS

“Agency records” include all documents or records created or obtained by a U.S. government agency (DoD) that are in the agency’s possession and control at the time a FOIA request is received. Four factors determine an agency’s control:

- The intent of the creator of the document to retain control over the record;
- The ability of the agency to use and dispose of the record as it sees fit;
- The extent to which agency personnel have read or relied upon the document; and
- The degree to which the document was integrated into the agency’s record systems or files.

## D. INITIAL DENIAL AUTHORITY (IDA)

Only an IDA can deny a FOIA request. Reasons for denial, other than exemptions, include: no records responsive to the request; records not reasonably described; and not an agency

record within the meaning of the FOIA. The IDAs are specifically designated in AR 25-55. The IDAs are authorized to act on records within their area of functional responsibility.

## **E. PROPER REQUEST**

A proper request is a request that is in writing, by any person (U.S. or foreign, organization or business, not a Federal agency), that reasonably describes an agency record, asserts a willingness to pay fees, and invokes the FOIA (either generally or specifically).

## **F. EXEMPTIONS**

It is the DoD policy to make records publicly available. There are certain types of records that may be withheld if the IDA determines that an exemption applies. There are nine exemptions to the FOIA. Some specific exemptions include: classified information (properly classified, substantively and procedurally); purely internal rules and procedures; privileged communications (including internal advice and recommendations, such as attorney-client privileged information); personnel, medical, and similar files (that contain personal and private information, release of which would constitute a clearly unwarranted invasion of privacy); and law enforcement records.

## **G. FEES**

Requestors may be charged fees for search, review, and reproduction in accordance with AR 25-55. However, there are restrictions on charging fees, including no charge of certain fees where the agency fails to comply with time limits in responding to a request. Under certain requirements, requestors may seek a waiver of fees.

## **H. APPEALS**

Requestors may appeal any adverse determination or denial of requests to the DoD component's appellate authority within 90 calendar days after the date of the response. For the Department of the Army, the appellate authority is the Secretary of the Army, delegated to the Department of the Army Office of the General Counsel (OGC).



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# Privacy Act Program

## A. REFERENCES

- Title 5, United States Code, section 552a (5 USC 552a), The Privacy Act of 1974
- DoD 5400.11-R, Department of Defense Privacy Program, 14 May 2007
- AR 25-22, The Army Privacy Program, 22 December 2016

## B. OVERVIEW

The Privacy Act pertains to three aspects of Government practices regarding personally identifiable information (PII): collection & maintenance, disclosure, and access and amendment of records. The Privacy Act applies to information that is collected and stored in a “system of records,” limits the Government’s use, and provides the individual access to their records, unless specifically exempted from disclosure.

## C. COLLECTION, MAINTENANCE AND USE

An agency can only collect personal information for a valid purpose in accordance with the applicable “system of records” and cannot disclose the information to any person, or another agency, without the written consent of the individual to whom the record pertains, or an applicable exception. There are twelve exceptions to the consent requirement; the four most relevant to the military are: (1) to agency (DoD) officials with a “need to know” for the performance of official duties; (2) when required by the Freedom of Information Act (FOIA); (3) for routine use; and (4) for law enforcement purposes.

## D. SYSTEM OF RECORDS

A Privacy Act (PA) “system of records” is a group of records, whatever the storage media (paper, electronic, and so forth), under the control of an Army activity from which personal information about an individual is retrieved by the name of the individual, or by an identifying number, symbol, or other identifying particular assigned, that is unique to the individual. System of Record Notices (SORNs) of all Army systems of records are required by the Privacy Act to be published in the Federal Register.

## E. ROUTINE USES

In addition to routine uses listed in SORNs, there are blanket routine uses applicable to all records from systems of records maintained by the Army. Examples of blanket routine uses include, but are not limited to: law enforcement; disclosure when requesting information; congressional inquiries disclosure; and disclosure to Office of Personnel Management.

## **F. INDIVIDUAL ACCESS AND AMENDMENT OF RECORDS**

The Privacy Act permits individuals to gain access to or amend “his or her record or to any information pertaining to him or her” that is contained in a PA system of records. An individual may request access to information pertaining to him or her from a system of records, except when subject to an exemption or compiled in reasonable anticipation of a civil action or proceeding. Exemptions to the access requirement are covered in AR 25-22, Chapter 4. An individual may also request to amend personal information contained in a system of records unless the system is exempted from the amendment provisions of the Act. The standard for amendment is that the records are factually inaccurate, irrelevant, untimely, or incomplete. The burden of proof is on the individual requester.

## **G. DENIAL AUTHORITIES**

Only “Denial Authorities” can deny a request for records or a request to amend in a PA system of records. Denial authorities are authorized to deny requests, either in whole or in part, for access and amendment of Privacy Act records contained in their respective areas of responsibility. Denial Authorities are the same authorities designated as Initial Denial Authorities under the Army Freedom of Information Act Program, AR 25-55.

## **H. PRIVACY ACT STATEMENTS**

When asking an individual for PII that will be maintained in a PA system of records, the individual must be provided with a Privacy Act Statement. Most DoD and DA Forms contain a Privacy Act Statement.

## **I. BREACHES OF INFORMATION/UNAUTHORIZED DISCLOSURE**

A “breach” is when PII is lost, stolen, improperly disclosed or otherwise available to individuals without a duty-related official need to know. Army activities should report all incidents involving PII and should not distinguish between suspected and con-firmed breaches. Report all incidents to the Army Privacy Office (APO) within 24 hours of discovery by entering data into the Privacy Act Tracking System (PATS). If computer access is not available, PII compromise can be reported at the 24/7 Army toll free number at 1-866-606-9580. Specific guidance on reporting actual or suspected breaches is contained in AR 25-22, Chapter 9.

**Contract and**



**Fiscal Law**



# Fiscal Law for Commanders

## A. INTRODUCTION

### 1. Source of Funding and Fund Limitations

The U.S. Constitution gives Congress the authority to raise revenue, borrow funds, and appropriate proceeds to federal agencies. This “power of the purse” includes the power to establish restrictions and conditions on the use of appropriated funds. Congress primarily exerts its “power of the purse” through three fiscal limitations: purpose, time and amount.

- An agency may obligate and expend appropriations only for a proper purpose;
- An agency may obligate only within the time limits applicable to the appropriation (e.g., Operations and Maintenance (O&M) funds are available for obligation for one fiscal year); and
- An agency may not obligate more than the amount appropriated by the Congress.

### 2. The Fiscal Law Philosophy

The expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress. Therefore, fiscal law requires positive authority (unlike criminal law, which permits actions unless they are specifically prohibited). Fiscal law requires the finding of a positive authority that states one can do something, rather than finding an authority that states one cannot do something.

## B. AVAILABILITY AS TO PURPOSE

The Purpose Statute provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. Where a particular expenditure is not specifically provided for in the appropriation act, it is permissible if it is necessary and incident to the proper execution of the general purpose of the appropriation. The Government Accountability Office (GAO) applies a three-part test to determine whether an expenditure is a “necessary expense” of a particular appropriation: 1) The expenditure must bear a logical relationship to the appropriation sought to be charged (i.e. it must make a direct contribution to carryout either a specific appropriation or an authorized agency function for which more general appropriations are available); 2) the expenditure must not be prohibited by law; and 3) the expenditure must not be otherwise provided for; that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. An agency’s determination that a given item is reasonably necessary to accomplishing an authorized purpose is given considerable deference. In reviewing an expenditure, the GAO examines

“whether the expenditure falls within the agency’s legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond that range.”

## **C. AVAILABILITY AS TO TIME**

An appropriation is available for obligation for a definite period of time. With limited exceptions, an agency must obligate funds within their period of availability. For O&M funds, the period of availability is one fiscal year. If an agency fails to obligate funds before they expire, those funds are no longer available for new obligations. Further, funds may only be expended for a “bona fide need” of the current period of availability. In other words, with limited exception, funds may only be expended for needs of the current fiscal year and not for the needs of a future fiscal year. Expired funds retain their “fiscal year identity” for five years after the end of the period of availability. During this time, the funds are available to adjust existing obligations, or to liquidate prior valid obligations, but not to incur new obligations.

## **D. LIMITATIONS BASED UPON AMOUNT (THE ANTIDEFICIENCY ACT)**

The Antideficiency Act (ADA) prohibits:

- making or authorizing an expenditure or obligation in advance of the amount available in an appropriation;
- making or authorizing expenditures or incurring obligations in excess of an apportionment or a formal subdivision of funds; or
- accepting voluntary services, unless otherwise authorized by law.

### **1. Investigating Violations**

If an ADA violation occurs, the agency must investigate to identify the responsible individual. The agency must report the violation to Congress through the Secretary of the Army. Violations could result in criminal and/or administrative sanctions.

### **2. Augmentation of Appropriations & Miscellaneous Receipts**

Augmentation of appropriations is generally prohibited. Augmentation increases the effective amount of funds available in an agency’s appropriation. This generally results in expenditures in excess of the amount originally appropriated by Congress. Augmentation often occurs by using one appropriation to pay costs associated with the purposes of another appropriation or by retaining funds received from another source.

## **E. TYPICAL QUESTIONABLE EXPENSES AND COMMON PROBLEMS**

### **1. Clothing/Apparel**

Buying clothing for individual employees is generally considered a personal expense, unless a statute provides otherwise, because doing so does not materially contribute to an agency’s mission performance. Exceptions include the purchase of special clothing for personnel that protects against hazards in the performance of their duties.

## **2. Food**

Buying food for individual employees – at least those who are not away from their official duty station on travel status – generally does not materially contribute to an agency’s mission performance and is prohibited. As a result, food is generally considered a personal expense. There are some limited exceptions to this rule that can include some training events. Because this area is complex, consultations with a Judge Advocate is recommended.

## **3. Bottled Water**

Bottled water generally does not materially contribute to an agency’s mission accomplishment. It is generally a personal expense. The major exception to this rule is that appropriated funds may be used to buy bottled water when it has been determined that a building’s water supply is unpotable or unsafe and bottled water is determined to be the best economical way to provide water.

## **4. Workplace Food Storage and Preparation Equipment (i.e. refrigerators, microwave ovens)**

Food preparation and storage equipment may be purchased with appropriated funds, so long as the primary benefit of its use accrues to the agency and the equipment is placed in common areas where it is available for use by all personnel. (Note: consult agency regulations and policies prior to applying this decision.)

## **5. Personal Office Furniture and Equipment**

Ordinary office equipment is reasonably necessary to carry out an agency’s mission, so appropriated funds may be used to purchase such items so long as they serve the needs of the majority of that agency’s employees. With limited exceptions, such as the requirement to make “reasonable accommodations” for qualified handicapped employees, equipment that serves the needs of only a single individual or a specific group of individuals is considered a personal expense rather than a “necessary expense” of the agency.

## **6. Entertainment**

Entertaining people generally does not materially contribute to an agency’s mission performance. As a result, entertainment expenses are generally considered to be a personal expense.

## **7. Decorations**

The use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience is generally permissible.

## **8. Business Cards**

Under a “necessary expense” analysis, the GAO has sanctioned the purchase of business cards for agency employees. However, current policy permits only recruiters and criminal investigators to purchase commercially prepared business cards. All others are permitted to

use appropriated funds to purchase card stock and printer ink and then use in-house computing resources to print their own business cards.

## **9. Telephone Installation and Expenses**

Even though telephones might ordinarily be considered a “necessary expense,” appropriated funds may not generally be used to install telephones in private residences or to pay the utility or other costs of maintaining a telephone in a private residence. Repair or maintenance of telephone lines in residences owned or leased by the U.S. Government is generally permissible. The prohibition on installing telephones in a personal residence does not prevent an agency from purchasing cell phones for its employees, if they are otherwise determined to be a necessary expense.

## **10. Awards (Including Unit or Regimental Coins and Similar Devices)**

Agencies generally may not use their appropriated funds to purchase “mementos” or personal gifts. Congress has provided specific authority to “award medals, trophies, badges, and similar devices” to military members for “excellence in accomplishments or competitions”, but this authority is limited. Somewhat broader authority exists to provide awards to civilian employees. In both cases, consult the most recent Army Regulation for guidance. See the Commander’s Coin chapter for guidance on use of coins as awards.

## **F. MILITARY CONSTRUCTION**

Congressional oversight of the Military Construction Program is extensive and pervasive. There are different categories of construction work with distinct funding requirements. Specified Military Construction (MILCON) Program projects generally cost over \$6 million. Unspecified Minor Military Construction (UMMC) Program construction projects generally cost between \$2 million and \$6 million. Minor Military Construction projects costing less than \$2 million are typically funded with Operations and Maintenance funds.

Within the context of fiscal law, construction includes, among other things, building new structures, as well as the alteration, addition, expansion, and replacement of existing facilities, plus site preparation and some installed equipment. Splitting a project into multiple projects in order to avoid a statutory threshold is prohibited. The rules for construction apply to permanent and temporary projects.

Maintenance and repair projects are not definitional construction for fiscal law purposes, and may therefore be funded entirely with Operations and Maintenance funds. However, the determination of what is maintenance and repair versus construction is a technical decision that should be made by public works, facilities management, or engineering personnel, in close coordination with resource managers and judge advocates.



## **G. EMERGENCY AND EXTRAORDINARY EXPENSE FUNDS (INCLUDING OFFICIAL REPRESENTATION FUNDS)**

### **1. Definition**

Emergency and extraordinary expense (EEE) funds are appropriations that an agency has much broader discretion to use for “emergency and extraordinary expenses.” Expenditures made using these funds need not satisfy the normal purpose rules. Not all agencies receive emergency and extraordinary funds, and those that do typically receive a very small amount. Agencies that do receive and expend EEE funds must comply with Congressional notification and reporting requirements.

### **2. Regulatory Controls**

Although extremely broad in purpose by statute, EEE funds have strict regulatory controls. This is largely due to their limited availability and potential for abuse. DOD typically uses these funds in the following ways:

### **3. Official Representation Funds (ORF) (Protocol)**

This subset of emergency and extraordinary expense funds is available to extend official courtesies to authorized guests, including dignitaries and officials of foreign governments, senior U.S. Government officials, senior officials of state and local governments, and certain other distinguished and prominent citizens. In some limited cases, ORF funds may be used to purchase gifts and mementos to specified non-DoD guests. See AR 37-47.

### **4. Criminal Investigation Activities.**

This subset of emergency and extraordinary expense funds is available for unusual expenditures incurred during criminal investigations or crime prevention.

### **5. Intelligence Activities.**

This subset of emergency and extraordinary expense funds is available for unusual expenditures incurred during intelligence investigations.



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# Government Contract Law for Commanders

## A. INTRODUCTION

### 1. The Federal Acquisition Regulation System

The Government has many needs that cannot be fulfilled through the use of Federal labor or supplies and that instead require the use of a contract with a non-Federal entity. The commitment of appropriated funds to fulfill a Government need through a contract is governed by the Federal Acquisition Regulation System. The purpose of the Federal Acquisition Regulation System is to provide “uniform policies and procedures for acquisition.” The Federal Acquisition Regulation System consists of the Federal Acquisition Regulation (FAR), which is the primary regulatory document, as well as agency acquisition supplements and regulations that implement or supplement the FAR. The vision for the FAR is to deliver on a timely basis the best value product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives. The guiding principles of the Federal Acquisition System serve to:

- Satisfy the customer in terms of cost, quality and timeliness of the delivered product or service by, for example, promoting maximum competition, using commercial end products or services, and using contractors who have a track record of successful past performance or otherwise demonstrate superior ability to perform;
- Minimize administrative operating costs;
- Conduct business with integrity, fairness and openness; and
- Fulfill public policy objectives.

Agency FAR supplements are generally intended to provide direction and guidance as to how statutory and regulatory requirements contained in the FAR are implemented within a particular agency.

### 2. The Contract

Under the FAR, a “contract” is a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. The FAR and its supplements apply to contracts funded with appropriated funds.

## **B. AUTHORITY**

### **1. General Authority to Contract**

As a sovereign entity the United States has inherent authority to enter into contracts to fulfill Government needs. This authority to contract, however, is not unlimited. A Government contract must be an appropriate exercise of governmental power or duties, and it must not be otherwise prohibited by law.

### **2. Contracting Officer Authority**

In general, the Government is bound only by Government agents acting within the actual scope of their authority to contract; acts of Government agents that exceed their contracting authority do not bind the Government. Under the FAR, contracting authority is vested in the head of the agency. Within the Department of Defense, the heads of the agencies are the Secretaries of Defense, the Army, the Navy, and the Air Force. The head of the agency may establish subordinate contracting activities and delegate broad contracting authority to these activities. In turn, agency heads or their designees select and appoint “Contracting Officers,” who must be formally appointed in writing and provided a “warrant” that details the scope of their authority. Contracting Officers may bind the Government only to the extent of the authority delegated to them through their warrant. Thus, to lawfully bind the Government in contract, agency officials must have express statutory or regulatory authority, or they must have received a formal delegation and appointment (e.g., a warrant) consistent with this express statutory or regulatory authority.

### **3. Unauthorized Commitments and Ratification**

A Government official attempting to bind the Government in contract without proper authority to do so will create an “unauthorized commitment.” An unauthorized commitment is an agreement that is nonbinding solely because the Government representative who made it lacked the authority to enter into that agreement. If an unauthorized commitment occurs, it can present significant fiscal and contract law concerns, but in certain circumstances it may be appropriate for a lawfully-appointed Contracting Officer to “ratify” the unauthorized commitment after-the-fact. “Ratification” is the act of approving an unauthorized commitment, by an official who has the authority to do so, for the purpose of paying for supplies or services provided to the Government as a result of the unauthorized commitment. Depending upon the dollar amount at issue, the ratification may require higher headquarters approval.

## **C. CONTRACT FORMATION**

The process by which agencies assess and determine its needs—and the best way to fulfill those needs through the lawful award of a procurement contract appropriate to the circumstances—is often referred to as the “contract formation” period.

### **1. Acquisition Planning**

Acquisition Planning is the process of coordinating and integrating efforts of the agency’s acquisition personnel through a comprehensive plan that provides an overall

strategy for managing the acquisition and fulfilling a Government need in a timely and cost effective manner. Acquisition Planning involves conducting “market research” appropriate to the circumstances to collect and analyze information about the ability of the market to satisfy Government needs. Under the FAR, agencies must perform acquisition planning and conduct market research for all acquisitions to promote: (1) the acquisition of commercial or nondevelopmental items to the maximum extent practicable; and (2) full and open competition (or competition to the maximum extent practicable).

## **2. The Competition in Contracting Act (CICA) of 1984**

In 1984, Congress passed the Competition in Contracting Act (CICA) to increase competition in government contracting and to impose more stringent restrictions on the award of non-competitive sole source contracts. Under the CICA, and the FAR, Contracting Officers shall provide for “full and open competition” by using competitive procedures to solicit offers and award contracts, unless a lawful exception applies. In general, if full and open competition is not provided, the Contracting Officer must justify the decision to solicit offers and award non-competitive contracts. This justification must be approved at appropriate levels.

## **3. Solicitation, Offer and Award**

In general, the Government must provide notice of proposed contract actions, and this notice is usually transmitted through the authorized Government-wide point of entry, <https://www.fbo.gov/>. The intent behind the general requirement for broad publication of proposed contract actions is to promote maximum competition, broaden industry participation in meeting Government requirements, and to assist small business concerns with obtaining contracts and subcontracts. Once the agency publishes a “solicitation” to fulfill a particular Government need (and in this solicitation explains how the Government intends to evaluate bids, quotes, or proposals), potential contractors will have time to respond to this solicitation with a bid, quote or proposal that explains how the prospective contractor intends to meet the Government’s need. The Government then conducts an evaluation of the bids, quotes or proposals. Following the evaluation, the Government awards a contract to the contractor with the bid, quote or proposal that represents the best value to the Government.

## **4. Bid Protests**

The laws and regulations that govern contracting with the Government are designed to ensure that each procurement is conducted fairly. On occasion, individuals or entities interested in Government procurements may have reason to believe that a contract has been—or is about to be—awarded improperly or illegally, or that they have been unfairly denied a contract or the opportunity to compete for a contract. In such an instance, the individual or entity is authorized to submit a formal protest. This “bid protest” may be submitted directly to the procuring agency, to the Government Accountability Office (GAO), or to the United States Court of Federal Claims (COFC) in Washington, DC.

## **D. CONTRACT ADMINISTRATION**

Contract Administration involves those activities performed by Government officials after a contract has been awarded. Contract Administration encompasses all dealings between the Government and the contractor from the time the contract is awarded until the work has been completed and accepted or the contract terminated, payment has been made, and disputes have been resolved. The specific nature and extent of contract administration varies from contract to contract. It can range from the minimum acceptance of a delivery and payment to the contractor to extensive involvement by program, audit and procurement officials throughout the contract term. Factors influencing the degree of contract administration include the nature of the work, the type of contract, and the experience of the personnel involved. In addition to the statement of work or specifications that describe the requirement to be fulfilled, each contract will have numerous standard FAR clauses that articulate the Government's rights, the contractor's remedies, and govern the parties' contractual relationship.

### **1. Contract Changes**

During performance, many changes may be required in order to fix inaccurate or defective specifications, react to newly encountered circumstances, or modify the work to ensure that the contract meets government requirements. Any changes made to a contract may force the contractor to perform more work, or to perform in a more costly manner, and may require additional funding through a modification to the contract. The Government is authorized to make these changes to the contract under the standard FAR "Changes clause," which allows the Government to make substantive changes to a contract, so long as the changes are within the general scope of the contract. Only a Contracting Officer acting within his or her proper authority can order changes to the contract.

### **2. Inspection and Acceptance**

The Government has the right to receive conforming goods and services. The particular inspection clauses in a contract, if any, determine the extent of the Government's right to inspect a contractor's performance. Inspection clauses may grant the Government right to inspect and test supplies, services, materials furnished, work required by the contract, facilities, and equipment at all places and times, and, in any event, before acceptance. In general, the Government is entitled to strict compliance with the specifications in its contract. If the contractor delivers nonconforming goods or services, the Government may take remedial action consistent with its inspection clauses to ensure that it receives the fair value of the goods and services for which it contracted.

### **3. Terminations**

There are two general types of terminations: "Terminations for Convenience," and "Terminations for Default." Under a Termination for Convenience, the Government has the right to terminate a contract, in whole or in part, if the Contracting Officer determines that termination is in the Government's interest. The contractor is then entitled to (1) the contract price for completed services or supplies accepted by the Government; (2) reasonable costs incurred in

the performance of the work terminated; (3) a fair and reasonable profit (unless the contractor would have sustained a loss had that contract been completed); and (4) reasonable costs of settlement of the work terminated. Under a Termination for Default, however, the Government has the right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations. When a contract is terminated for default, the contractor may be liable to the Government for any excess costs incurred with acquiring the supplies or services similar to those terminated for default, and for any other damages, whether or not repurchase is occurs.

#### **4. Disputes**

The Contract Disputes Act (CDA) of 1978 established procedures and requirements for asserting and resolving contract claims against the Government. Unlike bid protests, which are submitted prior to the time that a contract is awarded, contract claims are filed during contract performance for reasons that are various and varied. A claim is a written demand by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract. Claims arising under or relating to a contract include those supported by remedy granting clauses (such as the Changes clause), breach of contract claims, and mistakes alleged after award. In general, a claim must be properly certified and submitted to the Contracting Officer for a final decision on the claim. Once the Contracting Officer issues a final decision, the decision is binding on the parties unless appealed. To appeal a final decision by the Contracting Officer, a contractor must timely file its appeal at either the United States Court of Federal Claims (COFC) or with the Boards of Contract Appeals (i.e., the Armed Services Board of Contract Appeals (ASBCA) for DoD contracts or the Civilian Board of Contract Appeals (CBCA) for non-DoD contracts).





# Appendix

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## Useful References for Commanders

The following references may be useful to the commander or new officer who is confronted with a problem in a specific area (e.g., Article 15, Line of Duty Investigation, etc.).

Topic	Reference
Abbreviations	<a href="https://armypubs.army.mil/abca">https://armypubs.army.mil/abca</a>
Absentee and Deserter Apprehension	AR 190-9
Alcohol and Drug Problems	AR 600-85
Apprehension, Restraint, Release, and Release to Civil Authorities	AR 190-9
ARIMS System	AR 25-400-2
Armed Forces Disciplinary Control Boards And Off Installation Military Enforcement	AR 190-24
Army Command Policy and Procedures	AR 600-20
Army Community Service	AR 608-1
Army Emergency Relief	AR 930-4
Army Military Human Resources Record (OMPF)	AR 600-8-104
Article 15, UCMJ	AR 27-10
Assignments/Transfers (Enlisted)	AR 614-200
Assignments/Transfers (Officer)	AR 614-100
Awards (Military)	AR 600-8-22
Awards (Civilian)	AR 672-20
AWOL	AR 630-10
Bars to Reenlistment	AR 601-280
Casualty Assistance	AR 38-8
Change of Name, SSN	AR 600-8-104
Child Custody	AR 608-99
Claims	AR 27-20
Clothing, Issued, and Sale of Personal Items	AR 700-84
Commercial Solicitation	AR 210-7
Commissaries	DoDI 1330.17; DODD 5105.55
Correction of Military Records	AR 15-185

Topic	Reference
Dictionary of DoD/Military Terms	<a href="https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf">https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf</a>
Distribution of Literature	AR 600-20
Dropped From Rolls (DFR)	AR 630-10
Drunk Driving	AR 190-5
Duty Roster	AR 220-45
Eliminations (Enlisted)	AR 635-200
Eliminations (Officers)	AR 600-8-24
Enlisted Personnel Separations	AR 635-200
Equal Opportunity	AR 600-20
Evaluation Reports (Officer, Enlisted, and Academic)	AR 623-3
Extremist Organizations	AR 600-20
Family Advocacy	AR 608-18
Family Care Plan	AR 600-20
Family Housing	DoDM 4165.63
Family Support	AR 608-99
Family Support Groups	DoDI 1342.22, Army Dir. 2019-17
Financial Liability Investigation of Property Loss (FLIPL)	AR 735-5
Flags (Suspension of Favorable Personnel Actions)	AR 600-8-2
Freedom of Information Act (FOIA)	AR 25-55
Fund Raising	AR 600-29; JER
Gambling	JER
ID Card and Privileges	AR 600-8-14
Indebtedness	AR 37-104-4
Inspector General	AR 20-1
Law of Land Warfare	DoD Law of War Manual; FM 27-10
Leave	AR 600-8-10
Legal Assistance	AR 27-3
Letter (Memorandum) of Reprimand	AR 600-37
Line of Duty Investigations	AR 600-8-4
Mail, Unit Operations	AR 600-8-3
Military Justice	AR 27-10
Military Police Investigations	AR 190-30
Military Whistle Blower Protection	DoDD 7050.6; AR 600-20

Topic	Reference
Morale, Welfare, & Recreation (MWR)	AR 215-1
Motor Vehicles (Registration)	AR 190-5
Official Military Personnel File (AMHRR)	AR 600-8-104
Overseas Service	AR 614-30
Orders, Military	AR 600-8-105
Passes	AR 600-8-10
Paternity	AR 608-99
Permissive TDY	AR 600-8-10
Physical Evaluation for Retention, Retirement or Separation	AR 635-40
Physical Fitness Program	FM 7-22
Physical Security	AR 190-11; AR 190-13
Political Activities	AR 600-20
Post Exchange	AR 215-8
Pregnancy	AR 40-501; Army Dir. 2019-05
Privacy Act Program	AR 25-22
Private Organizations	AR 210-22; JER
Promotions (Enlisted)	AR 600-8-19
Promotions (Officers)	AR 600-8-29
Publications	AR 25-30
Quarters & Commercial Activity	Army Dir. 2018-29; AR 210-7 & AR 210-22
Qualitative Service Program (QSP) (Enlisted)	AR 601-280, Army Dir. 2016-19
Reductions (Enlisted)	AR 600-8-19
Reenlistment Program	AR 601-280
Relief for Cause	AR 600-20
Religious Practices (Accommodation)	AR 600-20
Representation Funds of the Secretary of the Army	AR 37-47
Retirement, Voluntary (Enlisted)	AR 635-200; AR 600-8-7
Retirement (Officer)	AR 600-8-24; AR 600-8-7
Salutes, Honors, and Visits of Courtesy	AR 600-25
Security Clearance (Suspension/Revocation)	AR 380-67
Separation, Processing Personnel for	AR 635-8
Separations (Enlisted)	AR 635-200
Separations (Officer)	AR 600-8-24

Topic	Reference
Serious Incident Report (SIR)	AR 190-45
Soldier and Family Readiness Groups	DoDI 1342.22, Army Dir. 2019-17
Traffic Regulation	AR 190-5
Unfavorable Information	AR 600-37
Uniform Wear and Appearance	AR 670-1
Weight Control Program	AR 600-9





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