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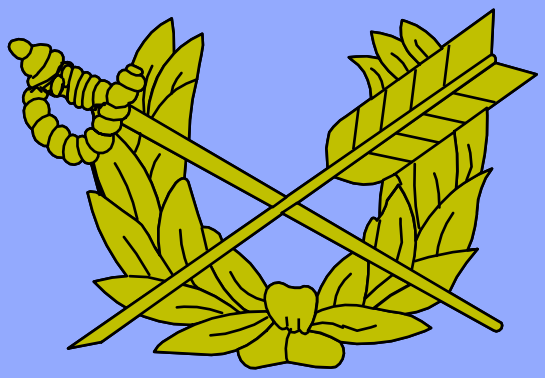

The Judge Advocate General's School
United States Army

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CHAPTER A: Command Authority, Installation protection & the Regulation of Speech, Politics & Religion

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

I. SOURCES OF COMMAND AUTHORITY:

A. Constitution:

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

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

B. Statutes:

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

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

C. Regulations:

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

2. Service Regulations:

   a. Army – Army Regulations (AR), e.g. AR 600-20, Army Command Policy (24 July 20);

   b. Navy – Navy Regulations, SECNAVINST, OPNAVINST;

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

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

3. Local regulations, policies, directives.

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 Often serve as gap fillers when higher directives, orders, or regulations are inadequate or have been rescinded.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

   b. Local regulations are “heavy lifters” in the area of installation protection. DoDI 5200.08, Security of DoD Installations and Resources, 20 November 2015, paragraph 1.2 authorizes military commanders to issue the necessary regulations for the protection and security or property or places under their command.

D. Inherent Authority.

1. Except in a few limited areas, there is no general statutory authority for the regulations and actions of a commander. The Constitution, statutes, and regulations defining the authority of a commander do not address every contingency faced by a commander in the lawful execution of their duties. To the extent authority for a commander's actions cannot be found in statute or superior regulation, a concept of "inherent authority" has been inferred from case law. Commanders have inherent authority to act in order to avert dangers to morale, welfare, or discipline. NOTE: The Secretary of the Army has fairly broad general statutory authority to issue regulations (see 10 U.S.C. § 3013).

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

3. Limitations. There must be some nexus between the authority sought and the effect on morale, welfare, or discipline. See, e.g., United States v. Roach, 26 M.J. 859 (1988), finding that an order to not consume alcohol for the accused's "own good" did not serve a valid military purpose. Additionally, practitioners should beware of overly broad exercises of command authority when proscribing otherwise lawful behavior. See, e.g., United States v. Pugh, 77 M.J. 1 (2017), finding an Air Force regulation prohibiting consuming *any* hemp products was invalid when applied to commercial food products regulated and sold in the U.S. because such products did not undermine the stated purposes of the ban (ensure readiness and protect reliability of Air Force Drug Testing Program).

II. DELEGATION OF COMMAND AUTHORITY:

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

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

III. ACCESS TO MILITARY INSTALLATIONS

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

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

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

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

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

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

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

IV. USE OF COMMAND AUTHORITY TO REGULATE:

A. Speech.

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

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

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

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

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

(3) U.S. v. Apel, 134 S.Ct. 1144 (2014). The court held a "military installation" for § 1382 purposes encompasses a commanding officer's area of responsibility, which included the Base's highways and protest areas. No requirement of exclusive possession/control to block a protestor's activities.

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

(1) Open House activities on military installations. Public access, such as at open house, is not sufficient to convert a military installation into a public forum in absence of abandonment of military special interest. Factors include mission-focus and political neutrality. Greer v. Spock, supra; Persons for Free Speech at SAC v. U.S., 675 F.2d 1010 (8th Cir. 1982) (open house on an Air Force base did not create a public forum).

(2) A base commander is afforded substantial discretion to control the use of the base and was not unreasonable in prohibiting nuclear weapons protesters from participating in the open house activities). See also Brown v. Palmer, 915 F.2d 1435 (10th Cir. 1990) (Air Force base did not become a public forum during an open house. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse"). Contra, U.S. v. Albertini, 710 F.2d 1410 (9th Cir. 1983) (open house created temporary public forum allowing nuclear war protesters access to protest on the installation), rev. on other grounds, 472 U.S. 675 (1985) (in dicta the Supreme Court stated that it was dubious that the military installation was ever converted into a public forum).

2. Standard applicable to each type of forum.

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

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

c. **Designated or "Created" Public Forum**: Same strict scrutiny on viewpoint discrimination; subject matter discrimination is not constitutionally prohibited. Rosenberger, supra (discrimination on subject matter which preserves limited forum purpose is permissible; discrimination because of ideology, opinion, or perspective is impermissible when directed against speech otherwise within limited forum; excluding student publication with religious editorial viewpoint from funding for publication available to other student publications held unconstitutional).

3. Restricting Servicemember Speech:

a. Civilian and military authorities may proscribe "fighting words," i.e., those "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen v. California, 403 U.S. 15, 20 (1971) (simply wearing jacket bearing words "F*** the Draft" may not be constitutionally made a criminal offense); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" upheld conviction for calling another "damned racketeer" and "a damned Fascist"). See, e.g., Article 117, UCMJ, Provoking Speech and Gestures.

b. Dangerous Speech:

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

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

4. Handling Dissident Activities Among Members of the Armed Forces. See DoDI 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces (27 Nov 09 and Change 1, 22 Feb 12); AR 600-20, Army Command Policy, para. 5-9; AFI 51-903, Dissident & Protest Activities (30 Jul 15); MCO 5370.4B, Dissident & Protest Activities (26 Jun 97); OPNAVINST 1620.1B, Guidelines for Handling Dissent & Protest Activities Among Members of the Armed Forces (14 Sep 99).

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

b. Limitations: A commander cannot prohibit materials properly distributed through official outlets such as post exchanges or military libraries. These materials are governed by separate statutes or regulations. AR 25-97, The Army Library Program (8 Dec 14); AR 600-20, para. 5-9 (6 Nov 14); AR 215-8, Army and Air Force Exchange Service Operations (5 Oct 12).

5. Blogging

a. Army Policy

(1) All Army personnel will know what their organization considers to be sensitive and/or critical information, where it is located, who is responsible for it, why it needs to be protected, and who the unit OPSEC officer is. They will protect from unauthorized disclosure any sensitive and/or critical information to which they have personal access. AR 530-1, Operations Security (OPSEC)(26 Sep 14).

(a) "Comply with command policy/direction as well as existing regulations prior to publishing or posting sensitive and/or critical information that may be released into the public domain. This includes all voice, text, technical data communications, and other emerging Internet-based capabilities."

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

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

(2) The Army Web Risk Assessment Cell (AWRAC), will conduct random reviews of information posted to Army web sites and blogs. It will also conduct random reviews of web sites for disclosure of critical and/or sensitive information. Web sites to include but are not limited to Soldier blogs, FRG pages, and unofficial Army websites. AR 530-1, para. 2-17c.

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

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

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

c. Air Force:

(1) AFI 51-508 (12 Oct 18) addresses restrictions of Airmen in political activities, placing lawful limits on the type of speech permitted while in the military and serve as a reminder to all military that while the Bill of Rights grants free speech to all, free speech within the military is certainly limited.

(2) AFI 51-508 states that, "commanders must preserve the service member's right of expression, to the maximum extent possible, consistent with good order, discipline, and national security" and grants commanders authority "to ensure their mission is performed while maintaining good order and discipline."

B. Solicitation.

1. Charitable: DoD Instruction 5035.1, Combined Federal Campaign (CFC), Fund-Raising Within the Department of Defense (6 Jun 17); AR 600-29, Fund-Raising within the Department of the Army (7 Jun 10); On-duty solicitation authorized only for Combined Federal Campaign and military relief & aid agencies. (See JER 3-210). Limited off-duty local fund raising may be authorized, e.g., for MWR activities, on-post private organizations, and other limited fund-raising to assist the unfortunate such as veteran organization flower sales and placing collection boxes for food or goods for charitable causes.

2. Commercial: DoD Instruction (DoDI) 1344.07, Personal Commercial Solicitation on DoD Installations (30 Mar 06); AR 210-7, Commercial Solicitation on Army Installations (18 Oct 07); SECNAVINST 1740.2D, Solicitation & Conduct of Personal Commercial Affairs (12 Jul 08).

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

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

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

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

C. Political Activities: Ch. 6, DoDD 5500-7.R, Joint Ethics Regulation (17 Nov 11); DoDD 1344.10, Political Activities by Members of the Armed Forces (19 Feb 2008); AR 600-20, Army Command Policy, para. 5-15 (24 Jul 20); ALNAV 051/19, Political Activities of Servicemembers and Civilian Employees (21 Jun 19); MARADMIN 662/19, Guidance on Political Campaigns and Activity (02 Dec 19); AFI 51-508, Political Activities, Free Speech, and Freedom of Assembly of Air Force Personnel (12 Oct 18).

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

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

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

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

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

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

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

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

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

a. Paragraphs 2-4, 3-1, and 4-1, AR 360-1 (The Army Public Affairs Program) (08 Oct 20), provide policies and guidance to be followed when considering military involvement in election year activities. Installation commanders should not permit the use of installation facilities by any candidate or representative of a candidate for political assemblies, meetings, fund-raising, events, press conferences, or any other activity that could be construed as political in nature.

b. Requests from members of Congress to visit an installation should be referred to the Office of the Chief Legislative Liaison (see AR 1-20) (25 Aug 21). Candidates who are not members of Congress may be given the same access to installations as that to which any other visitor is entitled. Before visiting an installation, all candidates must be informed that all political activity and media events are prohibited while on the installation.

5. Recurring issue: Bumper Stickers & Signs.

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

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

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

6. Recurring issue: Teleworking/Virtual Communication.

a. Teleworking is becoming more commonplace and to maintain agency operations many employees participate in videoconferencing using platforms such as Skype, Teams, or Zoom. “Employee participating in virtual work-related conferences are subject to the same on-duty Hatch Act restrictions as when they attend meetings or communicate in-person with others at work.” U.S. Office of Special Counsel, Hatch Act Advisory for Teleworking Employees (28 Apr 20).

b. Employees should ensure partisan material such as candidate images, hats, campaign slogans, or political party symbols are not visible during video meetings.

D. Religion.

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

a. Applied:

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

(2) Holiday displays: Lynch v. Donnelly, 465 U.S. 668 (1984) (secular holiday display which included nativity scene not unconstitutional). Bottom line: holiday display in front of command headquarters is okay so long as it represents more than one religion and/or includes secular elements.

(3) Invocations / Benedictions:

(1) Official prayer at nonreligious military ceremonies:

(a) Army: See AR 165-1, Chaplain Activities in the United States Army (23 Jun 15), authorizes chaplain-led prayers at military and patriotic ceremonies. Such occasions are not considered religious services; however, chaplains are not required to offer a prayer "if doing so would be in variance with the tenets or practices of their faith group."

(b) Prayer Possible Solution: For official military events/ceremonies, many commanders and chaplains have adopted a practice of prefacing official prayer with a "qualifier." "Qualifier" examples: "Please join me according to your faith," or "I invite you to join me according to your faith tradition as I pray." Problems likely will arise if the prayer is submitted using a name in a particular religious tradition, such as "in Jesus's name we pray," "praise be to Allah," etc.

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

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

b. Exceptions:

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

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

2. Wearing of religious apparel while in uniform: 10 U.S.C. § 774. Provides for the wearing of neat and conservative items of religious apparel while in uniform unless wear would interfere with performance of duty. The statute legislatively overruled Goldman v. Weinberger, 475 U.S. 503 (1986) (which granted great deference to professional judgment of military authorities on matters of military

interest and held that First Amendment did not prohibit USAF regulation preventing wearing of yarmulke while on duty and in uniform). See below for more details relating to religious accommodation.

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

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

   b. Under DODI 1300.17, the Armed Forces shall accommodate the beliefs of a member of the armed forces reflecting the conscience, moral principles, or religious beliefs of the member. Further, no member may require a chaplain to perform any rite, ritual, or ceremony that is contrary to religious beliefs of the chaplain. No member may also discriminate or take adverse action on the basis of the refusal to comply with a requirement that violates such chaplain's beliefs (see Pub. L. 113-66, div. A, title V, 532(a), Dec. 26, 2013, 127 Stat. 759).

   c. Requests for religious accommodation that do not substantially burden a service member’s exercise of religion are evaluated by looking at the needs of the requesting service member balanced against the needs of mission. Only if the needs of mission outweigh the needs of the service member may the request be denied. Substantially Burden. Significantly interfering with the exercise of religion as opposed to minimally interfering with the exercise of religion. Compelling Governmental Interest. A military requirement that is essential to accomplish the mission.

d. Requests for accommodation of religious practices will be resolved by immediate commanders when such requests do not require a waiver of Military Department or Service policies regarding the wearing of military uniforms, the wearing of religious apparel, or Service grooming, appearance, or body art standards. An essential part of unit cohesion is uniform military grooming and appearance standards. Requests that do require such a waiver will be forwarded to the Secretary of the Military Department concerned (known in this issuance as the "Secretary concerned") for decision.

e. Religious accommodation requests: Five major areas.

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

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

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

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

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

(c) Army Directive 2018-19, Approval, Disapproval, and Elevation of Requests for Religious Accommodation. Religious accommodation requests for the wear of the hijab, the wear of a beard and the wear of a turban or under turban/patka, with uncut beard and uncut hair may be disapproved, approved, or forwarded to the Secretary of the Army by general officers exercising GCMCA. The GCMCA will approve these requests unless the commander (A) determines the request is not based on a sincerely held religious belief or (B) identifies a specific, concrete hazard that is not specifically mentioned in Army Directive 2018-19 that cannot be mitigated by reasonable measures after coordinating with the branch or MOS proponent. Prior to approval, consultation is required with OTJAG, DCS, G-1 Command Policy Division, the Office of the Chief of Chaplains, and, when applicable, U.S. Army Corrections Command.

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

(5) Grooming practices: Requests for religious accommodation of wear and appearance of the uniform, personal appearance, and personal grooming practices may only be approved or disapproved by the Secretary of the Army (or designee). All other command levels will make recommendations as to whether the request should be approved or denied and forwarded through the command levels to DCS, G-1. Soldiers requesting an accommodation must continue to comply with AR 670-1 until the religious accommodation request is approved.

(6) A developing area of religious accommodation is performing duties inconsistent with religious beliefs.

(1) Chaplains. The 2013 NDAA amended the notes preceding 10 U.S.C. § 1030 to prohibit members of the Armed Forces from requiring chaplains “to perform any rite, ritual, or ceremony that is contrary to the conscience, moral principles, or religious beliefs of the chaplain.” This authority has been cited by chaplains refusing to provide certain religious services to servicemembers with a sexual orientation that is not supported by their ecclesiastical endorser.

(2) Other Military Duties and Responsibilities. Some military personnel have defended their disobedience to orders or other departures from service norms with varying outcomes. See, e.g., United States v. Sterling, 75 M.J. 407 (C.A.A.F. 2016) (finding a Marine's defense to disobedience of an order to remove a religious verse from her work area failed to establish that the order substantially burdened her exercise of religion as protected by the Religious Freedom Restoration Act, 42 U.S.C. § 200bb-1). But see Leland B. H. Bohannon v. Heather Wilson, Secretary, Department of the Air Force, No MO-2017-00003, Air Force Bd. For Corr. Of Military Records (27 Mar. 2018) (finding an Air Force colonel was improperly reprimanded for an equal opportunity violation when he declined to sign a spouse appreciation certificate for a subordinate's same sex spouse and requested relief from endorsing the public recognition of a same sex spouse from a senior commander).

(3)

E. Extremist and Criminal Gang Organizations.

1. See DoDI 1325.06 (22 Feb 2012); AR 600-20, para. 4-12; AFI 51-508; MCO 5354.1E (26 Mar 18); OPNAVINST 5354.1G (24 Jul 17) (prohibiting active participation in organizations which espouse supremacist, extremist, or criminal gang doctrine, ideology, or causes, including those that attempt to create illegal discrimination, advocate the use of force or violence, or otherwise engage in efforts to deprive others of their civil rights).

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

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

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

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

d. Punitive prohibitions include: participating in public demonstrations or rallies; fund raising; recruiting; creating or leading; distributing literature presenting a danger to discipline or mission accomplishment; attending meetings under certain circumstances, e.g., in violation of off limits sanctions or commander's order.

F. Appearance.

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

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

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

2. Army Policy on Tattoos, Body Piercing, Mutilation, and Tooth Ornamentation:

a. Soldiers are prohibited from having tattoos or brands on the head, face (permanent makeup, such as eyebrow or eyeliner, is authorized as long as the makeup conforms with standards of uniformity and professionalism), neck (anything above the t-shirt neck line to include on/inside the eyelids, mouth, and ears), and hands (with limited exceptions for ring tattoos). Accessing applicants must adhere to this same policy.

b. Army tattoo policy has changed multiple times since 2000. Some Soldiers may have one or more tattoos that were "grandfathered" following a policy change. The Soldier's AMHRR should contain the exception documentation.

c. Soldiers are prohibited from any unauthorized form of body mutilation, which is the willful mutilation of the body or any body parts in any manner. This prohibition does not include authorized medical alterations performed at a medical treatment facility or cosmetic, reconstructive, or plastic surgery procedures the commander normally approves. Examples of unauthorized body mutilation include, but are not limited to, tongue bifurcation (splitting of the tongue), ear gauging (enlarged holes in the lobe of the ear that are greater than 1.6mm), unnatural shaping of teeth, ear pointing (or elfing), scarification (cutting to create intentional scarring), or body modifications for the purpose of suspension (hanging by body hooks). Soldiers who entered the Army with approved body mutilation before 31 March 2014 may request an exception to policy from DCS, G-1. See DA Pam 670–1 for processing guidance.

V. AUTHORITY OFF THE INSTALLATION:

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

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

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

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

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

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

B. Regulation of Off-Post Behavior

1. Valid Military Purpose Required for the Order. See discussion of lawfulness of military orders at para. 16c(2)(a)(iv), Part IV, Manual for Courts-Martial, 2019: "The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs."

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

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

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

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

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

C. Current Issues Regarding Regulation of Off-Post Behavior

a. Motorcycle Protective Gear.

(1) DoDI 6055.04, DoD Traffic Safety Program (20 Apr 09 and Change 1, 2 Apr 10) establishes the Department of Defense's traffic safety program, and Enclosure 3, Highway Safety Program Guideline (HSPG) Number 3, "Motorcycle Safety," sets the personal protective equipment (PPE) requirement for motorcycle riders and passengers, It applies to "all military personnel at any time, on or off a DoD installation," para. 2c. The terms of the Instruction is incorporated in AR 385-10, The Army Safety Program (24 Feb 17), para 11-9.

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

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

b. Post-Deployment Drinking / Driving Restrictions.

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

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

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

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

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

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

VI. COMMAND DIRECTED BEHAVORIAL HEALTH EXAMS

A. Overview

1. DoD and Army policy regarding Command Directed Behavioral Health Exams (CDEs) changed significantly in 2013. The primary guidance can now be found in Department of Defense Instruction 6490.04 (4 Mar 2013) "Mental Health Evaluations for Members of the Military Services."

2. A commander is no longer required to contact a behavioral health provider, nor is he or she required to notify a Soldier two days in advance of a non-emergency CDE. The new requirements for non-emergency CDEs are discussed in section B below.

3. The authority to order a non-emergency or emergency CDE rests with a commander or supervisor. For purposes of CDEs, a "supervisor" is:

"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 [mental health exam]." DoDI 6490.04.

4. No one may refer a Service member for a CDE as a reprisal for making or preparing a lawful communication of the type described in DoD Directive 7050.06 (Military Whistleblower Protection).

B. Non-Emergency Exams

1. Referral for a command directed evaluation (CDE) of a Service member to a mental healthcare provider (MHP) for a non-emergency CDE may be initiated only by a commander or supervisor as defined above. 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. DoDI 6490.04, paragraph 3(c).

2. When a commander or supervisor, in good faith, believes that a Service member may require a non-emergency CDE, he or she will:

   a. Advise the Service member that there is no stigma associated with obtaining mental health services.

   b. Refer the Service member to a qualified mental health provider, providing both the name and contact information.

   c. Tell the Service member the date, time, place of the scheduled mental health exam.

   DoDI 6490.04, March 4, 2013, Enclosure 3.

3. A command directed mental health evaluation (MHE) (emergency or non-emergency) has the same status as any other military order.

C. Emergency Exams: a commander or supervisor will refer a Service member for an emergency CDE as soon as is practicable whenever:

1. A 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.

2. When the facts and circumstances indicate that the Service member's intent to cause such injury is likely.

3. When the commanding officer believes that the Service member may be suffering from a severe mental disorder.

D. For coverage of other legal issues associated with CDEs, please refer to DoDI 6490.04.

CHAPTER B: U.S. ARMY ADMINISTRATIVE INVESTIGATIONS

TABLE OF CONTENTS

I. REFERENCES.

A. 50 U.S.C., App §456(j), Military Selective Service Act.

B. DODD 7050.06, Military Whistleblower Protection, 17 April 2015 (w/change 1, 12 October 2021).

C. DODI 1300.06, Conscientious Objectors, 12 July 2017.

D. DODI 2310.05, Accounting for Missing Persons—Boards of Inquiry, 31 January 2000 (w/change 1, 14 March 2008).

E. DODI 6055.07, Mishap Notification, Investigation, Reporting, and Record Keeping, 6 June 2011 (w/change 1, 31 August 2018).

F. DODI 1020.03, Harassment Prevention and Response in the Armed Forces, 3 February 2018 (w/change 1, 29 December 2020).

G. DODI 1350.02, DoD Military Equal Opportunity Program, 4 September 2020.

H. AR 15-6, Procedure for Administrative Investigations and Boards of Officers, 1 April 2016.

I. AD 2021-16, Immediate Actions to Improve the Sexual Harassment/Assault Response Prevention Program, 5 May 2021.

J. AR 20-1, Inspector General Activities and Procedures, 23 March 2020.

K. AR 385-10, The Army Safety Program, 24 February 2017.

L. AR 638-8, Army Casualty Program, 7 June 2019.

M. AR 600-8-4, Line of Duty Policy, Procedures, and Investigations, 12 November 2020.

N. AR 638-34, Army Fatal Incident Family Brief Program, 19 February 2015.

O. AR 600-43, Conscientious Objection, 16 May 2019.

P. AR 735-5, Property Accountability Policies, 9 November 2016.

Q. DA Pam 735-5, Property Accountability Procedures and Financial Liability Officer's Guide, 23 March 2016.

R. AR 600-20, Army Command Policy, 24 July 2020.

II. OVERVIEW OF ADMINISTRATIVE INVESTIGATIONS.

A. Each Service has 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. Army Regulation 15-6 contains the basic rules for Army administrative boards (see *infra* Part IV). If an investigation is appointed under a specific regulation, that regulation will control the proceedings.

B. Some of the more likely types of investigations that Army judge advocates (JA) may encounter include: accident investigations (including friendly fire incidents), which may require both a Safety Accident Investigation and a Legal Accident Investigation under AR 385-10 (see *infra* Part V) and AR 638-34 (see *infra* Part VI); Line of Duty Investigations under AR 600-8-4 (see *infra* Part VII); and Financial Liability Investigations under AR 735-5 (see *infra* Part VIII). If an accident results in the death of a Soldier, JAs might also assist with the family briefing to the next-of-kin under AR 638-34. While deployed, JAs must be familiar with the friendly fire reporting and investigation requirements as well as the hostile death investigation requirement of AR 638-8 (see *infra* Part IV, B-10 – B-12). With the dramatic increase in joint operations, Army JAs should also be familiar with the basic regulations relied upon by the other Services.

C. In the Air Force, commanders have inherent authority to order commander directed investigations (CDI) of individuals, programs, and processes under their authorities. A CDI is a tool used to gather, analyze, and record matters of primary interest to the command. *Department of the Air Force Manual* (DAFMAN) 1-101, dated 9 April 2021, governs these CDIs. The DAFMAN applies to civilian employees as well as uniformed members of the Regular Air Force, the Air Force Reserve, the Air National Guard, and the United States Space Force. In the Air Force, prior to initiating an actual investigation, commanders are required to engage in "basic fact-finding" to determine whether an investigation, pursuant to the DAFMAN, is necessary. During this basic fact-finding phase, a commander may determine there is no need to conduct a CDI under the provisions of DAFMAN 1-101. Similar to AR 15-6, the DAFMAN covers standard of proof, roles and responsibilities, appointment, notification, and conduct of command investigations.

D. The Navy and Marine Corps rely upon JAGINST 5800.7F, *The Manual of the Judge Advocate General*, 26 Jun 12, also known as the "JAGMAN," for guidance regarding command investigations. It divides administrative investigations into specific types including litigation report investigations, courts and boards of inquiry, and command investigations. The JAGMAN also covers line of duty/misconduct investigations and loss of government property investigations, as well as a variety of other required investigations.

E. The Coast Guard reference for investigations is COMDTINST M5830.1A, *Administrative Investigations Manual*, 7 Sep 07. Like the JAGMAN, it includes a "preliminary inquiry," an informal inquiry directed by a commander to assist the commander in determining what type of investigation, if any, is warranted by the

situation.

F. Administrative investigations in all services follow similar basic concepts. Detailed analysis of Air Force, Navy, and Coast Guard Investigation requirements is beyond the scope of this outline. Reference to those Services' policies is for clarification only. Legal advisors should turn to the appropriate Service authorities for detailed guidance when dealing with Service-specific investigations. For investigations involving personnel from multiple services, hybrid investigations, which combine provisions from more than one service's regulations, are impermissible. A single service regulation should be utilized when conducting such an investigation.

G. There is currently no joint publication governing investigations (although DODI 6055.07, *Mishap Notification, Investigation, Reporting, and Record Keeping*, provides guidance on joint accident investigations). In the event an investigation is required in a joint environment, JAs should determine which service's regulation is most applicable and then an investigation under that regulation should be conducted. When determining which service's regulation is most applicable consider the possible uses of the investigation, whether a particular service requires a certain investigation, which service has the most at stake in the outcome of the investigation, any local or command guidance regarding joint investigations, and other matters that would contribute to an informed decision. Since investigations in all services follow similar basic concepts and will result in a thorough investigation if conducted properly, the regulation ultimately used is not as important as is choosing and following a particular authorized regulation. Under no circumstances should regulations be combined and a "hybrid" investigation created. Pick a regulation and follow it! The services are shown great deference in regards to administrative matters as long as regulations are followed correctly.

III. RULE FOR COURTS-MARTIAL (R.C.M.) 303 PRELIMINARY INQUIRY (AKA "COMMANDER'S INQUIRY").

A. If a commander receives information that a member of his or her command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander is required to make or cause to be made a preliminary inquiry into the charges or suspected offenses.

B. Sometimes called a “commander’s inquiry,” the R.C.M. 303 preliminary inquiry is usually informal in nature and not governed by procedures from any other statutory or regulatory authority. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases, a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of MPI/CID (see AR 195-2, *Criminal Investigation Activities*, Appendix B, for criminal offense investigative responsibility among CID, MPI, and unit commanders) or use the procedures found in regulatory guidance (i.e., AR 15-6 for Army personnel) to ensure the investigation is sufficiently thorough and contains safeguards to protect due process, transparency, and other interests of the command and other potential stakeholders.

C. In conducting an R.C.M. 303 inquiry, the commander should gather all reasonably available evidence on:

1. Guilt or innocence;

2. Aggravation; and

3. Extenuation and Mitigation.

D. A person who is an "accuser" under Article 1(9), UCMJ, may not convene a special or general court-martial [R.C.M. 504(b)]. Therefore, any commander who is a special or general courts-martial convening authority should appoint another officer in the command to conduct the preliminary inquiry and allow others to prefer charges, if necessary.

E. This inquiry is not the same as an Article 32 (UCMJ) preliminary *hearing*. It is worth mentioning that R.C.M. 303 has been titled “Preliminary Inquiry into Reported Offenses” for more than 20 years. In 2016, AR 15-6 was updated to create an investigatory vehicle specifically called a “preliminary inquiry.” Chapter 4 of AR 15-6, which governs preliminary inquiries, states that an inquiry pursuant to chapter 4 may satisfy the requirements of R.C.M 303. However, the R.C.M. itself does not describe procedures on how to conduct a “commander’s inquiry,” and the statutory inquiry required by R.C.M. 303 is separate from the regulatory procedures outlined in AR 15-6. Legal advisors should encourage commanders to use the preliminary inquiry procedures of AR 15-6 as they are designed to ensure any problems are identified without distracting from the unit’s mission.

F. The R.C.M. 303 preliminary inquiry should not be confused with the preliminary inquiry authorized under USN/USMC and Coast Guard regulations. Those regulations authorize a commander to conduct a preliminary inquiry into a matter in order to determine whether more detailed investigation is required and if so, what type. Commanders may also decide that further investigation is not required. Preliminary inquiries under

USN/USMC and Coast Guard regulations typically have a three-day suspense.

IV. PROCEDURES FOR PRELIMINARY INQUIRIES, ADMINISTRATIVE INVESTIGATIONS, AND BOARDS OF OFFICERS.

A. ARMY REGULATION 15-6 PROCEDURES

1. Applicability. Applies to DA civilians, the Active Army, the Army National Guard, and the U.S. Army Reserve, unless otherwise stated within the regulation.

2. Purpose.

a) Establishes procedures for conducting preliminary inquiries, administrative investigations, and boards of officers not specifically authorized by any other regulation or directive.

b) Even when not specifically made applicable, AR 15-6 may be used as a general guide for investigations or boards authorized by another directive, but in that case, its provisions are not mandatory (e.g., AR 385-10, *The Army Safety Program*, authorizes safety accident investigations but does not incorporate AR 15-6.) (See *infra* Part V).

3. Function of an AR 15-6 Investigation. An AR 15-6 investigation is used to ascertain facts and report them to the appropriate appointing authority. It is the duty of the investigating officer or board to thoroughly and impartially ascertain and consider the evidence on all sides of each issue, and to make findings and recommendations that are warranted by the facts, which comply with regulations and the instructions of the appointing authority.

B. TYPES OF INVESTIGATIONS AND BOARDS.

1. Preliminary Inquiries, Administrative Investigations or Board of Officers. When deciding whether to use a preliminary inquiry, administrative investigation or board of officers procedures, consider the purpose of the inquiry, seriousness of the subject matter, complexity of the issues involved, need for documentation, and desirability of providing a hearing for persons whose conduct is being investigated.

a) Preliminary inquiries (Chapter 4). A procedure 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. This procedure does not require written appointment, the collection of sworn statements, a legal review (if follow-on adverse action is not contemplated), nor a DA 1574-1. It does require consultation with a legal advisor and written findings. A legal review is only required if adverse

administrative action is later contemplated. It is the least formal investigation described in Army regulations.

b) Administrative investigations (Chapter 5 & 6). Proceedings that involve a single investigating officer (IO), with or without assistance from assistant IOs using the procedures delineated in chapters 5 and 6 of the regulation. An “administrative investigation,” pursuant to chapter 5, is what is most often referred to when the language “15-6 investigation” is used. Administrative investigations require a written appointment; collection of sworn statements and other evidence marked as exhibits; detailed, written findings and recommendations; a written legal review; and a completed DA Form 1574-1. They may also require executive summaries, tables of contents, witness lists, and chronologies. Administrative investigations may be used to investigate any matter, to include individual conduct. The fact an individual may have an interest in the matter under investigation or 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, board procedures are not mandatory unless required by other regulations or by higher authority. Administrative investigations provide great flexibility. These investigations do not involve a more formal hearing that is open to the public; statements are taken at informal sessions; there is no named respondent with a right to counsel (unless required by Art 31(b), UCMJ); and there is no right to cross-examine witnesses; etc.

c) Board of officers (Chapter 7). Proceedings that involve one or more IO that use the board procedures delineated in chapter 7. In practice, these are almost exclusively used in cases where regulation requires it (enlisted separation boards, officer elimination boards, and flight evaluation boards are the most common).

2. Boards of officers (Chapter 7).

a) Generally, boards of officers are used to provide a hearing for a named respondent. The board offers extensive due process rights to respondents (notice and time to prepare, right to be present at all open sessions, representation by counsel, ability to challenge members for cause, to present evidence and object to evidence, to cross examine witnesses, and to make argument).

b) Boards of officers include a president, voting members, a non-voting legal advisor, a non-voting recorder (normally a JA who presents evidence on behalf of the government), a reporter (normally a government paralegal who provides personnel support), a respondent, and respondent’s counsel. If a recorder is not appointed, the junior member of the board acts as recorder and is a voting member.

c) Boards of officers procedures are normally only used when required by regulation (i.e. AR 600-8-24, AR 635-200, AR 600-105).

C. APPOINTING AUTHORITY. (Para. 2-1)

1. Boards of officers. Must consult with JA or legal advisor prior to appointing a formal board.

a) Any general court-martial or special court-martial convening authority.

b) Any general/flag officer.

c) Any commander, deputy commander, or special, or principal staff officer in the grade of colonel (lieutenant colonel may appoint if assigned to a slot authorized a colonel) or above at HQDA, the installation, activity, or unit level.

d) Any state adjutant general.

e) A DA civilian supervisor in the grade of GS-14 or above, who is assigned as head of an agency, activity, division, or directorate.

f) Principal Deputies, Assistant Deputy Chiefs of Staff, and Assistant Secretaries of the Army at HQDA.

2. Administrative investigations and Preliminary Inquiries.

a) Any officer or supervisor authorized to appoint a formal board.

b) A commander at any level.

c) A special, personal, principal staff officer, or supervisor in the grade of major or above. Principal staff officers include individuals assigned to the following positions: Chief of Staff, Executive Officer, Deputy Commanding Officer, S–1, S–2, S–3, S–4, S–5, S–6, and S–7.

3. Special cases. Only a General Court-Martial Convening Authority (GCMCA) or a general/flag officer assigned to a command billet with a servicing SJA can appoint an investigation or board involving:

a) Property damage of $2,000,000 or more.

b) Loss or destruction of Army aircraft.

c) Loss or destruction of an unmanned aircraft system with a replacement or repair cost of $2,000,000 or more.

d) Injury or illness resulting in, or likely to result in, death or permanent total

disability.

e) Death of one or more persons.

4. Only the next superior authority to a General Court-Martial Convening Authority (GCMCA) or a general/flag officer assigned to a command billet authorized to appoint an investigation into a class A accident may appoint:

   a) Class A training accidents resulting in, or likely to result in, the permanent total disability or death of one or more persons.

   b) Combat-related deaths involving non-DOD personnel.

   c) An insider (green on blue) attack.

5. Friendly Fire Mishaps.

   a) 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 U.S. or friendly military forces, U.S. or friendly official government employees, U.S. DoD or friendly national contractor personnel, and nongovernmental organizations or private volunteer organizations, who, while accompanying or operating with U.S. Armed Forces, are mistakenly or accidentally killed or wounded in action by U.S. or friendly forces actively engaged with an enemy or who are directing fire at a hostile force or what is thought to be a hostile force. (Definition also includes incidents where only damage or destruction of U.S. or friendly military property occurs).

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

   c) Army Regulation 638-8, 1-28(i)(1) requires commanders to complete an AR 15-6 investigation of all friendly fire incidents that result in the death **or** injury of a Soldier.

   d) Army Regulation 638-8 requires all AR 15-6 investigations into friendly fire incidents be convened by the GCMCA for the unit to which the casualty is assigned. This includes both injury cases and fatality cases. (NOTE: In practice, this does not conflict with DODI 6055.07 since the Combatant Commander will or has delegated authority to a GCMCA to convene the investigation.)

e) Units must follow the following procedures for all friendly fire incidents, whether resulting in death or injury, as soon as personnel on the ground suspect a friendly fire incident has occurred, IAW Chapter 3 of AR 638-8:

(1) The unit must provide immediate telephonic notice through their servicing Casualty Assistance Center to the Army Casualty and Mortuary Affairs Operations Division (CMAOD). For time sensitive assistance contact the CMAOD Operations Center at 800-626-3317; COMM: 502-613-9025; DSN: 983-9025. OCONUS dial country code 001 or OCONUS DSN code (312).

(2) Generate an initial casualty report IAW AR 638-8, approved by a field grade officer, through command channels to the Combatant Commander.

(3) Initiate an AR 15-6 investigation (Appointed by GCMCA; approved by Combatant Commander *or his or her designee* IAW DODI 6055.07 and AR 638-8. See discussion above).

(4) Contact USACR/SC (COMM: (334) 255-2660/3410, DSN: 558-2660/3410) and initiate safety investigation as required based upon CRC guidance.

(5) Contact the local Criminal Investigation Command (CID) office. They will provide forensics assistance to the AR 15-6 IO or conduct the investigation if criminal action or negligence is suspected or substantiated.

(6) Provide the name and contact information of a knowledgeable field grade officer to CMAOD to serve as the unit POC. This POC will provide the CMAOD status updates of the investigative report(s) at 30 day intervals until the investigation report is complete.

(7) Once approved by the Combatant Commander *or his or her designee*, submit the AR 15-6 report of investigation to the CMAOD.

(8) Continue coordination with the CMAOD to offer and provide, if requested, an AR 638-34 family presentation for fatality cases (see *infra* Part VI).

f) Department of Defense Instruction 6055.07 also requires units to furnish the Commander, U.S. Joint Forces Command (USJFCOM), with completed privileged friendly fire safety investigations. USJFCOM is the lead agent for friendly fire mishap analysis. It maintains a joint database of pertinent causal factors and is responsible for developing

plans designed to prevent or mitigate future friendly fire mishaps.

g) Department of Defense Instruction 6055.07 authorizes combatant commanders to delegate their authority to subordinates. These delegations should be reviewed prior to any deployment.

6. Hostile Death Investigations.

a) Army Regulation 638-8, para. 1-28(i)(1) 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).

b) In accordance with AR 15-6, para. 2-1(c)(2), the GCMCA may, in writing, delegate appointing and approval authority to a subordinate commander exercising SPCMCA for hostile death cases only. This authority may not be further delegated.

c) If evidence is discovered during a hostile death investigation indicating 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. The next action to be taken is to comply with the friendly fire reporting and investigation requirements. This requires the GCMCA to notify the combatant commander (or his/her delegate). 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.

7. Suspected Suicides.

a) AR 638-8, para. 1-28(i)(1) requires AR 15-6 investigations for all suspected suicides. This AR 638-8 requirement for an AR 15-6 investigation does not apply to suicide attempts. However, a suicide attempt may require a formal Line of Duty Investigation pursuant to AR 600-8-4 if the attempt results in a loss of duty time for a period of more than 24 hours and an injury of lasting significance. (See AR 600-8-4 paras. 2-2(a)(1) & 2-2(d)(2); see also *infra* Part VII).

b) The appointing authority for the required AR 15-6 investigation into the suspected suicide fatality is a GCMCA, as is the case in most death investigations.

c) The AR 15-6 investigation will serve as the basis for the Suicide Incident Family Brief that must be offered to the primary next of kin (PNOK)—and to the parents of the decedent when they are secondary NOK, when practical—for confirmed cases of suicide. The Suicide Incident Family Brief should be conducted utilizing the

procedures for the Army Fatal Accident Brief to the NOK described in Chapter 7 of AR 638-34 (*see infra* Part VI).

8. Hazing and Bullying. AR 600-20 requires commanders to immediately report allegations of criminal behavior (e.g. assault, sexual assault, etc.), in violation of hazing or bullying policies, to law enforcement. All other hazing or bullying allegations reported to a commander will be investigated as possible violations of Article 92 of the UCMJ in accordance with the procedures set forth in AR 15–6 or in accordance with R.C.M. 303.

   a) Hazing is a form of harassment that includes conduct through which Soldiers or DA Civilian employees, without proper military authority or other governmental purpose but with a nexus to military service, physically or psychologically injure, or create a risk of such injury, to a Soldier or Soldiers for the purpose of: initiation into, admission into, affiliation with, change in status or position within, or a condition for continued membership in any military or DA Civilian organization. See AR 600-20, para. 4-19(a)(1)(a) for examples. Depending on the circumstances, online misconduct (the use of electronic communication to inflict harm) could constitute hazing.

   b) Bullying is a form of harassment that includes acts of aggression by Soldiers or DA Civilian employees, with a nexus to military service, with the intent of harming a Soldier either physically or psychologically, without proper military authority or other governmental purpose. It includes the exposure of an individual or group to physical and/or emotional aggression with the intent of causing distress or harm. Bullying is often indirect or subtle in nature and involves an imbalance of power between the aggressor and the victim. Bullying can be accomplished through electronic devices or communications, to include social media. See AR 600-20, para. 4-19(a)(2)(a) for examples.

9. Equal Opportunity. The Military Equal Opportunity (MEO) complaint system is intended to address alleged unlawful discrimination on the basis of race, color, sex (to include gender identity), national origin, religion, or sexual orientation and harassment (to include hazing, bullying, and other discriminatory harassment). Equal opportunity complaints can be submitted and received in three ways: anonymously, informally, or formally. The manner in which an EO complaint is submitted will dictate a command's responsibilities regarding reporting and investigating the complaint. See DoDI 1350.02 & Chapter 6 of AR 600-20.

   a) Anonymous Complaint (see AR 600-20, para. 6-6(b)(1)). Per the regulation, complaints where the complainant remains unidentified may be handled as either an informal or a formal complaint. However, if the commander determines that sufficient information is provided to proceed with any type of an investigation, the commander is required to sign the DA Form 7279, which essentially

forces formalization the complaint. If an anonymous complaint contains sufficient information to permit the initiation of an investigation, the investigation will be initiated by the commanding officer or supervisor in accordance with AR 600-20, para. 6-6. If an anonymous complaint does not contain sufficient information to permit the initiation of an investigation, the information should be documented in a Memorandum for Record and maintained on file (see AR 600-20 para. 6-6(b)(1)(b)).

b) Informal Complaint (see AR 600-20, para. 6-6(b)(2)). An informal complaint is one a Soldier, cadet, or Family member does not wish to file in writing on a DA Form 7279. Within three calendar days of complaint receipt, the chain of command will inform the MEO professional of the initiation of the informal complaint and any assistance efforts underway. Informal complaints may be resolved directly and informally by the complainant addressing the offending party, a peer, or another person in or outside the complainant's chain of command. If the commander receives the complaint, he or she may choose to resolve the situation without investigation *or* through a commander's inquiry or AR 15-6 investigation without the assistance of the MEO professional. When practical, an informal complaint should be resolved within 60 calendar days.

c) Formal Complaint (AR 600-20, para. 6-6(b)(3)). A formal complaint is one a complainant files in writing using a DA Form 7279 and swears to the accuracy of the complaint. Within three calendar days of complaint receipt, the unit MEO professional will refer the complaint to the subject's commander. Upon receipt of the complaint, the company or battalion commander must notify the SPCMCA of the formal complaint. For complaints processed at the brigade level, the GCMCA must be notified within five calendar days. The subject's commander must also: (1) commence the investigation of the formal complaint within five calendar days of receipt, (2) inform the complainant and subject of the commencement of the investigation, and (3) establish and implement a reprisal plan. The investigation must be completed within 30 days of receipt of the formal complaint. The commander will provide a progress report to the SPCMCA (or GCMCA if the complaint was processed at the brigade level) every 14 days until the investigation is complete. The entire formal complaint process will be complete within 60 days. Complainants have 60 calendar days to file formal MEO complaints. If a formal MEO complaint is received after 60 calendar days, the commander should consider the reason for the delay, the availability of witnesses, and whether a complete and fair inquiry or investigation can be conducted when using his or her discretion whether or not to investigate the matter.

10. Sexual Harassment (SH). The SH complaint system is intended to address alleged incidents of sexual harassment (see AR 600-20, 7-8). Commanders have a statutory charge to investigate all complaints of sexual harassment. The DoD's current definition of sexual harassment comes from statute. (10 USC § 1561). This definition is replicated in DoDI 1020.03 and AR 600-20. Per the FY22 NDAA, the statutory definition of sexual harassment will be amended to replicate the elements of the Article 134 Sexual Harassment offense. However, as of the date of this deskbook update, per statute, sexual harassment means any of the following:

    (1) Conduct that involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when—

        (a) Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay or career; or

        (b) Submission or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or

        (c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive working environment; and

        (d) Is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive.

    (2) Any use or condonation, by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the Armed Forces or a Civilian employee of the DoD.

    (3) Any deliberate or repeated unwelcome verbal comment or gesture of a sexual nature by any member of the Armed Forces or Civilian employee of the DoD.

    a) Sexual harassment complaints can be submitted and received in three ways: anonymously, informally, or formally. The manner in which a SH complaint is submitted will dictate a command's responsibilities regarding reporting. Currently, statute mandates investigation of all complaints whether anonymous, informal, or formal. However, per the FY22 NDAA, by 2023 the statute will require investigation of only formal complaints.

        (1) Anonymous Complaint (see AR 600-20, para. 7-8(l)). An anonymous complaint is defined as a report of sexual

harassment, regardless of the means of transmission, from an unknown or unidentified source. All anonymous complaints, even those that cannot be investigated, will be referred to the subject's BDE commander for evaluation. Actions taken regarding anonymous complaints will depend upon the extent of information provided in the anonymous complaint. If an anonymous complaint contains sufficient information to permit the initiation of an investigation, the commander will initiate an inquiry or investigation and sign the DA Form 7746, which essentially formalizes the complaint. If an anonymous complaint does not contain sufficient information to permit the initiation of an investigation, the complaint will be documented in a Memorandum for Record and maintained by the brigade SARC under double lock and key.

(2) Informal Complaint (see AR 600-20, para. 7-8(m)). An informal complaint is one a complainant does not wish to file in writing on a DA Form 7746. The SARC will ensure the complainant understands that if a commander is informed of a complaint of sexual harassment, by the complainant or another party, the commander will inquire into the matter. If the commander receives the complaint and chooses to resolve the situation through commander's inquiry or AR 15-6 investigation without the assistance of the SARC, the commander will inform the SARC within three calendar days of the receipt of the complaint and the subsequent resolution efforts. If the commander has enough information to initiate an investigation into an informal complaint, the SARC will inform the complainant. The complainant may then decide not to pursue the complaint or complete a DA Form 7746. An informal complaint is not subject to regulatory timeliness standards, but should be resolved within 14 calendar days of the complaint receipt.

(3) Formal Complaint (see AR 600-20, para. 7-8(n)). Soldiers can file formal sexual harassment complaints on the DA Form 7746, documenting the nature of the complaint and the requested remedies. The full-time brigade SARC will refer all formal complaints to the BDE commander immediately. Upon receipt of a complaint, commanders will commence or cause the commencement of an investigation or inquiry within 72 hours and will forward the complaint to the first commander in the chain of command with GCMCA within 72 hours of receipt. The investigation will be conducted at the level at which a thorough examination of the facts can be achieved (see para. 7-8(n)(9) for additional guidance). To the extent practicable, investigations should be completed no later than 14 calendar days after the date on which the investigation is initiated.

Within 20 calendar days of initiation of an investigation or inquiry, commanders will forward a progress report or final report of the investigation to the GCMCA. Progress reports will be submitted to the commander every 14 calendar days until complete.

b) Sexual Harassment Investigating Officers. Per AD 2021-16, commanders will appoint investigating officers—charged with investigating sexual harassment complaints—from outside the subject's brigade-sized element. Exceptions requiring appointment of an IO from the same brigade-sized element as the subject will be approved in writing by the first general officer in command and will be included as an enclosure to the investigation. The exception authority may not be delegated.

c) Appeal Procedures. The sexual harassment appeal procedures outlined in the July 2020 version of AR 600-20 are <u>not accurate</u>. Both the subject and the complainant in sexual harassment complaint investigations are, instead, provided two opportunities to appeal, as outlined in DoDI 1350.02 and in Chapter 6 of AR 600-20. See DoDI 1020.03, para. 5.2 & DoDI 1350.02, para. 5.2.

D. METHOD OF APPOINTMENT – The Memorandum of Appointment. (Para. 2-2).

1. Administrative investigations and boards of officers must be appointed in writing. However, when necessary to ensure facts are properly ascertained, documented, and preserved, they may be appointed orally and later confirmed in writing. Preliminary inquiries may be appointed orally; however, a written memorandum of appointment may prove beneficial to an IO.

2. Memorandums of appointment will state the purpose and scope of the investigation or board; describe the nature of the required findings and recommendations; and include special instructions as applicable. If the appointment is made pursuant to a specific regulation or directive, that authority should be cited in the appointment. specify the purpose and scope of the underlying investigation, inquiry, or board. Army Regulation 15-6 includes examples of memorandums of appointment (see AR 15-6, Figures 2-1 - 2-5).

3. The memorandum of appointment is a critical document and should include enough detail to fully inform and guide the IO. The appointing authority may amend the memorandum of appointment to modify the scope of the proceedings or provide additional guidance to the IO or board.

E. WHO MAY BE APPOINTED – The Investigating Officer. (Para. 2-3)

1. Only those **best qualified for the duty by reason of their education, training, experience, length of service, demonstrated sound judgement and temperament** should be appointed as investigating officers (IO) and board members. IOs and board members must be impartial, unbiased, and objective.

2. For investigations and inquiries appointed pursuant to AR 15-6, the IO must be a Commissioned Officer, Warrant Officer, or DA civilian in the grade of GS-11 or higher. Investigating officers and voting board members must be senior to any individual whose conduct may be investigated, or against whom adverse findings or recommendations may be made, unless the appointing authority determines military exigencies make this impracticable. In such a scenario, non-commissioned officers in the grade of E-7 or above may be appointed where the appointing authority determines no commissioned officers, warrant officers, or qualified DA civilians are readily available. A military exigency is an emergency situation requiring prompt or immediate action to obtain and record facts. Mere inconvenience would not justify this exception. Non-voting members (i.e., legal advisor, judge advocate recorder) do not have to be senior.

3. Assistant IOs may be appointed, as needed, to provide technical knowledge, or to assist the appointed IO with conducting interviews and performing other investigative tasks. Assistant IOs should not normally interview a more senior subject of the investigation without the senior IO being present during the interview.

4. Specific regulations may require additional qualifications for an IO (i.e., officers only, professionally certified, appropriate security clearance.) Examples follow.

   a) Safety Investigations. (Army Regulation 385-10, para. 3-16; see also *infra* Part V). Safety accident investigation boards require members will specific qualifications. For example, aviators for aircraft accidents, qualified DoD maintenance personnel, senior non-commissioned officer subject matter experts, and DoD weather officers.

   b) Security Inquiries. (Army Regulation 380-5, 9-3(a); see also *infra* Part XII.C). For security inquiries or investigations into the actual, or suspected compromise of classified information, the IO must have the appropriate security clearance and access.

   c) Line of Duty Investigations. (Army Regulation 600-8-4, para. 3-8; see also *infra* Part VII). An IO for a line of duty investigation must be in the grade of O-2 or above, if commissioned, or CW-2 or above, if warrant.

   d) Boards of Inquiry. (AR 600-8-24, para. 4-7(a)). Officer Elimination

Boards will consist of only commissioned officers in the grade of O-5 or above.

e) Serious Incidents. (AR 15-6, para. 2-3(e)). “Serious incidents,” as defined per AR 15-6 para. 2-1(c), require a Field Grade Officer or above to serve as IO or board member.

F. CONDUCTING THE ADMINISTRATIVE INVESTIGATION. (Chapters 5 & 6; Appendix C, para. C-3)

1. Before starting. The IO must review all written materials provided by the appointing authority and meet with their legal advisor prior to beginning a preliminary inquiry or an administrative investigation. The legal advisor will explain the rules and legal concerns for AR 15-6 administrative investigations and assist the IO in developing an investigative plan. The investigative plan is essential to the success of the investigation. The legal advisor should ensure the IO reviews Appendix C of AR 15-6 (Investigating Officer’s Guide) and has access to all other applicable regulations or policies (i.e. AR 600-8-4, AR 735-5, AR 600-20, etc.). The IO’s legal advisor should assist the IO in the formulation of an investigative plan, to include formulating witness questions necessary to establish the elements of the underlying concerns or allegations. (NOTE: Although AD 2010-01 is expired, that directive contains enclosures that may prove helpful to IOs developing questions for witnesses in suspected suicide investigations.)

2. The Investigative Plan should accomplish the following:

a) Provide the purpose of the investigation. What are the questions that need answering? What specific findings and recommendations must be made? What is the timeline? Who are the likely audiences for the investigation? The memorandum of appointment should address and account for these matters.

b) Outline established facts and identifies information gaps, and more importantly how to fill those gaps.

c) Identify potential witnesses and determine the most effective order for conducting interviews.

d) Identify physical and documentary evidence required to satisfy the requirements of the appointment order.

e) Determine if there are any possible Criminal or Counter-Intelligence implications. Will Article 31 Uniform Code of Military Justice (UCMJ) warnings be triggered/required? Privacy Act requirements?

f) Identify and review the regulations, policies, and laws involved.

g) Establish a Chronology for both the investigation, and the incident under investigation.

h) Ensure coordination with the MPs or CID as applicable.

3. Rules of Evidence.

a) Generally, an IO is not bound by the Military Rules of Evidence (MREs).

b) Anything that in the minds of a reasonable person is **relevant and material** to an issue may be accepted as evidence. All evidence is given such weight as circumstances warrant. For example, medical records, counseling statements, police reports, and other records may be considered regardless of whether the preparer of the record is available to give a statement or testify in person.

c) No officer, DA employee, or Service member may deny IOs and boards access to documents, records, or evidentiary materials needed to discharge their duties, to include data stored in official DA repositories, except as permitted by law and applicable regulations. In addition, an IO or board is authorized access to medical records without the consent of the patient (except for Medical Quality Assurance Records). Only the minimum necessary information will be released to the IO or board, and completion of request forms may be required prior to release of record. (See AR 15-6, para. 3-7(b)).

(1) NOTE: Certain regulations may limit IO or board access to documents, records, and other data. See limitations discussed in AR 385–10, AR 20–1, and AR 40–68.

(2) In contrast, see AR 25-22, para. 3-3, for discussion of DoD blanket routine uses of information and disclosure from Army systems of record, to include for law enforcement purposes and in response to certain types of requests for information.

d) Limitations.

(1) Privileged communications. The rules in section V, part III, MCM, concerning privileged communications between lawyer and client (MRE 502), privileged communications with clergy (MRE 503), spousal privilege (MRE 504), psychotherapists (MRE 513) and victim advocates (MRE 514) apply.

(2) Investigations related to sex offenses cases. With limited exceptions, evidence of an alleged victim’s sexual behavior or sexual predisposition is not relevant (See MRE 412).

(3) Polygraph tests. The person involved in the test must consent

to the use of any evidence regarding the results, or regarding the taking or refusing of a polygraph.

(4) “Off the record” statements are not allowed. Findings and recommendations cannot be based on statements not contained in the report of investigation.

(5) Statements regarding disease or injury. Per AR 600-8-4, a Soldier cannot be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury (see *infra* Part VII). 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.

(6) Involuntary admissions. A confession or admission obtained by unlawful coercion or inducement will not be accepted as evidence. Although AR 15-6 requires that subjects of investigations be advised of their Article 31 or 5th amendment rights, the fact that a respondent was *not* advised of his or her rights does not prevent acceptance of a confession or admission into evidence if it was not coerced or involuntary. This said, the inclusion of such evidence may not be considered in any follow-on, punitive action.

(7) Bad faith unlawful searches. Investigating Officers and boards may not accept or consider evidence obtained as a result of a bad faith, unlawful search. Such evidence is acceptable only if the legal advisor determines that the evidence would inevitably have been discovered. In all other cases, the IO or board may accept or consider relevant evidence obtained as a result of any search or inspection—even if it would have been ruled inadmissible in a judicial proceeding.

e) Ordering witnesses to testify.

(1) Investigating officers, generally do not have subpoena power to compel witnesses to appear and/or testify. Commanders and supervisors may order military personnel and civilian employees to appear and testify.

(2) No military witness can be compelled to incriminate himself or herself (UCMJ Article 31), or to make a statement or produce evidence not material to an issue under investigation, or that might tend to degrade them.

(3) No witness not subject to the UCMJ can be required to make a statement or produce evidence that would violate their right against self-incrimination per the 5th Amendment to the U.S. Constitution.

(4) A Soldier who is suspected of an offense under the UCMJ will be advised of his or her Art. 31 rights before being questioned regarding the suspected offense. The Soldier will be given a reasonable amount of time to consult an attorney, if requested, prior to answering any questions.

(5) A person who refuses to provide information must specifically state that the refusal is based on the protection afforded by Article 31 or the 5th Amendment. If a witness invokes his or her rights pursuant to Article 31 or the 5th Amendment, the IO must stop questioning and contact their legal advisor. The legal advisor will determine whether the witness may be ordered to answer if the reason for refusal is not properly based on their Article 31 or 5th Amendment protections. If the legal advisor determines the invocation was improper, the commander (or IO if authorized by the commander or supervisor—see AR 15-6, para. 3-8a(1)) may order the Soldier or civilian employee witness to testify. No adverse inference will be drawn against any witness or respondent who invokes his or her rights under Article 31 or the 5th amendment.

(6) Weingarten (NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975); 5 USC § 7114(a)(2)(B)). Weingarten rights may be necessary for civilian bargaining unit member employees.

(a) If a civilian employee who is a member of a certified bargaining unit represented by a labor organization reasonably believes he or she might be disciplined as a result of an investigation, then they may request, and are entitled, to have a union representative present during the interview.

(b) If a bargaining unit member requests union representation, the IO should consult with their legal advisor and the servicing labor counselor. 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.

(7) Garrity Rights (Garrity v. New Jersey, 385 U.S. 493 (1967)).

(a) A Garrity warning is used to ensure that statements made by a civilian suspect in an AR 15-6 investigation are not accidentally immunized. Immunity under Garrity, "will be found if an employee has an objectively reasonable belief that he or she will be disciplined if he or she refuses to answer questions." The Garrity warning ensures that immunity is not inadvertently granted as a matter of law, and it quashes any objectively reasonable belief an employee would be disciplined for refusing to answer questions that might incriminate them under the Fifth Amendment.

(b) Garrity warnings are given when an employee is requested to give information on a voluntary basis in connection with [their] own administrative misconduct, and the answers might also be used in a future criminal proceeding. The employee is informed of [their] right to remain silent if the answers may tend to incriminate [them]; that anything said may be used against [them] in a criminal or administrative proceeding; and [they] cannot be disciplined for remaining silent.

(8) Kalkines Rights (Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973)).

(a) The Kalkines case specifically made Garrity Rights applicable to federal civilian employees. It held an employee can be removed from their position for not replying to an administrative investigation's questions if they are adequately informed both that they are subject to discharge for not answering, and that their replies (and their fruits) cannot be employed against them in a criminal case.

(b) The Kalkines warning is used when the investigator plans to offer criminal use immunity to the employee under investigation. The installation's servicing labor counselor should be consulted prior to an IO issuing a Kalkines warning.

(c) For further reading on the interplay between Weingarten, Garrity, and Kalkines, *see* Eric R. Hammerschmidt, *Avoiding the Pitfalls of Investigating Federal Civilian Employees Pursuant to Army Regulation 15-6*, ARMY LAW., no. 4, 2021, at 52, https://tjaglcs.army.mil/avoiding-the-pitfalls-of-investigating-federal-civilian-employees-pursuant-to-army-regulation-15-6.

G. FINDINGS AND RECOMMENDATIONS. (Para. 3-10 thru 3-12)

1. Facts. Investigating Officers should determine dates, places, persons, and events definitely and accurately. An IOs findings should be supported by the facts, as collected and determined by the IO throughout the investigation or inquiry.

2. Findings.

a) A proper finding is a clear concise statement readily deduced from evidence in the record. It can include negative findings (i.e., evidence does not establish a fact). Findings must be supported by documented evidence. Findings should not normally exceed the scope of appointment without approval, but should address relevant issues encountered during the investigation. Investigating Officers must refer to the exhibit(s) relied upon in making each finding. Exhibits should be

numbered in the order they are discussed in the findings and recommendations memorandum. For example: “Exhibit 1, Statement of SGT Smith,” or “Exhibit 2, Screen Shot of Text Message.”

b) The evidentiary standard for findings is “preponderance of the evidence” or “a greater weight of evidence than supports a contrary conclusion.” Evidentiary weight is not determined by number of witnesses, but rather by considering all evidence and factors such as demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, and other indicators of veracity.

c) Investigating Officer should work with their legal advisor to develop an investigation’s findings based on the facts established by the evidence in the record of investigation, answering the scope laid out in their appointment memorandum, and through the application of any applicable regulations to the facts. If evidence in the report could reasonably support an alternative finding, the IO or board should state why his or her finding is more credible or probable than alternate conclusions and cite to supporting evidence.

3. Recommendations.

a) An inquiry, board, or investigation’s recommendations must be consistent with and logically based on the findings. They can be negative (e.g., recommend no further action be taken). The legal advisor should ensure the recommendations make sense and are supported by the record of investigation.

b) Recommendations must be clearly written and should be feasible, acceptable, and suitable—capable of being implemented, legally executable, fall within acceptable levels of acceptable risk, and should solve the identified problem or initiate a process to identify a solution.

c) Investigating officers and boards make recommendations according to their understanding of the rules, regulations, and customs of the Service, guided by fairness both to the Government and to individuals.

4. Report of Investigation. The IO should use concise, declarative sentences when drafting findings and recommendations. It is best practice for the IO to draft a formal memorandum as opposed to typing findings and recommendations directly into the DA Form 1574-1. The memorandum should be attached to the DA 1574-1 and the language, “see attached memorandum” should be the only language written into sections IV and V. The IO must ensure that the findings and recommendations memorandum answers all questions posed in the appointment memorandum. The IO should remember that his or her report may be reviewed by HHQ, family members of those involved, Congress, or the media. The IO should submit

his or her report in accordance with AR 15-6, para. C-4.

5. Deliberations and Voting (Boards of Officers, Chapter 7).

a) Deliberations are conducted in a private, closed session. Only voting members of the board may deliberate and vote. If consultation with non-voting member is required, the named respondent, if any, has the right to attend the consultation. The board may request the legal advisor assist in putting findings and recommendations in the proper form; respondent and counsel are not entitled to be present during such assistance.

b) With all voting members present, the board will propose a vote on findings of fact, followed by recommendations. Majority vote controls. In the case of a tie, the president's vote is the determination of the board.

H. REBUTTAL AND THE ARMY ADVERSE INFORMATION PORTAL (AAIP).

1. Minimum Safeguards. Whenever adverse action is contemplated against a Soldier based upon information obtained as a result of a preliminary inquiry, administrative investigation, or board of officers conducted pursuant to AR 15-6, minimum safeguards must be observed. (Para. 1-12a). AR 15-6 (generally) does not extend rebuttal rights to subjects where follow-on adverse action contains its own procedural safeguards (i.e. referred evaluation, GOMOR processing, nonjudicial punishment). (Para. 1-12d).

2. Field Grade Safeguards. Although the preliminary inquiry and administrative investigation procedures are not intended to provide a hearing for interested persons, field grade officers have a right to respond to adverse information in an investigation or inquiry prior to approval authority action. This right (and other rights specific to field grade officers such as the right to interview, expanded filing timelines, and requirements to substantiate adverse findings using the more robust procedures outlined in chapter 5) exists regardless of whether follow-on adverse administrative action is recommended or contemplated against the field grade officer. These field-grade-specific procedural protections, (outlined in the 2016 update to AR 15-6) exist because adverse findings against field grade officers may be used in future promotion selection boards. (DODI 1320.04, 3 January 2014, incorp'ing C1, 30 June 2020; AR 15-6, para. 5-4e).

3. Referral Procedures. When an officer has the right to respond pursuant to paragraph 5-4 of AR 15-6, the portion of the report of investigation and supporting evidence pertaining to the adverse information will be referred to the officer after being properly redacted in accordance with guidance in AR 600-37, para. 3-2a(1)(b) ("[r]edactions should be minimal . . . to ensure the recipient is afforded full due process rights in providing a meaningful

rebuttal"). The officer will have at least 10 business days to respond. The referral and processing of any response will be conducted in accordance with paragraph 2-8c. The officer's right to respond to adverse information will not serve as a substitute for attempting to interview the individual during the investigation. The 2016 version of AR 15-6 neither requires nor precludes approval authorities from extending rebuttal opportunities to non-field grade subjects of adverse information in the report of proceedings.

4. Subject Submissions. The subject's response to the referral of adverse information may include anything the officer deems to be relevant to the finding, including, but not limited to, a rebuttal memorandum prepared by the officer or his representative, additional evidence in any format, and letters of support. All materials provided in response to adverse information will be included as an exhibit to the report of proceedings.

5. Upload and Pre-Board Screen. If the adverse finding is ultimately approved, the investigation and rebuttal will be uploaded (along with a summary) into the AAIP database. A pre-board screen will be conducted of that portal in advance of active duty O4 promotion boards and reserve component O6 promotion boards. If adverse information is identified in that pre-board screen, the adverse information will be referred to the officer for comment in advance of the promotion board.

6. Definition of Adverse. Adverse information is any substantiated adverse finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be credible, the information must be resolved and supported by a preponderance of the evidence. To be adverse, the information must be derogatory, unfavorable, or of a nature that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual.

7. What is Not Adverse. The following types of information, even though credible, are not considered adverse:

   a) motor vehicle violations that did not require a court appearance;

   b) minor infractions without negative effect on an individual or the good order or discipline of the organization that: (a) were not identified because of substantiated findings or conclusions from an officially documented investigation; and (b) did not result in more than a non-punitive rehabilitative counseling administered by a superior to a subordinate. (NOTE: AR 15-6 added the conjunctive "and" in this portion of the definition; that conjunctive is not included in DoDI 1320.04.);

   c) information attributed to an individual 10 or more years before the date of the personnel action under consideration, except for substantiated

conduct which (if tried by court-martial) could have resulted in a punitive discharge and confinement for more than one year; and

d) information previously considered by the Senate pursuant to an earlier nomination of the officer.

8. Pending Army Directive. At the time of this deskbook update, an Army Directive is pending, which will likely require AAIP upload for substantiated adverse findings against all commissioned officers and thereby extend procedural safeguards (currently only mandated for field-grade respondents) to the same.

I. LEGAL REVIEW. (Para. 2-7).

1. All administrative investigations and boards directed under AR 15-6 require a written legal review from the approving authority's servicing SJA or legal advisor, appropriately marked as attorney work product exempt from FOIA release. Whenever possible, the legal advisor designated to advise the investigation or board will not also conduct the legal review

2. At a minimum, the review will determine: (1) whether the investigation complies with the requirements in the appointing order and other legal requirements; (2) the effects of any errors in the investigation; (3) whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by a preponderance of the evidence; (4) and, whether the recommendations are consistent with the findings.

3. The review should advise the approval authority whether the evidence supports any additional relevant findings, or suggests additional investigation is appropriate to address new concerns.

4. Effects of errors. (Para. 3-20).

a) Appointing errors. If the official who appointed an investigation did not have the proper authority to do so, then the proceedings are a nullity, unless an appropriate appointing authority ratifies the appointment.

b) Substantial errors. Errors that have a material adverse effect on an individual's substantial rights. If the error can be corrected without substantial prejudice to the individual concerned, the appointing authority may return the investigation to the same IO or board for correction. If respondent fails to raise an error during board proceedings, the underlying error may be treated as "harmless" (para. 3-20.d).

c) Harmless errors. Defects in the proceedings that do not have a

material adverse effect on an individual's substantial rights and do not prevent the approval authority from taking final action on the investigation or board.

5. If a legal advisor finds an investigation legally insufficient, he or she should work with the IO to try to remedy the error(s). Negotiation, good advice, and wise counsel should be used by JAs to resolve legal insufficiencies. Under no circumstances should the legal advisor or the JA conducting the legal review rewrite any portion of the report of investigation without the IO's permission and approval, or try to hide anything in the report from the appointing authority. If the legal insufficiencies cannot be resolved, the JA (who conducts the legal review) should prepare written memorandum describing the errors for the appointing authority. Just like the IO's report, however, the appointing authority is not bound by the legal review.

J. ACTION BY APPROVAL AUTHORITY. (Para. 2-8).

1. Approval Authority. Generally, the appointing authority for an investigation or board is also the approval authority. However, this is not always the case (e.g., approval authority withheld to next higher level of command, line of duty investigations where the appointing authority is the SPCMCA and approval is the GCMCA, situations where the appointing authority changes stations, etc.).

2. Options. The approval authority may:

a) Approve the investigation or board as is.

b) Disapprove, and/or return for additional investigation. They may consider all relevant information, even information not considered by the IO (If the approving authority does so, however, their consideration of the additional evidence should be documented and the evidence included with the report of investigation, if available). Unless otherwise provided by another directive (i.e., AR 635-200, binding the approval authority to a board recommendation of retention,) the approval authority is not bound by the IO or board's findings or recommendations; the approval authority may take action less favorable than recommended.

c) Add or substitute findings and recommendations.

3. The approval authority's decision must be documented on DA Form 1574-1 (Report of Proceedings by Investigating Officer). A common practice is to document any exceptions or substitutions of the findings and recommendations in separate memorandum. If additions, exceptions, or substitutes are documented on a separate memorandum, the DA Form 1574-1 should still be annotated and signed by the approval authority.

4. Once approved, the report of investigation becomes an official agency decision, subject to the provisions of the Freedom of Information Act (5 USC § 552). The approval authority should follow through with approved recommendations and maintain a record of the action taken.

K. REQUESTS FOR RECONSIDERATION. (Para. 2-9).

1. A subject, suspect, or respondent (such as an officer against whom an adverse finding was made) may request reconsideration of the findings of an inquiry or investigation upon the discovery of new evidence, mistake of law, mistake of fact, or administrative error.

a) New evidence is information that was <u>not</u> considered during the course of the initial investigation **<u>and</u>** was not reasonably available for consideration. New evidence neither includes character letters nor information that, while not considered at the time of the original investigation, the subject of the investigation could have provided during the course of the investigation.

b) Limitations. A request for reconsideration is not permitted when the investigation resulted in administrative, non-judicial, or judicial action, or any action having its own due process procedural safeguards. Requests for reconsideration must be submitted to the approval authority within one year of the approval authority's approval of the investigation. The approval authority may entertain a request outside of one year for good cause. Good cause is the discovery of new, relevant evidence beyond the one-year time limitation, which the requester could not have discovered through reasonable diligence, or the requester was unable to submit because duty unreasonably interfered with his or her opportunity to submit a request. The approval authority's determination of good cause is final.

L. ADVERSE ADMINISTRATIVE ACTION. (Para. 1-12). When adverse administrative action is contemplated by a commander based on an administrative investigation, the following safeguards are required (*unless the action is being taken under a regulation that provides its own appropriate due process procedures*):

1. Notice is given in writing to the subject of the investigation of the allegations against him or her. The subject is given a copy of the relevant portions of the investigation, subject to any required redactions.

2. The subject is given a reasonable opportunity to rebut the allegations in writing (No less than 10 days).

3. The Commander must consider the subject's rebuttal to the investigation, if submitted in a timely manner, before taking any adverse action.

4. Keep in mind that for Equal Opportunity and Sexual Harassment investigations, there are appeal procedures, outlined in AR 600-20 and DoDI 1350.02, which provide two opportunities for both the subject and the complainant to appeal investigatory findings. These appeal rights are separate from the referral of report of the investigation requirements outlined in AR 15-6.

M. RELEASE OF AR 15-6 INVESTIGATIVE REPORTS AND MATERIALS. (Para. 3-17).

1. AR 15-6 documents hold no special, automatic status under either the Privacy Act or the Freedom of Information Act. The individual parts of a report of investigation must be analyzed under both laws to determine suitability for release.

2. No part of a report should be released (unless specifically authorized by law or regulation such as a valid Freedom of Information Act (FOIA) request) without the approval of the appointing authority or other appropriate FOIA release authority.

N. MAINTENANCE AND STORAGE. Army Records Information Management System (ARIMS) and Record Retention Schedule - Army (RRS-A). www.arims.army.mil. Investigations must be retained by the approving authority for five years and then destroyed or shipped for permanent storage IAW ARIMS.

1. Approval authority filing requirements. Except in the case of an investigation or board that contains adverse information regarding a field-grade officer or a high-profile case, the approval authority will keep the original and a digital copy of the final report of proceedings on file for a period of not less than five years.

2. Adverse information. In the case of an investigation or board that contains adverse information regarding a field-grade officer, the approval authority will keep the original and a digital copy of the final report of proceedings, and the redacted version as provided to the officer on file for a period of not less than 10 years.

a) The investigation or board will be retained regardless of whether any adverse action was taken against the officer based on the findings and/or recommendations of the investigation or board. In addition, the approval authority will comply with specific filing requirements set forth in other regulations or directives, to include requirements to synopsize and upload portions of the investigations into a centralized database.

b) The servicing SJA or legal advisor will provide a synopsis of the adverse finding, and the filing location of the investigation by emailing: “USARMY Pentagon HQDA OTJAG Mailbox AL Adverse” found on the Global Address List.

3. Filing requirements for high-profile cases. Reports of proceedings in serious, complex, or high-profile cases resulting in national media interest, Congressional investigation, and/or substantive changes in Army policies or procedures have value for historical and lessons-learned purposes.

a) The approval authority will keep the original and a digital copy of these reports on file for a period of not less than 10 years.

b) The approval authority will also submit a copy of these reports through the U.S. Army Records Management and Declassification Agency (USARMDA) (AHRC–PDD–RR), 7701 Telegraph Road, Alexandria, VA 22315–3800, to the National Archives Records Administration (NARA). NARA determines, on a case-by-case basis, when these records may be destroyed. AR 25–400–2 provides additional guidance for filing reports of proceedings.

c) The approval authority will submit a copy of the report through command channels to the Office of The Judge Advocate General, DAJA-AL, 2200 Army Pentagon, Washington, DC 20310-2200, at the same time the report is submitted to Human Resources Command, and before the next of kin is notified of the results of the investigation pursuant to AR 600-8-1, for Class A training accidents resulting in, or likely to result in, the permanent total disability or death of one or more persons, and for combat-related deaths involving friendly fire, non-DOD personnel, or an insider (green on blue) attack.

c) Maintaining Investigations or Boards Conducted During Deployment. When an 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 in accordance with the requirements of this paragraph, and retains the authority to release the report

V. ARMY REGULATION 385-10 ACCIDENT INVESTIGATIONS.

A. AR 385-10, THE ARMY SAFETY PROGRAM (24 February 2017).

1. Applicability. 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.

2. Purpose: Provides policy on Army safety management procedures. Chapter 3 provides policies and procedures for initial notification, investigating, reporting, and submitting reports of Army accidents and incidents.

3. Function of an AR 385-10 Accident Investigation (Chapter 3). To determine the facts and causes of accidents in order to prevent future accidents, and to assess liability to determine the most likely organization to initiate corrective actions. The primary purpose of investigating and reporting Army accidents is prevention. A safety investigation cannot be used as the basis for disciplinary action.

4. The proponent of AR 385-10 is the Director of Army Staff.

B. WHAT IS AN ACCIDENT? (Para. 3-3).

1. An Army accident is defined as an unplanned event, or series of events, which results in one or more of the following:

a) Occupational illness to Army military or Army civilian personnel.

b) Injury to on–duty Army civilian personnel.

c) Injury to Army military on–duty or off–duty.

d) Damage to Army property.

e) Damage to public or private property, and/or injury or illness to non–Army personnel caused by Army operations (the Army had a causal or contributing role in the incident).

2. Accident classes are used to determine reporting and investigation requirements (Para. 3-4).

a) Class A: Damage totaling $2M or more; accidents involving aircraft destroyed/missing/abandoned; injury/occupational illness resulting in fatality or permanent total disability. Unmanned aircraft system (UAS) accidents are classified based on the cost to repair/replace the loss, damage, or abandonment of a UAS will not constitute a Class A accident unless the replacement/repair cost is $2 million or more. (Note: friendly fire fatalities must be reported and investigated as a Class A accident.)

b) Class B: Damage between $500k - $2M; injury/occupational illness resulting in permanent partial disability; three or more personnel

hospitalized as in-patients in a single occurrence.

c) Class C: Damage between $50k - $500k; a nonfatal injury/occupational illness that causes one or more days away from work or training beyond the day or shift on which it occurred; or disability at any time (that does not meet the definition of Class A or B and is a day(s) away from work case).

d) Class D: Damage between $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 an OSHA standard; occupational hearing loss; or work-related tuberculosis.

e) Class E Ground accident: An Army ground accident in which the resulting total cost of property damage is $5,000 or more but less than $20,000.

f) Class E Aviation Accident: An Army aviation accident in which the resulting total cost of property damage is $5,000 or more but less than $20,000.

g) Class F Aviation Incident: Damage to Army aircraft engines as a result of unavoidable internal or external foreign object damage.

C. INITIAL NOTIFICATION AND REPORTING. (Para 3-5 and 3-8).

1. All Army accidents and incidents, including damage to Army property, damage to public/private property, or occupational illnesses and injuries, regardless of how minor, are reportable to the unit/local safety office. The unit/local safety office will determine the reporting and investigative requirements for the accident.

2. All Class A, all Class B, and Class C Aviation accidents and incidents (includes in-flight and on-ground, and UAS.) require immediate notification to the U.S. Army Combat Readiness/Safety Center (USACR/SC) (https://safety.army.mil/).

D. CATEGORIES OF ACCIDENT INVESTIGATION REPORTS. (Para. 3-10).

1. Limited-Use Safety Accident Investigation Reports.

a) Accident investigations are close-hold, internal Army communications whose sole purpose is the prevention of future accidents. To encourage open and frank discussion of the accident, the Army will use its best efforts to prevent disclosure of statements provided under a promise of confidentiality.

b) Limited-use is required for all flight/flight related and fratricide/friendly fire accidents and accidents involving other systems, equipment, or

military-unique items, operations or exercises and also when the determination of causal factors is vital to the national defense as determined by Commander, USACR/SC.

c) Per AR 385-10, limited-use accident reports cannot be used as evidence or to obtain evidence for disciplinary action, in determining the misconduct or line-of-duty status of any person, before any evaluation board, or to determine liability in administrative claims for or against the government.

d) Witnesses may be given the option of making their statement under a promise of confidentiality if they are unwilling to make a complete statement without such a promise and the investigation board believes it is necessary to obtain a statement from a witness.

e) Confidential witness interviews and accident board findings, recommendations, and analysis are privileged. Only the Freedom of Information Act Initial (FOIA) Denial Authority for safety investigations, Commander, USACR/SC, may release that information. Excerpts from safety investigation reports composed purely of factual material may be released to other investigators and to the public under FOIA.

2. General-Use Safety Accident Investigation Reports.

a) These reports are prepared to record data concerning all recordable DA accidents not covered by the Limited-Use Safety Accident Investigation Report.

b) Intended for accident prevention purposes only. May not be used as evidence in any disciplinary, administrative, or legal action (punitive).

c) Promises may not be given that the information will be treated as exempt from mandatory disclosure in response to a request under FOIA. Witnesses may be assured that PII will be redacted prior to release.

3. Both limited use and general use reports contain privileged information. Federal courts have recognized the need to protect certain information within these reports to further accident prevention within the military and to protect national security. In both types of accident reports, the board's findings, analysis, and recommendations are privileged and protected from release under FOIA. Within a Limited Use Accident Report, 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 ACCIDENT INVESTIGATIONS. (Para. 3-12 thru 3-15).

1. Appointing authority. The type and extent of the investigation depends upon the class and type of accident. The following authorities are responsible for appointing accident investigation boards as required by this regulation (see below that a formal appointment is not necessary for a single officer investigation):

   a) Commander with general court-martial jurisdiction over the installation or unit responsible for the operation, personnel, or materiel involved in the accident;

   b) Commander, U.S. Army Reserve Command, for U.S. Army Reserve units;

   c) Commander, USACE, for USACE; and,

   d) State Adjutant General for National Guard units.

2. Boards of Officers. The following accidents must be investigated by a board consisting of at least three members.

   a) All on-duty Class A and B accidents.

      (1) Upon notification of a Class A or B accident, the Director of Army Safety (DASAF) will determine whether a Centralized Accident Investigation or an Installation-Level Accident Investigation will be conducted.

      (2) Centralized Accident Investigation Board. Some board members provided by Army Combat Readiness Center and some provided from the local command.

      (3) Installation-Level Accident Investigation Board. Board members are provided from the local command. Board members should be from battalion or battalion-equivalent organizations other than the accountable organization.

   b) Any accident that an appointing authority, or Cdr, USACR/SC, believes may involve a potential hazard serious enough to warrant investigation by multi-member board.

3. Single-Officer Board. The following accidents must be investigated by a board consisting of at least one member: Class C Aircraft Accidents.

4. Single-Officer Investigations (does not require formal board appointment orders). The following accidents will be investigated by one or more officers, warrant officers, safety officers/NCOs, supervisors, or DA safety and occupational health specialists, GS-9 or higher.

a) All off-duty military accidents.

b) Class C, D, and E ground accidents.

c) Aviation Class D, E, and F accidents and Class E and FOD incidents.

5. Board Composition.

a) Must be Army officers or warrant officers, DA safety and occupational health specialist/manager/engineer GS-9 or higher, full-time technicians holding federally recognized officer or warrant officer status, DoD medical officer or DoD contracted medical officers, qualified DoD maintenance personnel, subject matter expert senior NCOs, E-5 and above in MOS 93U, 33U, 52D (UAS accidents), DoD weather officers, any other personnel approved by Cdr, USACR/SC.

b) For Class A and B accidents, board members will not be from the same unit that incurred the accident (battalion or battalion-equivalent organization). Rank, grade, and/or specialty requirements vary with type of accident.

c) Note: Special board member requirements of AR 385-10, para. 3-16(d). Depending on the type or circumstances of incident, the safety board may require a medical officer or flight surgeon, qualified maintenance officer or technician, weather officer, master or senior aviator, UAS operator, or Army marine warrant officer.

6. Joint Safety Investigations. For accidents involving multiple services' property, a single Joint board may be convened. Service safety center commanders decide on board members and president by mutual agreement. The Joint Board's proceedings will be recorded in the format required by each Service.

7. Report Timelines. Class A, B, and C on-duty accidents must be completed and submitted to USACR/SC within 90 calendar days. Classes D, E, and F on-duty accidents must be completed and submitted to USACR/SC within 30 calendar days. All off-duty accidents must be completed and submitted to USACR/SC within 30 calendar days.

8. Review. The USACR/SC will review all accident reports.

F. LEGAL ACCIDENT INVESTIGATION (LEGAL INVESTIGATION). (Para. 3-10d). (Formerly known as a "collateral investigation.") See also AR 638-34, *infra* Part VI, for guidance (explaining that AR 385-10 investigations are conducted concurrent with AR 15-6 investigations).

1. Used to obtain and preserve all available evidence for use in litigation, claims, disciplinary action, or adverse administrative action. Such investigations are often conducted simultaneously but independently of the accident safety investigation. They are essential to protect the

privileged information of safety reports as they ensure an alternate source of information. Safety personnel may not be used to conduct or assist with the legal investigation, but they are authorized access to the entire legal investigation.

2. Legal Accident Investigations are required (see AR 15-6, para 2-1c "serious incident investigations"):

   a) For all Class A accidents, to include cases of friendly fire;

   b) As directed by the SJA IAW the claims regulation (AR 27-20);

   c) On accidents where there is a potential claim or litigation for or against the government or government contractor; or

   d) On accidents with a high degree of public interest or anticipated disciplinary or adverse administrative action against any individual.

3. Commanders may direct a legal investigation into any other accident. The investigation will normally use AR 27-20 procedures if related to potential claim. If not, AR 15-6 informal procedures should be used.

G. PRIORITY AND SHARING OF INFORMATION. (Para. 3-10 and 3-27 thru 3-30)

1. The safety investigation has priority (collection of evidence/access to scene) over the legal investigation and all other investigations except a criminal investigation conducted by military police or CID, which has priority over witnesses and evidence.

2. The safety investigation may obtain all information collected by the legal or MP/CID criminal investigations, as well as medical and personnel records of personnel involved in the accident.

3. Safety accident investigation reports will not be enclosed in any other report unless the sole purpose of the report is accident prevention.

4. Other Army authorized investigators may obtain various factual information from the safety investigation (see para. 3-28(a) for complete list).

5. Information from the safety investigation that will **not** be given to other investigators include:

   a) Information given to a safety investigator pursuant to a promise of confidentiality and any information derived from that information or direct or indirect references to that information.

   b) Products of deliberative processes of safety investigators including (see

para 3-11 for a complete list):

(1) Draft and final findings, evaluations, opinions, preliminary discussions, conclusions, accident causes, recommendations, analyses, and other material that would reveal the deliberations of safety investigators.

(2) Draft and final diagrams and exhibits if they contain information that depicts the analysis of safety investigators.

(3) Animations that incorporate privileged safety information.

c) These restrictions on the distribution of safety accident information are punitive. Violations of para. 3-28(b) are violations of Art. 92, UCMJ.

H. RELEASE OF INFORMATION FROM ACCIDENT INVESTIGATION REPORTS. (Para. 3-28 and 3-30)

1. AR 385-10, para. 3-29(c) makes unauthorized disclosure of privileged safety information punishable under Article 92, UCMJ.

2. The U.S. Army Combat Readiness/Safety Center is the repository for Class A, B, C, D, and E accident reports, and Class E and F incident reports.

3. Freedom of Information Act requests for Class A, B, or C safety accident reports must be referred to the USACR/SC.

VI. FATAL INCIDENT FAMILIY BRIEF

A. AR 638-34 – ARMY FATAL INCIDENT FAMILY BRIEF PROGRAM.

1. Applicability. Active Army, Army National Guard, and U.S. Army Reserve.

2. Purpose. Standardize the process for presenting Army Fatal Incident Family Briefs when a Soldier's death results from training, operational and/or friendly fire accident, or suicide. This regulation implements guidance published in DODI 1300.18.

3. Function of an AR 638-34 Family Presentation. To provide a thorough explanation of releasable, investigative results of fatal training/operational accidents and suicides to the deceased's PNOK; ensure the family understands the circumstances of the incident surrounding the death of a Soldier; and ensure the family is reassured of the Army's concern regarding the tragedy and is aware of the compassion of Army leaders. Information concerning the accident or accident investigation may not be released to Congress, the media, or the public before it is presented to the PNOK.

B. ARMY IMPLEMENTATION.

1. Key definitions.

a) Training-related deaths include those accidents associated with non-combat military exercises or training activities designed to develop a Soldier's physical ability or to maintain or increase individual/collective combat and/or peacekeeping skills.

b) Operational-related deaths are those associated with active duty military exercises or activities occurring in a designated war zone or toward designated missions related to current war operations or other contingency operations, contributing directly or indirectly to the death.

c) Primary Next of Kin. The legal next of kin. That person of any age most closely related to the individual according to the line of succession as described in AR 638-8. Seniority, as determined by age, will control when the persons are of equal relationship. For PNOKs under the age of 18 years, the adult custodian will determine the PNOK's ability to receive a face-to-face presentation.

2. Presentations are required to be offered for the following (Para. 5-1):

a) All fatal training/operational accidents investigated under AR 15-6, AR 385-10, and AR 638-34.

b) Special interest cases or cases in which there is probable high public interest, as determined by The Adjutant General.

c) All suspected cases of Friendly Fire.

d) In general, fatal accidents that are hostile as defined by DODI 6055.07, but do not occur as a result of engagement with the enemy.

e) Confirmed Soldier suicides investigated pursuant to AR 15-6, AR 385-10, DODI 6055.07, and AR 638-34 and/or Soldier deaths where the Armed Forces Medical Examiner or civilian equivalent has determined the manner of death to be suicide.

3. Updates to PNOK. The appointing/approval authority is responsible for the release of information from the investigation to the PNOK for investigations that exceed 30 days. (Para. 5-2e).

a) The approving authority's legal office must review each update to ensure that it contains no admission of liability, waiver of any defense, offer of compensation or any statement that might jeopardize the Army's litigation posture.

b) The update is provided to the Casualty and Mortuary Affairs Operation Division (CMAOD) who will direct the Casualty Assistance officer (CAO) to provide the update to the family.

4. Preparing the presentation to the PNOK. (Chapter 5)

   a) Once the investigation is complete, the CMAOD contacts the Army Command/ASCC/DRU commander and the legal investigation appointing/approval authority in order to coordinate appointment of the briefer from the unit in the grade of colonel (this is typically the brigade-level commander).

   b) The command is ultimately responsible to provide an O6 to present the briefing as the CMAOD does not provide briefing teams.

   c) Once (1) the approval authority takes final action on the AR 15-6 investigative report, (2) the report has been appropriately redacted, and (3) the O-6 brief has been identified, a statement of offer (SOO) will be provided to the PNOK. See AR 638-34, figures 5-1 & 5-2.

   d) The CAO then follows up with the PNOK to arrange for the presentation date and forward the preferred dates (primary and secondary) to the CMAOD.

5. Briefing Team. (Para. 5-3).

   a) At a minimum, the briefing team must consist of the briefer (a colonel from the chain of command), the family's CAO, and a chaplain (unless the NOK requests no chaplain), other SMEs, and a CMAOC representative (if so directed by TAG for fatal training, operational and/or friendly fire accidents).

   b) The briefer must consider including the SJA, legal advisor, and/or PAO representative when it is apparent a family has invited, or may invite, the local media or a family legal representative will attend the presentation.

   c) The CAO must work with the PNOK to obtain a list of people the PNOK intends to invite to the presentation to enable the presentation team to determine the family's intent to invite media or legal representation.

   d) NOTE: The Army is prohibited from putting conditions or limitations upon those whom the family wishes to invite to the presentation (para. 5-2(k)(6)).

   e) The briefer must also consider including an interpreter if the PNOK or other attending family members do not understand English.

6. Conducting the Family Presentation. (Chapter 6).

a) The briefer's primary responsibility is to meet personally with the PNOK and deliver a thorough open explanation of the releasable facts and circumstances surrounding the accident. At a minimum, the briefer must provide the following:

(1) An explanation of the unit's mission, highlighting the Soldier's significant contributions to the mission and the Army.

(2) An accurate account of the facts and circumstances leading up to the accident, the sequence of events that caused the accident, and a very clear explanation of primary and contributing factors causing the accident as determined by the legal investigation.

(3) Actions taken at the unit level to correct any deficiencies. Questions regarding criminal investigations should be referred to the USACIDC CLO.

b) Most PNOK prefer to receive the family presentation in the family home, but alternate arrangements may be warranted (e.g. a library study room, a conference room at a nearby hotel or military installation). Coordination between the CAO will ensure a proper location to facilitate the briefing.

c) Style of presentation.

(1) Dialogue with no notes, but with maps and diagrams of training areas. This works best for a briefer who is intimately familiar with the accident and investigation.

(2) Bullet briefing charts. These work well as they tend to help the briefer stay focused. Charts must be reviewed and approved in advance by the SJA.

(3) Simple notes and an executive summary. Written materials must be reviewed and approved by the SJA and copies should be left with the PNOK if requested.

7. Completion of Family Presentation. Within ten working days of the presentation, the briefer must submit an AAR through the AR 15-6 approval authority and ACOM, ASCC, or DRU Commander to the CMAOD. The Adjutant General will task appropriate organizations to respond to any unresolved issues related to the presentation (i.e. questions about the criminal investigation).

8. SJA Requirements.

a) The servicing SJA or legal advisor is required to review the

presentation to ensure that it contains no admission of liability, waiver of any defense, offer of compensation, or any other statement that might jeopardize the Army's litigation posture. This may include review of briefing charts, notes, and executive summaries.

b) The servicing SJA or legal advisor must provide a non-redacted copy of the AR 15–6 death investigation report to CMAOD.

c) The release requirements outlined in AR 638-34 are not intended to provide the PNOK with information not otherwise releasable under the Privacy Act or the Freedom of Information Act.

(1) The SJA must redact the AR 15–6 death investigation report and prepare the required number of copies. At a minimum, the briefer, each team member, and each PNOK will be given a redacted copy.

(2) The SJA also must prepare a letter to accompany the redacted version of the report delivered to the family and will explaining, in general terms, the reasons for the redactions.

9. Release of the AR 15–6 Death Investigation. (Para. 4-2). The investigation will be released in the following sequence:

a) Family members IAW AR 638-34;

b) Interested offices within DOD and DA;

c) Members of Congress, upon request, IAW AR 1-20;

d) Members of the public and media, upon request, IAW AR 360-1.

VII. LINE OF DUTY INVESTIGATIONS.

A. AR 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS

1. Applicability. Applies to the Active Army, the Army National Guard, the U.S. Army Reserve, ROTC Simultaneous Membership Program, cadets of the U.S. Military Academy, Senior ROTC cadets, and applicants for enrollment while performing authorized travel to or from or while attending training or a practice cruise.

2. Purpose. Prescribes policies and procedures for investigating the circumstances of illness, disease, injury, or death of a Soldier. Provides standards and considerations used in determining a Soldier's line of duty status.

3. 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.

B. POSSIBLE OUTCOMES. (Para 2-5).

1. In Line of Duty (ILD) – Soldier was not AWOL and injury was not proximately caused by intentional misconduct or gross negligence.

2. Not in Line of Duty-Not Due to Own Misconduct (NLD-NDOM) – Soldier was AWOL at time of injury (and mentally sound at inception of AWOL), but injury was not caused by the Soldier's intentional misconduct or gross negligence.

3. Not in Line of Duty-Due to Own Misconduct (NLD-DOM) – Soldier's intentional misconduct or gross negligence was the proximate cause of their injury, illness, disease, or death, regardless of status.

4. In Line of Duty-Existed Prior to Service-Service Aggravated (ILD-EPTS-SA) – clear and unmistakable evidence establishes a Soldier's injury, illness, or disease existed prior to service and the condition has been service aggravated. Aggravation must be determined by an appropriate provider IAW DODI 1332.18.

5. Not in Line of Duty-EPTS-Not Service Aggravated (NLD-EPTS-NSA) - clear and unmistakable evidence establishes a Soldier's injury, illness, or disease existed prior to service and condition has *not* been service aggravated.

6. In Line of Duty-This Episode Only (ILD-This Episode Only) – a one-time event where no serious injury or illness has occurred, but warrants a Soldier be attended to by a physician; of primary importance to Reserve Component Soldiers as this determines authorization of military treatment.

7. Presumptive in Line of Duty (PILD) – hostile action, death of natural causes, or death of passengers in a commercial carrier or military vehicle; *only Human Resources Command (HRC) can apply this determination*.

8. No Finding -used in cases where an LOD investigation was completed and HRC determines it was not required; *only HRC can apply this determination*.

C. IMPACT OF LINE OF DUTY DETERMINATION. (Para. 2-3).

1. Extension of enlistment: enlisted Soldiers unable to perform duties for

more than one day because of their use of drugs or alcohol, or injury/disease resulting from intentional misconduct (including gross negligence), is liable to serve additional days on their current term of enlistment equal to those missed due to the injury/disease.

2. Longevity and retirement multiplier: periods of service where a Soldier is unable to perform duties because of his intemperate use of drugs or alcohol, or because of injury/disease resulting from intentional misconduct, will not be included in computing creditable service.

3. 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 injury/disease directly caused by and immediately following his or her use of unauthorized drugs or alcohol. NOTE: pay is *not* forfeited for absence from duty caused by injuries or a disease not directly caused by and immediately following the use of unauthorized drugs or alcohol.

4. Disability retirement and severance pay: to be eligible for certain retirement and severance pay benefits, a Soldier's disability must not have resulted from the Soldier's intentional misconduct or gross negligence, and must not have been incurred during a period of AWOL.

5. Medical and dental care for Soldiers on duty other than active duty: ARNG/USAR Soldiers are entitled to hospital benefits, pensions, and other compensation for injury, illness, or disease incurred ILD, under the following conditions prescribed by law:

   a) While performing active duty for a period of 30 days or less,

   b) While performing inactive duty training,

   c) While performing duty or service on funeral honors duty,

   d) While traveling directly to or from the place at which the Soldier is to perform (or has performed) (1) active duty for a period of 30 days or less, (2) inactive duty training, or (3) service on funeral honors duty.

   e) 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, and

   f) 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.

D. TWO-STEP LINE OF DUTY ANALYSIS:

1. Step 1: Did the Soldier's intentional misconduct or gross negligence proximately cause the injury, illness, or death?

   a) Injury, illness, or death caused by a Soldier's own intentional misconduct can never be in line of duty.

   b) Violation of a regulation by itself is not misconduct, it is simple negligence. Simple negligence is NOT misconduct. However, a regulatory violation is a factor that should be considered in making a line of duty determination, it is one circumstances to be examined and weighed with all other circumstances. Depending on the particular facts and circumstances, multiple (two or more) regulatory violations may be considered gross negligence.

2. Step 2: 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). A Soldier injured while in an unauthorized status will be found to be NLD, unless a behavioral health provider determines the Soldier was mentally unsound, such that the Soldier did not have the ability to form the intent to go into an unauthorized duty status (Para. 4-7). In this context, "duty status" does not refer to worker's compensation or claims theories of "performing military duties" or being "job-related."

3. Examples:

   a) In Line of Duty. A Soldier is injured in car crash while on approved leave. The crash is caused by another driver's negligence. The Soldier is considered to be in the line of duty.

   b) Not in Line of Duty, Not Due to Own Misconduct. A Soldier is AWOL (while mentally sound), but otherwise doing nothing wrong. While walking down the street, Soldier is hit by a car that jumps the curve and is seriously injured. Soldier is considered to be not in the line of duty, but not due to own misconduct. NOTE: NLOD-NDOM may also be based on an existed prior to service (EPTS) condition, not aggravated by service.

   c) Not in Line of Duty, Due to Own Misconduct. Soldier gets drunk at a party and attempts to drive home but is involved in an accident on the way. If the Soldier's intoxication was the proximate cause of the accident, then the Soldier is considered to be not in the line of duty due to own misconduct.

E. PROCEDURES.

1. Presumptive Finding of In Line of Duty – No investigation is required when:

a) A disease does not involve a factor cited at paragraph VII(E)3(d), below.

b) Injury is clearly incurred as the result of enemy action or terrorist attack.

c) Death by natural causes, or death occurs while a passenger on a common commercial carrier or military aircraft.

2. Informal Investigation (Paras. 3-1 through 3-6).

a) No intentional misconduct is suspected.

b) No gross negligence is suspected.

c) Formal investigation is not otherwise required.

d) At a minimum, the MTF representative and commander must sign a DA Form 2173. Supporting exhibits should be attached.

e) Special court-martial convening authority (SPCMCA) is the appointing and approving authority. (For Soldiers assigned to USAR TPU units or ARNG Soldiers not federalized/not attending OASS, the appointing authority is the first commander, in the grade of O-6 or above, who exercised UCMJ authority over the Soldier. See Chapter 5 of AR 600-8-4 for ARNG/USARC processing requirements).

f) NOTE: Informal investigation can only result in an ILD determination except in the case where the MTF finds that a condition EPTS. In that event, the status would be NLD-NDOM.

3. Formal Investigation. (Paras. 3-7 thru 3-12).

a) Appointing Authority is the SPCMCA. For formal LOD investigations, the appointing authority may delegate duties and responsibilities to other appropriate field grade staff officers as outlined in para. 1-15c.

b) Final approving authority is the first General court-martial convening authority (GCMCA) in the chain of command. The GCMCA may delegate this authority to a field grade officer or DA Civilian in the grade of GS-13 or above. See Para. 1-16c. Delegations are permissible for formal LODIs but not informal LODIs. This is because formal LOD determinations that involve a death or result in NLD determinations are forwarded to The Adjutant General, U.S. Army Human Resources Command, 1600 Spearhead Division Avenue, Fort Knox, KY 40122-5405 for final

review; whereas, informal LODIs end with approval by the SPCMCA with no further forwarding and always result in ILD findings.

c) Investigating officer must be senior in rank to the individual investigated. May be commissioned officer in the grade of O-2 or above, warrant officer in the grade of CW2 or above, or commissioned officer of another U.S. military service in joint activities where the Army has been designated as the executive agent. IOs must be familiar with the IO guide in AR 600-8-4.

d) Formal investigations are required when any of the following factors are present:

(1) Injury, disease, illness, or death under strange or doubtful circumstances, or apparently due to gross misconduct or gross negligence.

(2) Injury, illness, or death involving alcohol or drugs.

(3) Self-inflicted injuries or possible suicide.

(4) Injury, illness, or death incurred while AWOL.

(5) Injury or death that occurs while an individual was enroute to final acceptance in the Army.

(6) When a USAR or ARNG Soldier serving on orders for less than 30 days becomes disabled due to injury, illness, disease, or death.

(7) When directed by a higher authority (HRC, approval authority, or appointing authority).

(8) When a medical provider determines a condition ETPS.

(9) Injury or death of a USAR or ARNG Soldier while traveling to or from authorized training or duty.

(10) Death of a USAR or ARNG Soldier while participating in authorized training or duty.

(11) When a commander believes circumstances should be fully investigated.

e) Evidentiary standards and presumptions:

(1) Soldier is presumed ILD UNLESS refuted by a preponderance of the evidence contained in the investigation.

(2) A finding or determination must be supported by a greater weight of evidence than supports any different conclusion.

(3) The evidence must establish a degree of certainty so that a reasonable person is convinced of the truth or falseness of the fact.

(4) KEY: Must use the guide in Appendix B IO Guide and the rules in Appendix D.

(5) The general guidance contained in AR 15-6 applies (see *supra* Part IV), unless AR 600-8-4 provides more specific or different guidance.

4. Timeline to complete investigation.

a) Informal: Must be initiated within 5 calendar days of the command's discovery of the injury, disease, illness, or death. The timeline for completing an informal investigation is no more than 60 days.

b) Formal: Must be initiated within 5 calendar days of the command's discovery of the injury, disease, illness, or death. The current version of AR 600-8-4 does not include a suspense by which formal LODs must be completed. See AR 600-8-4, para. 3-10. It is common practice for formal LODs involving death to have a suspense of either 45 days, or until the completion of the autopsy/toxicology report, whichever is later.

F. PROCEDURAL DUE PROCESS REQUIREMENTS.

1. During Evidence Collection: A Soldier is not required to make a statement against interest relating to the origin, incurrence, or aggravation of his or her injury or disease. A Soldier must be advised that he or she does not have to make a statement against interest prior to being questioned or providing a statement. If a Soldier is not informed of the right not to make statement, or is forced to make statement, it cannot be used in making the LOD determination (10 USC § 1219).

2. Regarding Adverse Findings: The IO must provide the Soldier with written notice of the proposed adverse finding, a copy of the investigation, and the supporting evidence. The IO must issue a warning regarding making statements against interest. Para. 3-3c. The IO must give a reasonable opportunity to reply in writing and to offer rebuttal (normally 30 days). If the IO receives a response, it must be considered before finalizing findings. If the IO does not receive a response, the IO may proceed to finalize the findings (Para. 3-12).

3. Both formal and informal investigations must receive a legal review before a final determination is made (See para. 1-15(b)(3) & para. 1-15(d)).

4. Formal LOD investigations into deaths or that result in findings of NLD must be forwarded to HRC. (See *supra* para. VIIE3(b)).

G. APPELLATE RIGHTS FOR NLD DETERMINATIONS. (Para. 4-17).

1. The service member may appeal in writing within 30 days after receipt of the notice of the NLD determination.

2. The service member's appeal is to the approving authority.

3. The approval authority may change his previous determination of NLD to ILD only if there is substantial new evidence to warrant it. Absent such evidence, the NLD finding will be endorsed and the appeal will be sent to HRC for final review and determination.

H. SPECIAL CONSIDERATIONS.

1. Mental responsibility, emotional disorder, suicide, and suicide attempts.

a) A Soldier may not be held responsible for his or her acts if, as a result of mental defect or disease, the Soldier was unable to comprehend the nature of such acts or to control his or her actions. Such disorders are considered ILD unless they existed prior to the Soldier entering the service and were not aggravated by military service. Personality disorders by their nature are considered as EPTS.

b) Suicide and suicide attempt line of duty investigations must determine whether the Soldier was mentally sound. The IO must, therefore, inquire into the Soldier's background. Per regulation, "mental soundness can only be determined by a behavioral health expert." (Para. 2-5). However, the regulation also states that, "[t]he IO is not bound by the behavioral health opinion." (Para. 3-11d(6)). Although the mental health assessment must be completed by the behavioral health expert and such determination should be annotated on the DA Form 261, the IO's is not bound by this behavioral health opinion and can make his or her own assessment regarding mental soundness. In instances where the IO and the behavioral health expert disagree and the result is a finding of NLD, that fact should be highlighted in the findings and recommendations memorandum and the investigation will be forwarded to HRC IAW paragraph 1-16 of the regulation. Human Resources Command will review all death and NLD findings prior to Soldier notification.

c) For purposes of making LOD findings, there is a presumption that a mentally-sound person will not commit suicide (or make a bona fide attempt to commit suicide). This presumption prevails until rebutted by a greater weight of the evidence than supports any different

conclusion. A failure to rebut this presumption will support a finding of ILD. However, if properly rebutted, then intentional, self-inflicted injuries by a mentally sound Soldier should be considered misconduct and result in NLD-DOM.

VIII. FINANCIAL LIABILITY INVESTIGATIONS OF PROPERTY LOSS (FLIPL)

A. AR 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY.

1. Applicability. Applies to the Active Army, the Army National Guard, and the U.S. Army Reserve.

2. Purpose: Prescribes the basic policies and procedures in accounting for Army property.

3. Tools:

a) Financial liability officers should use DA Pam 735-5, Financial Liability Officer's Guide, during their investigation.

b) Units must use DA Form 7531, Checklist and Tracking Document for Financial Liability Investigations of Property Loss, to track investigations. (See fig. 13-3).

4. Function of an AR 735-5 Financial Liability Investigation of Property Loss.

a) A FLIPL is used to document the circumstances concerning the loss, damage, 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.

b) It is used to enforce property accountability and is not intended as corrective action or punishment. Commanders, however, are not precluded from using separate administrative or disciplinary measures, such as reprimand or nonjudicial punishment, if a Soldier's misconduct contributed to the LDDT of Government property.

B. ALTERNATIVES TO FINANCIAL LIABILITY INVESTIGATIONS.

1. Statement of Charges/Cash Collection Voucher – when liability is admitted and the charge does not exceed one month's base pay. (These two functions have been combined on DD Form 362)

2. Cash sales of hand tools and organizational clothing and individual equipment (also completed on a DD Form 362). (See para. 12-3).

3. Unit level commanders may adjust losses of durable hand tools up to $500 per incident, if no negligence or misconduct is involved.

4. By memorandum for losses of durable and expendable items or OCIE IAW paragraph 4-20.

5. Abandonment order (by O6 or above) – may be used in combat, large-scale field exercises simulating combat, military advisor activities, or to meet other military requirements.

6. Damage statement – Approval authority may sign a damage statement when there is no evidence of negligence or misconduct (see para. 4-18(b)(2)).

7. Recovery of property unlawfully held by civilians is authorized — show proof it is U.S. property and do not breach the peace.

8. AR 15-6 investigations and other collateral investigations can be used in conjunction with the DD Form 200.

C. MANDATORY FLIPLs. (Para. 13-3) A unit must initiate a FLIPL to account for LDDT of Government property when:

1. When negligence or misconduct is suspected, and the individual refuses to admit liability and refuses to make voluntary reimbursement or sign the DD 362.

2. The property lost, damaged, or destroyed involves a change of accountable officer's inventory and the outgoing accountable officer has not made voluntary reimbursement for the full value of the loss.

3. The amount of loss or damage exceeds an individual's monthly base pay, even if liability is admitted.

4. The damage to government quarters or furnishings exceeds one month's base pay.

5. The loss involves certain bulk petroleum products (exceeding allowable loss for the specific product, and is greater than $1,000).

6. A specified type of controlled item is lost or destroyed (requires AR 15-6 investigation).

7. A serial number changes for sensitive item (requires AR 15-6 investigation for changes of more than two characters).

8. Loss involves public funds or other negotiable instruments greater than $750, or any such loss and the individual does not voluntarily reimburse

the Army.

9. A higher authority or other DA regulation directs a financial liability investigation.

10. Loss or damage involves a government vehicle, the cost exceeds $1,000, and responsible party is not relieved of liability.

11. The loss resulted from fire, theft, or natural disaster.

12. Loss involves certain recoverable items (recoverability code of D, F, H, or L).

13. Losses due to combat where equipment is determined captured, abandoned or a physical loss (no residue).

14. Certain ammunition losses require an AR 15-6 investigation (See AR 190-11, Appendix E).

D. JOINT FINANCIAL LIABILITY INVESTIGATIONS.

1. Absent a loan agreement stating otherwise, the regulation of the Service that owns the property (property is located on that service's property account) is the appropriate regulation to apply.

2. The Army and Air Force have a reciprocal agreement outlined in paragraph 14-36 of AR 735-5 that explains the process for processing financial liability investigations that find Air Force personnel liable for the loss, damage, or destruction of Army property. Upon completion of the investigation, it should be forwarded to the appropriate Air Force approval authority for final action and possible collection.

3. For all other situations where non-Army personnel are found to be liable for the loss, damage, destruction or theft of Army property, the procedures of AR 735-5, paragraph 14-35 should be followed. Upon completion of the investigation, the respondent will be formally notified and requested to make payment in full. If after 60 days, the respondent fails to pay, the investigation should be sent to the respondent's servicing finance office for processing.

4. Financial liability investigations that find contractors liable should be processed IAW the applicable contract through the contracting office (See para. 14-13).

E. INITIATING THE FLIPL. (Paras. 13-7 & 13-8).

1. Timeline. Upon discovering the LDDT of Government property, the hand receipt holder, accountable officer, or person with most knowledge of the incident will initiate a FLIPL within:

a) Active Army: 15 calendar days.

b) Army Reserve and National Guard: 75 calendar days.

2. AR 15-6 Investigation. Certain losses (e.g., controlled items and weapons/ammunition identified in AR 190-11, App E) require an AR 15-6 investigation as the underlying investigative mechanism. A DD Form 200 (FLIPL) will be completed as the adjustment document, but the appointing or approving authority should not conduct a separate FLIPL. (See para. 13-25).

3. Initiation is complete when forwarded to the appointing/approving authority for appointment of a financial liability officer (investigating officer).

4. Government Property Damaged or Lost by Contractors (Para. 13-20). The approving authority will compile all documentation regarding the LDDT and forward to the contracting officer responsible for monitoring the contract, who will investigate the loss. (See para. 14-13).

F. APPROVING/APPOINTING AUTHORITY. (Para. 13-17).

1. The approving authority is an Army officer, or DA civilian employee, authorized to appoint a financial liability officer and to approve financial liability investigations “by authority of the Secretary of the Army.” The approving authority does not have to be a court-martial convening authority. The following personnel are approving authorities for FLIPLs.

a) For final loss or damage $5,000 or less, the first lieutenant colonel (O5) in the rating chain is the approval authority (if delegated in writing by an O6) except for equipment classified as communications security (COMSEC), sensitive items, or equipment containing personal identification information (PII).

b) For final loss or damage greater than $5,000 but less than $100,000, the first colonel (O6) or supervisory GS-15 in the rating chain is the approval authority.

c) For final loss or damage $100,000 or greater, or any final loss of a controlled item, the first general officer or senior executive service civilian in the rating chain is the approval authority.

2. The appointing authority is an officer or civilian employee designated by the approving authority with responsibility for appointing financial liability investigation investigating officers. The approving authority may designate, in writing, a Lieutenant Colonel (O5) (or major in a lieutenant colonel billet) or DOD civilian employee in the grade of GS-13 (or a GS-12 in a GS-13 billet) or above as an appointing authority.

3. Regardless of who initiates the financial liability investigation, it is processed through the chain of command of the individual responsible for the property at the time of the incident, provided the individual is subject to AR 735-5. AR 735-5, para. 13-5.

G. FINANCIAL LIABILITY OFFICER (FLO) QUALIFICATIONS. (Para. 13-27).

1. The financial liability officer can be an Army commissioned officer; warrant officer; or enlisted Soldier in the rank of Sergeant First Class (E-7) or higher; a civilian employee GS-07 or above; or a Wage Leader (WL) or Wage Supervisor (WS) employee. In joint commands or activities, any DOD commissioned or warrant officer or non-commissioned officer E-7 or above assigned to the activity or command can be the financial liability officer.

2. The FLO will be senior to the person subject to possible financial liability, except when impractical due to military exigencies.

H. CONDUCTING THE INVESTIGATION. (Long FLIPL) (Section VI).

1. The FLO's primary duty is the investigation. The FLO 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 JA.

2. Timeline. The FLO must complete the investigation within:

a) Active Army: 30 calendar days.

b) Army Reserve and National Guard: 85 calendar days.

3. Financial liability officers must:

a) Seek out all the facts that surround the LDDT and conduct a thorough and impartial investigation.

b) Physically examine damaged property and release it for turn-in or repair.

c) Interview and obtain statements from individuals with useful information.

d) Resolve conflicting statements and confirm self-serving statements.

e) Organize the investigation in accordance with the regulation. See para. 13-31.

f) Determine the cause and value of the LDDT of Government property

and determine if assessment of financial liability is warranted.

I. ASSESSMENT OF FINANCIAL LIABILITY. (Para. 13-29).

1. Individuals may be held financially liable for the 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.

2. Loss. Before a person may be held liable, the facts must show a loss to the Government occurred. The dollar amount of the LDDT will be the actual value at the time of the loss, minus any scrap or salvage value.

a) Types of Loss. There are two types of loss which can result in financial liability:

(1) Actual loss. Physical loss, damage or destruction of the property.

(2) Loss of accountability. Due to loss circumstances, it is impossible to determine if there has been actual physical loss, damage, or destruction because it is impossible to account for the property.

b) Fair market value (as determined by a “qualified technician”) is the preferred method of valuing the loss. (App. B, para. B-2a)

(1) Determine the item’s condition at the time of the loss or damage.

(2) Determine a price value for similar property in similar condition sold in the commercial market within the last 6 months.

c) Depreciation.

(1) Least preferred method of determining the loss to the government. (App. B, para. B-8)

(2) Compute charges depending on the type of equipment according to App. B, para. B-2b.

3. Responsibility. The type of responsibility a person has for property determines the obligations incurred by that person for the property. The type of obligation a person has toward property is relevant when determining whether a person was negligent. There must be a finding of either negligence or willful misconduct before an individual may be held liable.

a) Command Responsibility.

(1) The commander has an obligation to insure proper use, care,

custody, and safekeeping of government property within his or her command.

(2) Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at any level.

b) Supervisory Responsibility.

(1) The obligation of a supervisor for the proper use, care, and safekeeping of government property issued to, or used by, subordinates. It is inherent in all supervisory positions and not contingent upon signed receipts or responsibility statements. It arises because of assignment to a specific position and includes:

(2) Providing proper guidance and direction;

(3) Enforcing all security, safety, and accounting requirements; and

(4) Maintaining a supervisory climate that will facilitate and ensure the proper care and use of government property.

c) Direct Responsibility.

(1) The obligation to ensure the proper use, care, custody, and safekeeping of all government property for which the person has receipted.

(2) Direct responsibility is closely related to custodial responsibility (discussed below).

d) Custodial Responsibility.

(1) An individual’s obligation regarding property in storage awaiting issue or turn-in to exercise reasonable and prudent actions to properly care for and ensure property custody and safekeeping of the property.

(2) Who has custodial responsibility? A supply sergeant, supply custodian, supply clerk, or warehouse person who is rated by and answerable directly to the accountable officer or the individual having direct responsibility for the property.

(3) Responsibilities include:

(a) Ensuring the security of all property stored within the supply room and storage annexes belonging to the supply room or SSA is adequate.

(b) Observing subordinates to ensure they properly care for and safeguard property.

(c) Enforcing security, safety and accounting requirements.

(d) If unable to enforce any of these, reporting the problems to their immediate supervisor.

e. Personal Responsibility. An individual's obligations to properly use, care, and keep safe government property in their possession, with or without a receipt.

4. Culpability (negligence or willful misconduct). Before a person can be held liable, the facts must show he or she acted negligently or engaged in willful misconduct.

a) Simple negligence. The absence of due care, by act or omission of a person which lacks that degree of care for the property that a reasonably prudent person would have taken under similar circumstances, to avoid the LDDT.

(1) Remember, a reasonably prudent person is an average person, not a perfect person.

(2) The IO should consider what could be expected of the person considering their age, experience, and special qualifications? The IO should also consider:

(a) The type of responsibility involved.

(b) The type and nature of the property. More complex or sensitive property normally requires a greater degree of care.

(c) The nature, complexity, level of danger, or urgency of the activity ongoing at the time of the LDDT of the property.

(3) Examples of simple negligence.

(a) Failure to do required maintenance checks.

(b) Leaving personally assigned equipment in the trunk of a personal vehicle.

(c) Driving too fast for road or weather conditions.

(d) Failing to maintain proper hand receipts.

b) Gross negligence. An extreme departure from due care resulting from

an act or omission of a person accountable or responsible for Government property which falls far short of the degree of care for the property a reasonably prudent person would have taken under similar circumstances. It is accompanied by a reckless, deliberate, or wanton disregard for the foreseeable loss or damage to the property.

(1) Reckless, deliberate, or wanton: These elements may be expressed or implied. These elements do not include thoughtlessness, inadvertence, or errors in judgement

(2) Foreseeable consequences: Does not require actual knowledge of actual results. The Soldier or Civilian does not need to foresee the particular loss or damage that occurs, but must foresee that some loss or damage of a general nature may occur.

c) Willful misconduct—any intentional wrongful or unlawful act.

(1) Willfulness can be express or implied and includes violations of law and regulations such as theft or misappropriation of government property. However, a violation of a law or regulation is not negligence per se.

(2) Examples of willful misconduct:

(a) 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.

(b) Soldier steals a self-propelled howitzer, but he does not know how to operate it. Accordingly, his joyride around post results in damage to several buildings.

5. Proximate cause. Before a person can be held liable, the facts must clearly show 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.

a) Probable cause is 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.

b) The IO should use common sense and good judgment to determine probable cause.

c) Examples of proximate cause.

(1) Soldier driving a vehicle fails to stop at a stop sign and strikes another vehicle after failing to look. The proximate cause of the damage to the vehicle was the Soldier's failure to stop and look.

(2) Soldier A illegally parks his vehicle in a no parking zone. Soldier B backs into A's vehicle. B did not check for obstructions to the rear of his vehicle. A's misconduct is not the proximate cause of the damage. Instead, B's negligent driving is the proximate cause.

d) An independent intervening cause is an act that interrupts the original flow of events or consequences of the original negligence. It may include an act of God, criminal misconduct, or negligence. In the regulatory definition of proximate causation, an intervening cause would be the "new cause" that breaks the natural and continuous sequence of events.

J. CONCLUDING THE INVESTIGATION.

1. Liability not recommended by the financial liability officer (Para. 13-33). If financial liability is not recommended, the investigation is forwarded through the appointing authority, if any, to the approving authority for action.

a) If the approving authority concurs and does not assess liability, the investigation is complete.

b) If the approving authority does not agree with the FLO's determination that liability should not be assessed and the approving authority independently decides to assess liability, the individual against whom liability will be imposed (respondent) must be given notice and an opportunity to rebut the decision (same procedure as if the financial liability officer initially recommended liability).

2. Liability recommended by the FLO. (Para. 13-34 & 13-35). If financial liability is recommended against an individual, the individual becomes a respondent. Respondents have certain rights.

a) The FLO will notify the respondent by memorandum of the proposed recommendation of financial responsibility. (See fig 13-13). The notification includes:

(1) The right to inspect and copy the report of investigation and Army records relating to the debt. A copy of the investigation is normally sent with the notification.

(2) The right to obtain free legal advice (military and DA civilians) from the servicing legal office.

(3) The right to submit a statement and other evidence in rebuttal to the recommendation.

(4) Time limits for submitting rebuttal evidence to the FLO are as follows.

(a) 7 calendar days – from the date of hand-delivered receipt.

(b) 15 calendar days – when respondent is unavailable, but in the same country, and the investigation is mailed or emailed with delivery receipt. If sent via email, the financial liability officer will ensure sent, delivered, and read verification is applied. All verification emails will be attached to the DD Form 200 as exhibits.

(c) 30 calendar days – when respondent is unavailable and in a different country and the investigation is mailed or emailed to AKO.

b) The FLO must consider the respondent's rebuttal, even if received after the submission deadline. Regardless of whether the financial liability officer changes the recommendation, the investigation is forwarded through the appointing authority, if any, to the approving authority for decision.

c) The approving authority is not bound by the recommendation of the FLO. The approving authority may decide not to impose liability or to impose liability.

d) Again, if the FLO 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. See *supra* paragraph J1, above.

3. Approving authority decides to impose liability.

a) The approval authority must notify the respondent of his or her decision to impose liability and that collection efforts will commence in 30 days (NOTE: ARNG affords 60 days) from the date delivered or mailed. In the memorandum the approval authority must also notify the respondent of the following rights:

(1) The right to inspect and copy the file.

(2) The right to legal advice from the local legal assistance office.

(3) The right to request reconsideration based on legal error.

(4) The right to a hearing (for DOD civilians only).

(5) The right to request remission of indebtedness. (AR 735-5, para. 13-42 and AR 600-4). Remission requests are only appropriate to avoid extreme financial hardship. Only unpaid portions can be remitted. Respondents must request reconsideration before submitting requests for remission. NOTE: although AR 735-5 repeatedly states that remission is only an option for enlisted personnel, this is no longer the case IAW updates to AR 600-4.

(6) The right to request extension of collection time.

(7) The right to petition Army Board for the Correction of Military Records (ABCMR) IAW AR 15-185 if the assessment of financial liability was unjust. Such petitions can only be made after appeal authority acts on request for reconsideration (see below).

(8) Civilian employees may avail themselves of the grievance/arbitration procedures.

b) Collection efforts will be temporarily halted if a Respondent requests reconsideration, a hearing, or remission or cancellation of debt. Such actions stop all collection actions pending outcome of the Respondent's request.

4. Mandatory legal review. (Para. 13-39). Before the approving authority approves a recommendation of liability, a JA must provide a written opinion as to the legal sufficiency of the evidence and the propriety of the findings and recommendations. The legal reviews should be completed within 10 days (80 days USAR and 30 days ARNG). In practice, the legal review should be conducted prior to review and decision by the approval authority. The approving authority may not assess financial liability against individuals for LDDT if the findings and/or recommendations are legally insufficient.

K. DECISION BY APPROVING AUTHORITY WITHOUT INVESTIGATION (Short FLIPL). (Paras. 13-22 & 13-23)

1. When initial information indicates there was no negligence involved in the LDDT of Government property, the approving authority may relieve all individuals from liability.

2. When initial information indicates that negligence or willful misconduct was the proximate cause of the LDDT of Government property, the approving authority may assess liability by:

a) Notifying the respondent of the intent to hold him/her liable. Notification must include all the facts upon which the decision is based and must include notice of all the respondent's rights as outlined above. The respondent has the right to submit a rebuttal.

b) The approving official must consider the rebuttal, if one is submitted, prior to making a final determination as to liability.

c) The information contained in the DD 200, and any submitted rebuttal, must receive a legal review.

d) Upon receipt of the legal opinion, the approving authority makes a final decision and notifies the respondent accordingly.

L. REQUESTING RELIEF FROM LIABILITY.

1. Requests for reconsideration and appeal. (Paras. 13-43 and 13-44).

a) Given inconsistencies in the regulation, Soldiers should be given 30 days to submit a request for reconsideration. The sample notification of liability to a respondent (fig. 13-15) states that such a request must be made in 30 days. However, the chart documenting time constraints for military personnel (fig. 13-17) lists a 20-day suspense. Paragraph 13-44, which deals with reconsideration requests is silent on this point.

b) Requests for reconsideration can only be based on legal error.

c) Requests are submitted to approving authority. If approving authority does not reverse decision, the request becomes an appeal, which is forwarded to the appeal authority by the approving authority.

d) The appeal authority is the next higher commander or DA civilian in the chain of command or supervision. The decision of the appeal authority is final.

e) The investigation must receive a legal review by the appeal authority legal advisor prior to appeal authority action.

f) If an appeal is unsuccessful, individuals held liable may also appeal to the ABCMR (AR 15-185) or apply for remission or cancellation of debt (AR 600-4).

2. Reopening financial liability investigations. (Para. 13-49).

a) Reopening a FLIPL is an administrative procedure, and not an appeal.

b) Authority to reopen rests with the approval authority, or at the direction

of the appeal authority.

c) May occur:

(1) As part of a request for reconsideration, or on appeal of the assessment of financial liability.

(2) When a response to the financial liability officer's original notification from an individual recommended for assessment of financial liability is received after the approving authority has approved financial liability.

(3) When a subordinate headquarters recommends reopening based upon new evidence.

(4) When the property is recovered.

(5) When the approving authority becomes aware that an injustice (against either the Government or the individual found liable) has occurred.

3. The approval authority may reduce or waive liability, in whole or in part, if such action is deemed warranted by, "the nature and circumstances" of the loss, damage, or destruction of property (Paras. 13-40(d)(3) and 13-41(b).

M. LIMITS ON FINANCIAL LIABILITY. (Para. 13-41).

1. General rule is that an individual will normally not be charged more than one month's base pay.

a) Charge is based upon the Soldier's base pay at the time of the loss.

b) For ARNG and USAR personnel, base pay is the amount they would receive if they were on active duty.

c) For civilian employees it is 1/12 of their annual salary.

2. Exceptions to the general rule (Para. 13-41a). When negligence or willful misconduct are shown to be the proximate cause for a loss, the following individuals/entities will be charged the full amount of the government's loss:

a) Accountable officers;

b) Contractors and contract employees:

c) Non-appropriated fund activities;

d) Persons losing public funds;

e) Soldiers losing personal arms or equipment (PA&E);

f) Persons, who lose, damage, or destroy government quarters, and/or provided furnishings and equipment for use in quarters, through gross negligence or willful misconduct.

3. Collective financial liability: Two or more persons may be held liable for the same loss. (Para. 12-2).

a) There is no comparative negligence.

b) Financial loss is apportioned according to AR 735-5, Table 12-4. Each respondent pays a percentage of the loss in accordance with their percentage of pay when all respondents' pay is totaled.

c) If one of the collective liability respondents is not federally employed, divide the total amount of the loss by the total number of respondents. Each respondent is liable for that amount or their monthly pay, whichever is less.

N. INVOLUNTARY WITHHOLDING OF CURRENT PAY. (Para. 13-42).

1. Members of the armed forces may have charges involuntarily withheld from their Federal pay. This also applies to former members of the Army and civilian employees who have retired prior to a decision being made on the assessment of financial liability. Payment will be taken from retirement pay unless the retiree makes other arrangements for payment.

2. Involuntary withholding for civilian employees. Withholdings will be by salary or administrative offset for civilian employees.

O. TOTAL PROCESSING TIME. Total processing time is computed by subtracting the approval date from the initiation date minus time used to notify respondent of rights. Under normal circumstances these time constraints are as follows:

1. The Active Army Component: 75 calendar days.

2. The U.S. Army Reserve/ Army National Guard: 240 calendar days.

3. Contracting Officers: 120 calendar days.

4. Appendix D, paragraph D-4b(3)(a) outlines a full break down of processing times for active army.

IX. INSPECTOR GENERAL INVESTIGATIONS.

A. AR 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES.

1. Applicability. Applies to the Active Army, the Army National Guard, and the U.S. Army Reserve. It also applies to Department of the Army civilian employees and non-appropriated fund employees.

2. Purpose. Prescribes policy and mandated procedures concerning the mission and duties of The Inspector General (TIG). Prescribes duties, missions, standards, and requirements for inspectors general (IGs) throughout the Army. Prescribes responsibilities for commanders; State Adjutants General (AGs); and heads of agencies, activities, centers, and installations for the support of IG activities.

3. The four IG functions. Inspector Generals serve their commanders and their commands by executing the four IG functions: (1) teaching and training, (2) inspections, (3) assistance, and (4) investigations for the specific purpose of enhancing the command's readiness and warfighting capability.

B. THE INVESTIGATIVE FUNCTION. (Chapter 7). The primary purpose of IG investigations and investigative inquiries is to resolve allegations of impropriety efficiently and effectively by gathering evidence, evaluating the credibility of that evidence, analyzing that evidence in the context of identified standards, and packaging that analysis and subsequent conclusion in a well-written report. The standard of proof is preponderance of the evidence.

1. Investigative Inquiry. (most common) Informal fact-finding process into allegations, issues, or adverse conditions that are not significant in nature (as determined by the command IG or the directing authority) and when the potential for serious consequences (such as potential harm to a Soldier or negative impact on the Army's image) are not foreseen. Testimony is not required to be sworn or recorded. The conclusions of the investigative inquiry are reported using a Report of Investigative Inquiry (ROII).

2. IG Investigation. A formal, fact-finding examination by detailed IG into allegations, issues, or adverse conditions of a serious nature that provides the directing authority a sound basis for making decisions and taking action. Investigations involve the systematic collection and examination of evidence that consists of testimony recorded under oath; documents; and in some cases, physical evidence. Only the directing authority can authorize IG investigations using a written and signed directive. A written legal review is required. Verbal notification required of the commander/supervisor of the nature of the allegations against the subject/suspect, and verbal notification of the results to commander or supervisor. Should not contain recommendations for adverse action against suspect/subject. The conclusions of the investigation are reported using a ROI (Report of Investigation) for directing authority approval.

C. JURISDICTION.

1. IGs may investigate or conduct inquiries into:

a) Violations of policy, regulation, or law.

b) Mismanagement, unethical behavior, fraud, or misconduct.

2. IGs will not normally investigate or conduct inquiries into:

a) Allegations that, if true, would amount to serious criminal misconduct. (NOTE: Many allegations could be construed as dereliction of duty, violation of regulation, or conduct unbecoming. This does not preclude IG inquiry/investigation.)

b) Allegations where established means of address already exist to resolve the matter, unless a due process violation alleged.

c) Where the chain of command decides to address the allegations through a command investigation/inquiry.

d) Professional misconduct of an Army lawyer (military or civilian) or allegations of mismanagement by a supervisory Army lawyer (military or civilian).

e) Professional misconduct by an Army chaplain.

3. Directing Authority. A directing authority is an official who has authority to direct an IG investigation or inspection. At DA, directing authorities are the SA, the Under Secretary of the Army, the CSA, the VCSA, and TIG. Commanders or directors who are authorized IGs on their staffs may direct IG investigations and inspections within their commands.

a) A directing authority must approve all allegations substantiated by either an IG investigation or an IG investigative inquiry.

b) A directing authority may not delegate using his or her directing authority but may delegate in writing the approval authority to a deputy commander or director.

c) Although command and state IGs may direct IG investigative inquiries they are not considered directing authorities.

d) Only the Secretary of the Army, Under Secretary of the Army, CSA, VCSA, and TIG may authorize or direct an IG inquiry or investigation into allegations of improprieties or misconduct by general officers, promotable colonels, and civilian employees of SES or equivalent grade or position.

4. The IG Action Process IGs use the 7-step IGAP outlined in The Assistance and Investigations Guide to perform both investigations and investigative inquiries. (See AR 20-1, para. 6-1(d)).

   a) Receive the IG Action Request (IGAR).

   b) Conduct IG preliminary analysis.

   c) Initiate referrals and make initial notifications.

   d) IG fact finding.

   e) Make notification of results.

   f) Follow-up.

   g) Close the IGAR.

5. UNFAVORABLE INFORMATION

   a) If an ROI or ROII will contain unfavorable information about an individual, the individual must be notified and afforded an opportunity to comment on the unfavorable information before the ROI/ROII is finalized

   b) Inspector general records will not be used as the basis for adverse action against individuals, military or civilian, by directing authorities or commanders except when specifically authorized by the SA, the Under Secretary of the Army, the CSA, the VCSA, or TIG. If they are used as the basis for adverse action, the individual may be entitled to additional due process rights (opportunity to review the report and comment). (Para. 3-5a).

   c) Individuals under IG investigation will normally not be flagged. However, commanders will initiate flagging actions for individuals under a command investigation when the IG refers the allegation to the command. (Para 3-5c).

6. CONFIDENTIAL INFORMATION.

   a) Protecting the anonymity of units and individuals enhances the IG's reputation as a fair and impartial fact finder and trusted agent. The mission of the Army IG records and information release program is to balance the confidentiality of those seeking assistance with the needs of the Army and with due process concerns.

   b) All IG records and information belong to SECARMY. IGs maintain these records and safeguard this information on behalf of SECARMY. TIG, as SECARMY's designee, is the release authority of such

records.

c) All IGs have a duty to protect, to the maximum extent possible, the personal identify of a complainant, witness, or any other individual providing information to the IG.

d) The law provides redress to persons who suffer reprisal as a result of intentional or inadvertent release of IG communications to third parties. The degree of confidentiality and the specific information kept confidential may vary according to each of the IG functions. (10 USC §1034; DoDD 7050.06; AR 20-1, para. 1-13).

e) When a person seeks assistance from the IG, the IG must often reveal the person's identity to obtain the help needed to resolve the issue. The IG will inform the person of that necessity and the IG file case notes will reflect that notification. If the individual does not consent to release of identity, the IG may be unable to assist. The IG may disclose the complainant's identity to another IG, the local legal advisor, and/or the directing authority without the complainant's consent unless such disclosure is unnecessary or is prohibited during the course of the inquiry of investigation. (Para. 1-13e(3)).

4. RIGHTS AND EVIDENTIARY CONSIDERATIONS

a) Soldiers retain their Article 31 rights and civilians their 5th amendment rights. DA Civilians retain their Weingarten rights (5 USC § 7114 of labor union representation.

b) Inspector General investigators may not consider privileged communications, as recognized in MRE 502, 503, and 504 (lawyer-client, clergy, and husband- wife). (Para. 7-1h).

5. CONCLUDING THE INVESTIGATION OR INQUIRY. (Para. 7-2).

a) IG Review. Command IGs will ensure the directing authority is familiar with the ROI/ROII and the directing authority will approve all ROIs unless the deputy commander is designated in writing.

b) Legal review. Prior to approval, the command IG will forward the completed ROI/ROII to the supporting JA or command counsel to conduct a legal sufficiency review. Written legal reviews are required for all ROIs, ROIIs, or hotline completion reports that involve substantiated findings. Once the legal sufficiency review is complete, the command IG will forward the ROI to the directing authority for approval.

c) Approval or Disapproval in Whole or in Part. The directing authority or command IG will approve or disapprove the report in whole or in part. The command IG or directing authority will sign the report indicating

their approval/disapproval. If the directing authority disapproves the IG ROI, the IG must work with the directing authority to resolve the disapproval by conducting additional investigative actions as necessary in order to obtain approval. If the IG is unable to resolve the disapproval, the IG must contact the next higher IG or the Assistance Division. Once approved, the directing authority will take final action on approved portions that are within his or her authority and responsibility.

6. RELEASE OF IG RECORDS. (Chapter 3 and *supra* at para. IX(C)(6)).

a) Definition. An IG record is any written, recorded, or electronic media information gathered and/or produced by an IG. Inspector general records include, but are not limited to, any correspondence or documents received from a witness or a person requesting assistance; IG reports of inspection, inquiry, and investigation; IGNET or other computer automated data processing files or data; and DA Form 1559s when entries are made on either side. Inspector general records may contain documents that an IG did not prepare.

b) Unauthorized use or release of IG records can seriously compromise IG effectiveness as a trusted adviser to the commander and may breach IG confidentiality.

c) Individuals, commands, or agencies within DA having a need for IG records in the official performance of their duties may obtain a copy as a FOUO release. (Para. 3-4).

d) The Inspector General is the initial denial authority under the Freedom of Information Act, and the access and amendment refusal authority under the Privacy Act (Paras. 3-7 & 3-11).

7. WHISTLEBLOWER REPRISAL ALLEGATIONS. DODD 7050.06, MILITARY WHISTLEBLOWER PROTECTION; 10 USC § 1034

a) Whistleblower Protection Act. The purpose of this act is to encourage Soldiers to come forward in good faith with complaints of wrongdoing that need to be addressed and to prove such Soldiers protection for doing so. Inspector Generals within military departments are authorized to conduct investigations for reprisal allegations presented directly to them by Servicemembers.

b) Whistleblower Reprisal. Defined as taking (or threatening to take) an unfavorable personnel action or withholding (or threatening to withhold) a favorable personnel action with respect to a member of the armed forces for making or preparing to make, or being perceived as making or preparing to make, a (lawful) protected communication. Lawful communications are those communications made to an IG; Member of Congress (MC); member of a DOD audit, inspection, or

investigation organization; law enforcement organization; or any other person or organization (including any person or organization in the chain of command starting at the immediate supervisor level) designated under regulations or other established administrative procedures (such as the equal opportunity advisor or safety officer) to receive such communications.

c) Lawful Communication. Lawful communication encompasses information that the employee reasonably believes provides evidence of a violation of law or regulation, including a law or regulation 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.

d) Reporting Requirements. Allegations of reprisal against Soldiers for making a protected communications require reporting to the DODIG and DAIG within five working days (Para. 1-4b(5)(g) and Table D-1).

e) Timeliness. An allegation of whistleblower reprisal may be untimely at the DODIG's discretion if the allegation is made more than 1 year after the Soldier became aware of an adverse or unfavorable personnel action that the Soldier believes was taken in reprisal.

f) Anonymity. For allegations of statutory whistleblower reprisal, the complainant must provide his or her identity; IGs will not grant anonymity in these cases.

X. CONSCIENTIOUS OBJECTION

A. DODI 1300.06, CONSCIENTIOUS OBJECTORS; AR 600-43, CONSCIENTIOUS OBJECTION

1. Applicability. DODI 1300.06 applies to all Military Services; AR 600-43 applies to the Active Army, the Army National Guard/Army National Guard of the United, and the U.S. Army Reserve.

2. Purpose. Sets forth policy, criteria, responsibilities, and procedures to classify and dispose of military personnel who claim conscientious objection to participation in war in any form or to the bearing of arms.

3. Function of Investigation. Ensure the application contains all required information to allow the decision authority to make an appropriate decision regarding the validity of an applicant's claim of conscientious objection.

B. BACKGROUND. The conscientious objector program was first required by the selective service system, but the DoD retained the program for the all-volunteer military. “Nothing contained in this title [Military Selective Service Act] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.” 50 USC App. § 456(j).

C. DEFINITIONS.

1. Conscientious objection: A firm, fixed, and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and/or belief. Includes both 1–O and 1–A–O conscientious objectors.

   a) Class 1–O conscientious objector: A member who, by reason of conscientious objection, sincerely objects to participation of any kind in war in any form.

   b) Class 1–A–O conscientious objector: A member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions are such as to permit military service in a noncombatant status.

2. War in any form: A person who desires to choose the war in which he or she will participate is not a conscientious objector under the regulation. His or her objection must be to all wars rather than a specific war. However, a belief in a theocratic or spiritual war between the powers of good and evil does not constitute a willingness to participate in “war” within the meaning of this regulation.

3. Religious training and belief: Belief in an external power or “being” or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being. The external power or “being” need not be one that has found expression in either religious or societal traditions. However, it should sincerely occupy a place of equal or greater value in the life of its possessor. Deeply held moral or ethical beliefs should be valued with strength and devotion of traditional religious conviction. “Religious training and belief” does not include a belief that rests solely upon consideration of policy, pragmatism, expediency, or political views.

D. PROCESS.

1. Application. An applicant initiates the process by requesting CO status. The burden of establishing a claim of conscientious objection as a ground for separation or assignment to non-combatant training and service is on the applicant. The applicant must show by **clear and convincing** evidence that nature of their claim comes within definition of conscientious

objection and that their beliefs are firm, fixed, sincere, and deeply held, and whether those beliefs govern the claimant's actions in word and deed.

a) Army applicants submit their application on a DA Form 4187 (Personnel Action) to their company commander. Applications from active duty personnel will be processed and forwarded to ARBA within 90 days from the date submitted. If processing time exceeds 90 days, the GCMCA will state the reasons for the delay and add these reasons as an enclosure to the record.

b) Applications require detailed information regarding (1) general information, (2) training and belief, (3) and participation in organizations, as outlined in Appendix B of AR 600-43.

2. Counseling. Upon receipt of the application, the company commander must expeditiously process the application and ensure the applicant is properly counseled in writing regarding the following:

a) Privacy Act provisions (5 USC § 552a). (Fig. 2-2).

b) Department of Veterans' Affairs (DVA) benefits (38 USC § 5303). Service members who refuse to perform military service or wear uniform who are granted CO status (1-0) will lose DVA benefits for the period of Service from which they are discharged/dismissed. (Fig. 2-3).

c) Consequences concerning enlistment, reenlistment, or extension of enlistment. (Fig. 2-1).

3. Interviews. The company commander must arrange for the applicant to be interviewed by a military chaplain and psychiatrist. (Para. 2-2f).

a) Military chaplain. (Para. 2-3a).

(1) Interview is not privileged and must *not* be conducted by a chaplain who has an existing confidential relationship with the applicant.

(2) The interviewing chaplain will submit a detailed report to the commander, which will include the nature and basis for applicant's claim; opinions on the applicant's source of beliefs; comment on the applicant's sincerity and depth of conviction; appropriate comments as to applicant's demeanor and lifestyle; specific reasons for chaplain's conclusions; and, explanation of circumstances if the applicant refuses to be interviewed.

(3) Chaplains do not recommend approval or disapproval of conscientious objector applications.

b) Psychiatrist (or other medical officer if not available). (Para. 2-3b).

(1) Psychiatrist provides mental status examination report indicating presence or absence of any psychiatric disorder that warrants treatment or disposition through medical channels, or such a personality disorder as to warrant recommendation for appropriate administrative action. If the applicant refuses mental evaluation or is otherwise uncooperative during the interview, that fact will be included in the report.

(2) Psychiatrists do not recommend approval or disapproval of applications.

4. Investigation. The initial application, counseling statements, and interview reports become the application packet and are forwarded through the chain of command. The commander exercising special court-martial convening authority over the applicant must then convene an investigation.

a) Investigating Officer (IO). Must be a Chief Warrant Officer in the grade of WO-3 or higher or an officer in the grade of O-3 or higher, senior to applicant. Cannot be in applicant's chain of command. Should not be from the same company, but can be from the same battalion.

b) Review and Legal advice. The IO will review the application packet, study applicable Army Regulations, obtain necessary legal advice, and seek information from commanders/supervisors/records/other sources that may contribute to final recommendations prior to submitting a written report.

c) The Hearing. The IO is required to hold a hearing on the application though the applicant may waive appearance in writing. (Fig. 2-5).

(1) Purpose of the hearing is to give an applicant the opportunity to present evidence, enable the IO to ascertain and assemble all relevant facts, and to create a comprehensive record upon which an informed decision can be made.

(2) An applicant must acknowledge in writing the applicant's understanding of the nature of the hearing. Hearing is informal and is not adversarial. Military Rules of Evidence do not apply, except that any oral testimony provided shall be under oath. Failure or refusal by the applicant to submit to questioning under oath or affirmation may be considered by the IO in making recommendations and in evaluating the applicant's claim. Statements obtained from persons not present at the hearing need not be notarized or sworn. Any relevant material may be considered. An applicant may present evidence and cross examine witnesses. An applicant may be represented by

counsel at no expense to the Government. A verbatim record is not required. Witness testimony will be summarized by the IO, and the IO must authenticate the record.

5. The Report. (Para. 2-5). At the end of the investigation, the IO must prepare a report. Report includes all documents considered; summaries of witness testimony; executed statement of understanding; executed statement of waiver (if applicable); statement of IO conclusions, and recommendations for disposition of the case.

   a) Conclusions must be made WRT (1) basis of professed conscientious objection, (2) time period in which belief became fixed; (3) whether the belief constitutes 1-O or 1-A-O, and (4) applicant sincerity.

   b) Recommendations. Recommendations must be backed by rationale. Actions recommended will be limited to one of three things:

      (1) Denial of any classification as a CO;

      (2) Classification as 1-A-O; or

      (3) Classification of 1-O.

         (a) In 1-O application cases, the IO will not recommend a classification of 1-A-O unless the applicant has indicated a willingness to remain on active duty in a noncombat role.

         (b) If such an indication exists, the IO should obtain a written statement from the applicant that affirms the willingness to continue to serve.

6. Rebuttal rights. A copy of the case record is provided to the applicant as the record is forwarded to the appointing authority (SPCMCA). Applicant has 10 days to submit rebuttal.

7. Case review. The entire file, with rebuttal, is forwarded through the chain of command, to the general court-martial convening authority. Each commander provides a recommendation as to disposition. (AR 600-43, para. 2-6).

8. Legal review. Prior to the GCMCA making a determination, the entire record will be reviewed by the GCMCA's SJA. The SJA will ensure that the procedural safeguards of the regulation have been afforded to the applicant. The SJA must make a recommendation for disposition and include their supporting rationale. A "legally sufficient" opinion does not satisfy this requirement.

9. Decision authority. (AR 600-43) Army GCMCAs may approve applications for 1-A-O status (noncombatant CO). The DA

Conscientious Objector Review Board (DACORB) will make final determinations on all applications requesting 1-O status (discharge) and those 1-A-O applications not approved by the GCMCA.

10. Time Limitations. Under normal circumstances active duty and reserve component applications will be processed and forwarded to HQDA within 90 days and 180 days, respectively. GCMCAs will annotate reasons for any delays, and will add these reasons as an enclosure to the record. (AR 600-43, para. 2-1).

E. USE, ASSIGNMENT, AND TRAINING. (AR 600-43, para. 2-10). To the extent practicable, applicants will be retained in their unit and assigned duties providing minimum practicable conflict with their asserted beliefs pending final disposition of an application; reassignment orders received after application submitted will be delayed until final determination; trainees will not be required to train with weapons. (Para. 2-10). Soldiers scheduled for deployment may be ordered to deploy. If an application has been forwarded to the DACORB, the GCMCA may excuse the Soldier from the deployment, pending decision.

XI. BOARD OF INQUIRY TO DETERMINE STATUS OF PERSONNEL MISSING AS A RESULT OF HOSTILE ACTION.

A. DODI 2310.05, ACCOUNTING FOR MISSING PERSONS—BOARDS OF INQUIRY; AR 638-8, ARMY CASUALTY PROGRAM.

1. Applicability. DODI 2310.05, the Military Services; AR 638-8, the Active Army, the Army National Guard, and the U.S. Army Reserve.

2. Purpose. Prescribes the policies and mandated operating tasks, responsibilities, and procedures for casualty operations functions of the military personnel system.

3. Function of an AR 638-8 (Chapter 11) Board of Inquiry. To inquire into and determine the whereabouts and status of personnel presumed to be missing as a result of hostile action. Inquiry required pursuant to the Missing Persons Act. Implements requirements of DODI 2310.05.

B. BACKGROUND.

1. The Missing Persons Act. Congress first enacted the Missing Persons Act in 1942 (current version codified at 37 USC §§ 551-59 and 5 USC §§ 5561-69). The Act provided for payment of pay and allowances to missing service members, and it was not intended to be a law to account for missing persons.

2. DOD Personnel Missing as a Result of Hostile Action. In 1996, Congress passed legislation to account for persons missing as a result of hostile

action (current version codified at 10 USC §§ 1501-1513). Among other provisions, the law and subsequent DOD instruction provide certain family members with due process rights.

C. APPLICABILITY OF THE MISSING PERSONS ACT. The statutory provisions on accounting for personnel missing as a result of hostile action apply to the following.

1. Members of the armed forces on active duty, or in the Reserve component performing official duties:

a) Who become involuntarily absent as a result of a hostile action or under circumstances suggesting that the involuntary absence is a result of a hostile action; and

b) Whose status is undetermined or who is unaccounted for.

2. Any other person who is a citizen of the U.S. and a civilian officer or employee of the DOD or an employee of a contractor of the DoD, as determined by the Undersecretary of Defense for Policy:

a) Who serves in direct support of, or accompanies, the armed forces in the field under orders and becomes involuntarily absent as a result of a hostile action or under circumstances suggesting that the involuntary absence is a result of a hostile action; and

b) Whose status is undetermined or who is unaccounted for.

D. DEFINITIONS.

1. Missing Status. The status of a missing person who is determined to be absent in any of the following categories.

a) Missing. A person who is not present at his or her duty location due to apparent involuntary reasons and whose location is unknown.

b) Missing in Action. The involuntary absence of a person whose location is unknown; and (1) the absence is a result of a hostile action; or, (2) the absence is under circumstances suggesting it is a result of a hostile action.

c) Interned. Any person definitely known to have been taken into custody of a nonbelligerent foreign power as the result of and for reasons arising out of any armed conflict in which the Armed Forces of the United States are engaged.

d) Captured. A person who has been seized as the result of action of an unfriendly military or paramilitary force in a foreign country. Per AR 638-8, “captured” is a sub-category of “missing.”

e) Casualty. Any person who is lost to the organization by having been declared, dead, DUSTWUN, EAWUN, missing, injured, or ill.

f) Detained. A person who is prevented from proceeding or is restrained in custody for alleged violation of international law or other reasons claimed by the government or group under which the person is being held. Per AR 638-8, "detained" is a category of "missing."

2. Accounted For. With respect to a person in a missing status:

a) The person is returned to U.S. control alive;

b) The person's remains are recovered and, if not identifiable through visual means, are identified as those of the missing person by a practitioner of an appropriate forensic science; or

c) Credible evidence exists to support another determination of the person's status (such as when a person's remains have been destroyed and are, thus, unrecoverable).

E. PROCEDURES REGARDING MISSING PERSONS.

1. Preliminary Assessment (AR 638-8, para. 11-3; 10 USC § 1502; DODI 2310.05, Encl. 3).

a) When an individual is unaccounted for, the immediate commander must conduct a basic inquiry to determine the individual's whereabouts. If after 24 hours, the individual's whereabouts are still unknown, and it appears that the absence is involuntary, the commander must make a preliminary assessment of the circumstances via an "informal investigation" under the provisions of AR 15-6. Use of DD Form 2812 (Commander's Preliminary Assessment and Recommendation Regarding Missing Person) may also be required.

b) The commander must also contact the Casualty Assistance Center (CAC) which will coordinate with the Casualty and Mortuary Affairs Operation Division (CMAOD) to place the person in an interim status called "Duty Status-Whereabouts Unknown" or "DUSTWUN" or "Excused Absence Whereabouts Unknown" or "EAWUN." If an involuntary absence cannot be determined by the facts, the individual should be listed as AWOL rather than DUSTWUN or EAWUN.[1]

c) The preliminary assessment must be concluded within 10 days of the incident. If the commander concludes the person is missing, the

[1] For the most updated guidance on classifying Soldiers as absent-unknown, AWOL, and DUSTWUN, and on processing Soldiers for desertion, see Army Directive 2020-16, Determination and Reporting of Missing, Absent-Unknown, Absent Without Leave, and Duty Status-Whereabouts Unknown Soldiers, 17NOV20.

commander must recommend the person be placed in a missing status and forward the investigation through the CAC to the CMAOD.

d) Upon receiving the commander's initial assessment and recommendation, the Secretary of the Army or his or her designee may appoint an initial board of inquiry.

2. Initial Board of Inquiry. (Para. 11-6; 10 USC § 1503; DODI 2310.05, Encl. 4).

a) Secretary must review the preliminary assessment and, not later than 10 calendar days after receipt, appoint a board to conduct an inquiry into the whereabouts and status of the person.

b) An initial board of inquiry is not always required. For example, if the evidence regarding a covered person may be received through news coverage or discovered through diplomatic channels, it may be sufficient to enable the Secretary to make a status determination. Receipt of additional evidence could require the Secretary to appoint an initial board, such as cessation of hostilities without the return of the person.

c) Per DODI 2310.05, the Secretary concerned may appoint a single board to inquire into the whereabouts and status of two or more persons where it appears that their absence is factually related.

d) Composition of the Board.

(1) The board must consist of at least one person who has experience with, and understanding of, military operations or activities similar to the operation or activity in which the person disappeared. The person must be:

(a) A field grade officer, in the case of an inquiry regarding a service member;

(b) A GS-13 or above, in the case of an inquiry regarding a civilian employee of the DOD or a DOD contractor; or

(c) At least one military officer and a civilian, in the case of an inquiry regarding one or more service members and one or more civilian DOD employees or DOD contractors. The ratio of service members to civilians should be roughly proportional to the number of service members and/or civilians subject to the board of inquiry.

(2) Legal Advisor.

(a) The Secretary (or designee) must appoint a JA to the Board, or appoint an attorney who has expertise in the law relating to missing persons, the determination of death of such persons, and the rights of family members and dependents of such persons.

(b) Duties of the legal advisor include representing the interests of the United States, advising the Board on questions of law or procedure pertaining to the Board, instructing the Board on governing statutes and directives, and monitoring (observing) the deliberations of the Board.

e) Duties of the Board. (Para. 11-9). The Board will:

(1) Close the proceedings to the public, including the PNOK, other immediate family members, and any previously designated person of the missing person (i.e., a person designated by the missing person to receive information on the whereabouts and status of the missing person).

(2) Collect, record, and safeguard all facts, documents, statements, photographs, tapes, messages, maps, sketches, reports, and other information (classified and unclassified) relating to the whereabouts and status of each person the inquiry covers.

(3) Gather information relating to actions taken to find the persons, including any evidence of the whereabouts and status arising from such actions.

(4) Arrive at findings and recommendations by a majority vote and ensure that a preponderance of the evidence supports its findings.

(5) Maintain a record of proceedings and submit, to the SECARMY or designee, a complete report using a DD 2811 and allied documents outlined in regulation.

f) Counsel for Missing Person. (DoDI 2310.05, encl. 4, para. E4.5.3.). Each person named in the inquiry is entitled to a counsel. If the absence or missing status of two or more persons may be factually related, one counsel may represent all such persons, unless a conflict results.

(1) The missing person’s counsel represents the interests of the missing person and not those of any member of the person’s family or other interested parties.

(2) The missing person’s counsel must have access to all facts and

evidence the Board considers;

(3) Observe all official activities of the Board during the proceedings;

(4) May questions witnesses before the Board; and

(5) Monitor (observe) the Board deliberations.

g) Independent Review. The missing person's counsel must conduct an independent review of the Board's report. This review is made an official part of the Board's record and accompanies the report to the Secretary for final decision.

h) Board Report.

(1) The Board must submit a report to the SA within 30 calendar days of its appointment. The report must include:

(a) A discussion of the facts and evidence the Board considered;

(b) Recommendation with respect to each person the report covers;

(c) Disclosure of whether the Board reviewed classified documents and information or used them otherwise in forming its recommendation;

(d) The missing person's counsel's independent review of the Board's report; and

(e) Legal review of the Board's report.

(2) An initial board of inquiry may not recommend that a person be declared dead unless:

(a) Credible evidence exists to suggest that the person is dead;

(b) The U.S. possesses no credible evidence that suggests the person is alive; and

(c) Representatives of the U.S. have:

(i) Completely searched the area where the person was last seen (unless, after making a good faith effort to obtain access to the area, the representatives are not

granted access); and

(ii) Examined the records of the government or entity having control over the area where the person was last seen (unless, after making a good faith effort to obtain access to the records, the representatives are not granted access).

(3) If the Board recommends that a missing person be declared dead, the Board must include in their report: a detailed description of the location where the death occurred; a statement of the date on which the death occurred; a description of the location of the body, if recovered; and if the body was recovered and is not identifiable through visual means, a certification by a forensic pathologist that the body is that of the missing person.

(4) Disclosure of Report. The report may not be made public, except to the PNOK, other members of the immediate family, and any other previously designated person, until one year after the date on which the report is submitted. Classified portions may not be made available to the public or the NOK.

3. Secretary Determination.

a) The Secretary must review the report within 30 calendar days of receipt and determine whether the report is complete and free of administrative error. If incomplete or not free of administrative error, the Secretary may return the report to the Board for further action.

b) If the Secretary determines the report is complete and free of administrative error, he or she will determine the status of the missing person(s), including whether the person(s) shall be declared:

(1) Missing;

(2) Deserted;

(3) Absent without leave; or

(4) Dead.

4. Report to Family Members and Other Interested Persons. No later than 30 calendar days after the date the Secretary determines status; the Secretary must provide the PNOK, immediate family, and other previously designated person:

a) An unclassified summary of the unit commander’s preliminary assessment and recommendation and the Board report (including the names of the members);

b) Notice that the U.S. will conduct a subsequent inquiry into the whereabouts and status of the missing person(s) upon the earlier of:

(1) On or about one year after the date of the first official notice of the disappearance; or

(2) Information becomes available that may result in a change in status.

5. Subsequent Boards of Inquiry. (Para. 11-7; 10 USC § 1504; DODI 2310.05, Encl. 5.)

a) Requirement to Conduct Subsequent Boards of Inquiry.

(1) If, during the year following the date of the transmission of a commander's initial report credible information becomes available that may result in a change of the person's status as determined by the Secretary based upon the recommendation of an initial board of inquiry, then the Secretary must appoint a subsequent board of inquiry to inquire into the information.

(2) In the absence of such information, the Secretary must appoint a subsequent Board of inquiry to inquire into the whereabouts and status of a missing person on or about one year after the date of the transmission of a commander's initial report on the person. One board may be appointed for two or more persons if their absence or missing status appears to be factually related.

b) Duties of the Board.

(1) The Board must review the commander's preliminary assessment and recommendation and the report of the initial board of inquiry.

(2) The Board must also collect and evaluate any document, fact, or other evidence with respect to the whereabouts and status of the person that has become available since the determination of the status of the person during the initial Board process. Considering the evidence, the Board must determine, by a preponderance of the evidence:

(a) Whether the status of the person should be continued or changed; or

(b) If appropriate, whether the person is accounted for (such as when credible evidence exists to support a determination that the person's remains have been destroyed and are unrecoverable).

c) Report. The Board must submit a report to the Secretary describing

their findings and conclusions, together with a recommendation for determination by the Secretary.

d) Counsel for Missing Person.

(1) Counsel must be appointed to represent each person the subsequent board of inquiry covers. When circumstances permit, counsel should be the same individual who represented the missing person during the initial board. The qualifications, rights, and duties of the counsel are the same as those for the initial board.

(2) The missing person's PNOK and other previously designated person shall have the right to submit information to the missing person's counsel relative to the disappearance and status of the missing person.

(3) The missing person's counsel must submit a written review of the Board's report, which becomes part of the official record.

e) Attendance of Family Members and Certain Other Interested Persons at Proceedings.

(1) The missing person's PNOK, other immediate family members, and any other previously designated person must be given notice not less than 60 calendar days before the first meeting of the Board that they may attend the proceedings. The person must then notify the Secretary of their intent, if any, to attend the proceedings not later than 21 calendar days after the date on which they received notice.

(2) Persons attending the proceedings of the board may:

(a) If PNOK or designated person, attend with private counsel;

(b) Have access to the case resolution file and unclassified reports relating to the case;

(c) Be afforded the opportunity to present information at the proceedings that such individual considers relevant; and

(d) Have the opportunity to submit in writing an objection to any recommendation of the Board regarding the status of the missing person.

f) Board Recommendation. The Board must make a recommendation as to the current whereabouts and status of each missing person, based on the findings that are supported by a preponderance of the evidence. The prerequisites for recommending that a person be declared dead are the same as those for the initial Board of inquiry.

g) Board Report. The Board must submit a report to the Secretary concerned. Board report requirements are the same as those for an initial Board of inquiry.

h) Action by the Secretary. No later than 30 days after receipt of the Board report, the Secretary must review the report, along with the report of the missing person's counsel and objections, if any, to the report submitted to the president by the PNOK, other family members, and any previously designated person. If the Secretary determines the report is complete and free of administrative error, the Secretary must determine the status of each person the report covers.

i) Report to Family Members and Other Interested Persons.

(1) No later than 60 days after the date the Secretary determines the missing person's status, the Secretary must provide the report (without classified portions) to the PNOK, other immediate family members, and any designated person.

(2) These individuals are also informed that the U.S. will conduct a further review board into the whereabouts and status of the person if the U.S. Government receives information in the future that may change the status of the person.

6. Further review boards. (Para. 11-14; 10 U.S.C. § 1505, DODI 2310.05, Encl. 6)

a) When the Director, Defense Prisoner of War/Missing in Action Office (DPMO) receives information from a U.S. intelligence agency or other Federal Government element relating to a missing person, the Director must:

(1) Ensure the information is added to the missing person's case resolution file; and

(2) Notify the following of the information:

(a) The missing person's counsel;

(b) The PNOK and any previously designated person;

(c) The appropriate Service Casualty/Mortuary Affairs Office;

(d) The Secretary concerned or his designee.

(3) The Director, with the advice of the missing person's counsel, must decide whether the information is significant enough to require a review by a further review board.

(4) If the Director decides to appoint a review board, he or she

notifies the Secretary concern, who must appoint the Board.

b) The procedures for further review boards are identical to those of the subsequent board of inquiry.

7. Judicial review. (10 U.S.C. § 1508).

a) The law provides that the PNOK or other previously designated person of a missing person who is declared dead by an initial, subsequent, or further board may obtain judicial review in a U.S. district court of that finding.

b) Judicial review may be obtained only on the basis of a claim that there is information that could affect the status of the missing person's case that was not adequately considered during the administrative review process.

F. Availability of Information. (DODI 2310.05, para. E7.6.).

1. The Secretary must, upon request, release the contents of a missing person's case resolution file to the PNOK, other immediate family members, and any other previously designated person.

2. Classified information, debriefing reports, or information protected by the Privacy Act or by other applicable laws and regulations may be made available, for official use only, to personnel within the DOD possessing the appropriate security clearance and having a valid need to know.

XII. MISCELLANEOUS INVESTIGATORY REQUIREMENTS.

A. INTELLIGENCE INTERROGATION INCIDENT.

1. References. DoDD 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, 11 October 2012 (C3, effective 29 October 2020).

2. Requirement. It is DoD policy that: All captured or detained personnel shall be treated humanely, and all intelligence interrogations, detainee debriefings, or tactical questioning to gain intelligence from captured or detained personnel shall be conducted humanely, in accordance with applicable law and policy. Acts of physical or mental torture are prohibited. All reportable incidents, allegedly committed by any DoD personnel or DoD contractors, shall be: promptly reported, thoroughly investigated by proper authorities, and remedied by disciplinary or administrative action, when appropriate.

3. Definitions. Reportable Incident. Any suspected or alleged violation of DoD policy, procedures, or applicable law relating to intelligence

interrogations, detainee debriefings or tactical questioning, for which there is credible information.

B. QUESTIONABLE INTELLIGENCE ACTIVITY (QIA).

1. References. DoDD 5148.13, Intelligence Oversight, 26 April 2017; AR 381-10, U.S. Army Intelligence Activities, 3 May 2007.

2. Requirement. Applicable only to questionable activities that are completed as part of Military Intelligence duties or mission.

a) DoD personnel must identify any QIA or S/HSM to their chain of command or supervision immediately. If it is not practical to report a QIA or S/HSM to the chain of command or supervision, reports may be made to the DoD Component legal counsel or IG; the GC DoD; the DoD SIOO; the Joint Staff IG or intelligence oversight officer; the Legal Counsel to the CJCS; the IG DoD; or the Intelligence Community IG. (DoDD 5148.13, para. 4.1.). Per AR 381-10, 15-2(b), regardless of which reporting channel is used, the report must reach TIG (SAIG-IO) no later than five days from discovery, with update every 30 days until the investigation is complete.

b) Each report of a questionable activity shall be investigated to the extent necessary to determine the facts and assess whether the activity is legal and is consistent with applicable policy.

c) **Investigation**. (Described in DoDD 5148.13, 4-2, and in AR 381-10, 15-3).

(1) A command may conduct an inquiry under the provisions of AR 15-6 or through an appropriate IG. Inquiries into allegations not referred to a counterintelligence or criminal investigative agency will be completed within 60 days of the initial report, unless extraordinary circumstances dictate a longer period.

(2) The results will be reported to TIG in accordance with AR 381-10, para. 15-2.

3. Definitions.

a) Questionable intelligence activity (DoDD 5148.13): Any intelligence or intelligence-related activity when there is reason to believe such activity may be unlawful or contrary to an E.O., Presidential directive, Intelligence Community Directive, or applicable DoD policy governing that activity.

b) Questionable intelligence activity (AR 381-10): Conduct during or related to an intelligence activity that may violate law, Executive Order or Presidential Directive, or applicable DOD or Army policy,

including this regulation.

c) Examples of QIA: Improper collection, retention, or dissemination of U.S. person information; misrepresentation (using one's status as an MI member to gain access for non-MI purposes); questionable intelligence activity constituting a crime; misconduct in the performance of intelligence duties.

C. ACTUAL OR POTENTIAL COMPROMISE OF CLASSIFIED INFORMATION

1. References. DoDM 5200.01 Vol 3, DoD Information Security Program: Protection of Classified Information, 24 February 2012 (C3, effective 28 July 2020); AR 380-5, Army Information Security Program, 22 October 2019.

2. Requirement.

a) Preliminary Inquiry. When an actual or potential compromise of classified information occurs, the head of the activity, or activity security manager having security cognizance, shall promptly initiate and complete an inquiry into the incident within 10 days. The purpose of the inquiry is to determine the facts and circumstances of the incident and to characterize the incident as an infraction or a violation. If information obtained as a result of the preliminary inquiry is sufficient to answer the questions below, then such information shall be sufficient to resolve the incident to include institution of administrative sanctions (DoDM 5200.01 V3):

(1) When, where, and how did the incident occur? What persons, situations, or conditions caused or contributed to the incident?

(2) Was classified information was compromised?

(3) If a compromise occurred, what specific classified information and/or material was involved? What is the classification level of the information disclosed?

(4) If classified information is alleged to have been lost, what steps were taken to locate the material?

(5) Was the information properly classified?

(6) Was the information officially released?

(7) In cases of compromise of classified information to the public media, the inquiry should determine in what specific media article, program, book, Internet posting, or other item did the classified information appear? To what extent was the compromised information disseminated or circulated? Would

further inquiry increase the damage caused by the compromise?

(8) Are there any leads to be investigated that might lead to identifying the person(s) responsible for the compromise?

(9) If no compromise and the incident was unintentional or inadvertent, was there a failure to comply with established practices/procedures and/or weakness that could lead to a compromise if uncorrected? What corrective action is required?

b) Investigation. If the circumstances of an incident are as such that a more detailed investigations is necessary, then an individual will be appointed to conduct that investigation. This individual must have an appropriate security clearance, have the ability to conduct an effective investigation, and must NOT be someone likely to have been involved, directly or indirectly, in the incident. Except in unusual circumstances, the activity security manager should not be appointed to conduct the investigation.

3. Definitions.

a) Compromise: an unauthorized disclosure of classified information.

b) Infraction: Any knowing, willful, or negligent action contrary to the requirements of Executive Order 13526, its implementing directives, or DoDM 5200-01, Vol. 3 that does not constitute a “violation,” as defined herein.

c) Violation:

(1) Any knowing, willful, or negligent action that could reasonably be expected to result in an unauthorized disclosure of classified information; or

(2) Any knowing, willful, or negligent action to classify or continue the classification of information contrary to the requirements of Executive Order 13526, its implementing directives, or DoDM 5200-01, Vol. 3; or

(3) Any knowing, willful, or negligent action to create or continue a special access program contrary to the requirements of Executive Order 13526, DoD Directive 5205.07, or DoDM 5200-01, Vol. 3.

D. LAW OF WAR VIOLATIONS (DETAINEE ABUSE).

1. References. DoDD 2311.01E, DoD Law of War Program, 2 July 2020;

Army Regulation 190-45, Law Enforcement Reporting, 27 September 2016; Army Regulation 190-8 (OPNAVINST 3461.6, AFJI 31-304, MCO 3461.1), Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, 1 October 1997.

2. Requirement. All reportable incidents committed by or against U.S. or enemy persons must be promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.

a) Any act or allegation of inhumane treatment will be investigated and, if substantiated, reported to HQDA as a Serious Incident Report (SIR) per AR 190-45.

b) Allegations of criminal acts or war crimes committed by or against EPW/RP must be reported to the supporting element of the U.S. Army Criminal Investigation Command (USACIDC). Death resulting from other than natural causes will be investigated by USACIDC.

c) Confinement facility commanders will appoint an officer to investigate and report: (1) Each death or serious injury caused by guards or suspected to have been caused by guards or sentries, another detainee, or any other person. (2) Each suicide or death resulting from unnatural or unknown causes.

3. Definitions.

a) Reportable Incident: An incident that a unit commander or other responsible official determines, based on credible information, potentially involves: a war crime; other violations of the law of war; or conduct during military operations that would be a war crime if the military operations occurred in the context of an armed conflict. The unit commander or responsible official need not determine that a potential violation occurred, only that credible information merits further review of the incident.

b) Law of war: The treaties and customary international law binding on the United States that regulate: the resort to armed force; the conduct of hostilities and the protection of war victims in international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States. Sometimes also called the “law of armed conflict” or “international humanitarian law,” the law of war is specifically intended to address the circumstances of armed conflict. Consult the DoD Law of War Manual for an authoritative statement on the law of war.

E. COUNTERINTELLIGENCE INVESTIGATIONS.

1. References. AR 381-20, The Army Counterintelligence Program, 9 June 2022 (this regulation is classified and may be hard to obtain); DA Pam

381-20, Counterintelligence Investigative Procedures, 15 April 2020.

2. Requirement. Counterintelligence (CI) issues will be investigated by CI units alone or jointly with other agencies (FBI, CID, etc.) Units identifying a CI issue must report it immediately.

3. Examples of CI Issues: (1) treason; (2) espionage and spying; (3) subversion; (4) sedition; (5) foreign intelligence service-directed sabotage; (6) CI aspects of terrorist activities directed against the Army; (7) CI aspects of assassination or incapacitation of Army personnel by terrorists or by agents of a foreign power; (8) investigation of the circumstances surrounding the defection of military personnel, and DA civilians overseas, and debriefing of the individual upon return to U.S. control; (9) investigation of the circumstances surrounding the detention of DA personnel by a government or hostile force with interests inimical to those of the United States; (10) investigation of the circumstances surrounding military members, and DA civilians overseas, declared absent without leave (AWOL), missing or deserters, who had access within the last year to TOP SECRET national defense information or sensitive compartmented information (special category absentees) (SCA); who were in a special mission unit (SMU); who had access to one or more special access programs; or were in the DA Cryptographic Access Program (DACAP); and debriefing of these personnel upon return to U.S. control; (11) CI aspects of security violations; known or suspected acts of unauthorized disclosure of classified information or material; unauthorized access to DA computer systems; and COMSEC insecurities. These CI investigations may occur simultaneously with the command's own responsibilities under AR 380–5; (12) CI aspects of incidents in which DA personnel with a SECRET or higher security clearance, access to a SAP or sensitive compartmented information, or in the DACAP or an SMU, commit or attempt to commit suicide; (13) CI aspects of unofficial travel to designated countries, or contacts with foreign diplomatic facilities or official representatives, by military personnel or by DA civilians overseas; (14) CI investigations of CI scope polygraph examinations and refusals as specified in appendix E (of AR 381-20).

CHAPTER C

ADMINISTRATIVE REMEDIES

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C. DoD Directive 7050.06, Military Whistleblower Protection

D. DoD Instruction 1332.28, Discharge Review Board (DRB) Procedures and Standards

E. DoD Instruction 6490.04, Mental Health Evaluations of Members of the Military Services

F. Army Regulation (AR) 1-20, Legislative Liaison.

G. AR 15-180, Army Discharge Review Board.

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J. AR 27-10, Military Justice

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

A. "*Any member of the armed forces* who believes himself wronged by his *commanding officer*, and who, upon due application to that commanding officer, is refused *redress*, may complain to any *superior commissioned officer*, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint, and take proper measures for redressing the *wrong* complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon." Article 138, UCMJ (emphasis added).

B. Army policies relating to Article 138 complaints are found in AR 27-10, Chapter 19:

1. Purpose: Provides an avenue for recourse for Soldiers who believe they have been wronged by their commanding officers.

2. Basic Tenets:

a. Resolution of complaints at the lowest level.

b. Begin with assumption command acted properly.

c. Complainant does not participate after filing complaint.

C. Key definitions.

1. Member of the armed forces: A member of the U.S. Army, Navy, Air Force, Marine Corps, or Coast Guard. Complaints from members of the Army National Guard and U.S. Army Reserve are limited to matters concerning their Federal service (Title 10 duty status).

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

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

a. In violation of law or regulation;

b. Beyond the commander's authority;

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

d. Materially unfair.

4. Redress:

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

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

5. Superior commissioned officer:

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

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

D. Initial assessment of Article 138 complaints.

1. Is the subject matter appropriate? Not when:

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

b. AR 15-6 board of officers procedure followed, including administrative separation boards for officers and enlisted Soldiers (AR 600-8-24 and AR 635-200).

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

d. Other Examples:

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

(2) Withdrawal of flight status (AR 600-105).

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

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

(5) Appeals of evaluation reports (AR 623-3).

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

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

a. Failure to first seek redress from commander.

b. Untimely complaint (waivable defect). Soldier must submit complaint within 90 days of discovery of wrong excluding period when request for redress was in the hands of the commander.

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

E. Complaint procedures.

1. Request for Redress.

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

b. Response by commanding officer.

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

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

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

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

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

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

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

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

c. Upon receipt, GCMCA will examine the complaint.

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

a. Return inappropriate subject matter complaints. Deficient complaints may be returned to the complainant or the deficiency may be waived and complaint considered by GCMCA.

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

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

(b) Redress not requested and refused.

(c) Repetitive complaint.

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

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

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

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

(d) Wrong did not affect complainant personally.

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

b. Grant or deny redress.

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

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

5. GCMCA forwards complaint.

a. After action, GCMCA must forward complaint to Headquarters Department of the Army (HQDA), specifically the Office of the Judge Advocate General, even if the requested relief is granted. *See* AR 27-10, para. 19-14.

b. Soldier may voluntarily withdraw the complaint.

F. JA Involvement.

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

2. Respondent commanders may consult their servicing legal advisor.

3. Before taking action on the complaint, the GCMCA's servicing legal advisor will conduct a legal review of the proposed action.

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

A. The Secretary concerned shall . . . establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force . . . . A board established under this section may . . . change a discharge or dismissal, or issue a new discharge, to reflect its findings. . . ." 10 U.S.C. § 1553.

B. Purpose.

1. The purpose of the review is to determine whether the discharge was granted in a proper manner, and

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

C. Review procedures.

1. Application for Review.

a. Submitted on DD Form 293.

b. Include statements, affidavits, or documents.

c. Request specific relief.

(1) Change in character of discharge.

(2) Change in reason for discharge.

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

D. Review standards.

1. Propriety of Discharge.

a. A discharge shall be deemed proper unless:

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

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

2. Equity of Discharge.

a. A discharge shall be deemed equitable unless:

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

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

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

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

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

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

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

E. Procedural rights of applicants.

1. Record Review.

2. Hearing before Board (five officer members).

a. Personal appearance authorized.

b. May be represented by attorney.

c. Rules of evidence do not apply.

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

3. Board deliberations, conclusions, and opinions.

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

b. Findings based on majority vote in closed session.

c. Decisional document prepared.

F. Liberal Consideration for Certain Claimants.

1. A claimant whose application for relief is based in whole or in part on matters relating to post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) as supporting rationale, or as justification for priority consideration, whose PTSD or TBI is related to combat or military sexual trauma, as determined by the Secretary concerned, shall have their case reviewed with liberal consideration that PTSD or TBI potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the member's discharge or dismissal. 10 U.S.C. § 1553 (as amended by FY 2017 NDAA, sec. 535) and AR 15-180, Chapter 3.

2. For additional information on liberal consideration at the discharge review boards and boards for correction of military records, see:

a. Secretary of Defense Memorandum, subject: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder, dated 3 September 2014.

b. Principal Deputy Under Secretary of Defense (Personnel and Readiness) Memorandum, subject: Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI), dated 24 February 2016.

c. Undersecretary of Defense (Personnel and Readiness) Memorandum, subject: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment, dated 25 August 2017.

d. AR 15-180, Chapter 3.

G. Judge Advocate (JA) involvement.

1. Legal advisor to DRB.

2. Advice to Soldiers pending discharge and eligible legal assistance clients.

H. Website

1. http://arba.army.pentagon.mil/adrb-overview.html.

2. http://boards.law.af.mil (link to each service's reading room).

IV. ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (10 U.S.C. §1552; DOD DIRECTIVE 1332.41; AR 15-185).

A. "The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. [S]uch corrections shall be made by the Secretary acting through boards of civilians of the executive part of the military department. . . . Except when procured by fraud, a correction made under this section is final and conclusive on all officers of the United States." 10 U.S.C. § 1552.

B. Purpose:

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

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

3. Some of the issues considered by the ABCMR:

a. Separations.

b. Consideration for promotions.

c. Evaluation Reports.

d. Pay and Allowances.

e. Memorandums of Reprimand.

C. Composition of the Board.

1. Not less than three civilian officers or employees of the Department of Army (five civilian members on board for formal hearings).

2. Pay grade of GS13+.

3. Service to the board is an extra duty.

D. Procedures.

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

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

E. Action by the Board.

1. Cases may be denied based on:

a. Insufficient evidence presented by applicant. Denial on this basis is non-prejudicial and applicant may refile claim.

b. Failure to exhaust administrative remedies.

c. Failure to timely file application.

2. Burden of proof is on the applicant by the preponderance of the evidence.

3. Board can, but need not, authorize a hearing known as a formal board. A formal board has five members, instead of three, and personal appearance is authorized.

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

5. Closed deliberations.

6. Written findings, conclusions, and recommendations required. Forwarded to the Secretary of the Army (or designee) for decision.

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

F. Liberal Consideration for Certain Claimants.

1. A claimant whose application is for review of a discharge or dismissal and is based in whole or in part on matters relating to PTSD or TBI as supporting rationale, or as justification for priority consideration, and whose PTSD or TBI is related to combat or military sexual trauma, as determined by the Secretary concerned, shall have their case reviewed with liberal consideration that PTSD or TBI potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the member's discharge or dismissal. 10 U.S.C. § 1552 (as amended by FY 2018 NDAA, sec. 520).

2. For additional information on liberal consideration at the discharge review boards and boards for correction of military records, see:

   a. Secretary of Defense Memorandum, subject: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder, dated 3 September 2014.

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   c. Undersecretary of Defense (Personnel and Readiness) Memorandum, subject: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment, dated 25 August 2017.

G. Appellate Review.

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

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

b. Monetary relief/back pay – U.S. Court of Federal Claims.

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

H. JA Involvement.

1. Legal Assistance in preparing application for relief.

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

I. Website

1. http://arba.army.pentagon.mil/abcmr-overview.html.

2. http://boards.law.af.mil/ (link to each service's reading room).

V. INSPECTOR GENERAL ACTIVITIES (AR 20-1)

A. Inspection function.

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

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

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

1. Allegations. Allegations are complaints that charge someone by name with an impropriety. The complaints come in the form of IG action requests (IGARs). Allegations are either substantiated or not substantiated if conducted by the IG.

2. In accordance with AR 20-1, IGs will not investigate complaints received from complainants when the command elects to resolve those matters using a commander's investigation or inquiry. IGs will always afford their commanders or directing authorities, or subordinate commanders who have the means to investigate, the opportunity to resolve the matter within the command channels. If the allegation comes to the IG but the command elects to investigate the matter, the IG will refer the allegation to the command and await the command product to resolve the allegation in the IG system.

3. IGs will not close out issues or allegations in IGARS as "substantiated" or "unsubstantiated" when those issues or allegations were received by the IG to the command for investigation. If the command elects to investigate the matter the IG referred, the IG will formally refer the issue or allegation to the command using a referral memorandum. If the command investigation answers all issues referred to the command, the IG will annotate in the case notes the form of action the command took and close the case as "assistance."

4. Issues. Issues are complaints that involve requests for information or assistance from the IG that do not identify someone by name as a violator of a standard. These complaints also come in the form of IGARs. Issues are either founded or unfounded and the IG addresses these complaints as part of the assistance function discussed below.

5. When complaints contain both issues and allegations, the IG resolves the issues by conducting an assistance inquiry as part of an investigation or investigative inquiry.

C. Assistance function.

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

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

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

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

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

A. In General.

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

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

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

b. Directly from the Member of Congress.

B. Process.

1. Command's response and any necessary inquiry into the matter must be timely (normally no more than 5 working days with an interim reply if that deadline is not feasible). Responses should be transmitted by the fastest possible means, with a preference for email transmission

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

3. Multiple inquiries are best answered with consistent responses.

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

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

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

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

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

VII. MILITARY WHISTLEBLOWER PROTECTIONS

A. References.

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

2. Department of Defense Directive 7050.06, Military Whistleblower Protection (17 April 2015)

3. Department of Defense Instruction 6490.04, Mental Health Evaluations of Members of the Armed Forces (4 March 2013)

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

5. AR 1-20, Legislative Liaison, Chapter 6

6. AR 600-20, Army Command Policy, paragraph 5-12

B. Prohibitions.

1. No person will restrict a Service member from making lawful communications to a member of Congress or an IG.

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

3. No person may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action in reprisal against any Service member for making or preparing:

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

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

(1) A Member of Congress;

(2) An Inspector General;

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

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

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

c. The “communications” protected in paragraph 3b, above, are those in which a member of the Armed Forces complains of, or discloses, information that the member reasonably believes constitutes evidence of the following:

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

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

C. Definitions (See Glossary of DoDD 7050.06).

1. Service member: A Regular or Reserve Component officer (commissioned and warrant) or enlisted member of the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard (when it is operating as a Service in the Navy) on active duty. A Reserve Component officer (commissioned and warrant) or enlisted member in any duty or training status, including officers and enlisted members of the National Guard.

2. Audit, Inspection, Investigation, and Law Enforcement Organizations: The IG DoD, the U.S. Army Audit Agency, the Naval Audit Service, the Air Force Audit Agency, and the Defense Contract Audit Agency. The law enforcement organizations at any command level in any of the DoD Components, the Defense Criminal Investigative Service, the U.S. Army Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations.

3. Personnel Action: Any action taken on a Service member that affects, or has the potential to affect, that member’s current position or career. Such actions include promotion; disciplinary or other corrective action; transfer or reassignment; a performance evaluation; decisions concerning pay, benefits, awards, or training, relief and removal; separation; discharge; referral for mental health evaluations in accordance with DoDI 6490.04; and any other significant change in duties or responsibilities inconsistent with the Service member’s grade.

D. Reporting.

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

2. Time Limit. Investigation is within the IG's discretion when a complaint is submitted to an IG more than 60 days after the date the member became aware of the personnel action that is the subject of the allegation. AR 20-1, para. 7-4.

E. Investigating.

1. Military whistleblower reprisal allegations are investigated by the DoD IG or the military service IGs. Whistleblower reprisal investigations normally take place at the same level of the IG staff section that received the complaint. AR 20-1, para. 7-3.

2. The investigation must be completed within 180 days of the original reprisal allegation being received by the IG, or the IG will so inform the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) and the complainant, in writing, of the estimated date of completion and the reasons for delay. A copy of the report of investigation (ROI) will be forwarded to the complainant [without interview summaries or documents, unless requested by the complainant] and the USD(P&R) not later than 30 days after ROI completion. The ROI given to the complainant will include all factual findings and recommendations (maximum disclosure of information possible), subject to security classification and FOIA limitations. DoDD 7050.06, Enclosure 2.

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

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

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

1. Military whistleblower reprisal complaint resolutions may be reviewed, at the complainant's request, by a BCMR and the Secretary of Defense. The BCMR may conduct a hearing, if appropriate. DoDD 7050.06, Enclosure 2.

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

3. The complainant may request review of the matter by the Secretary of Defense. The request for review by the Secretary of Defense must be submitted within 90 days of receipt of the final decision by or for the Military Service Secretary. DoDD 7050.06, Enclosure 2.

4. The USD(P&R) will review the final decision of the Military Service Secretary and decide whether to uphold or reverse the decision of the Military Service Secretary. This decision is final. DoDD 7050.06, Enclosure 2.

H. No Private Cause of Action. MWPA provides strictly administrative remedies and is not a money-mandating statute for purposes of Tucker Act (28 USC § 1491) jurisdiction in Court of Federal Claims. Thus, individual does not have private cause of action on which to file claim. *See, e.g.*, Soeken v. United States, 47 Fed. Cl. 430 (2000); Hernandez v. United States, 38 Fed. Cl. 532 (1997).

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

A. Reference: DoD Instruction 6490.04, Mental Health Evaluations of Members of Military Service.

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

C. The Directive does NOT apply to the following:

1. Patient self-referrals.

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

3. Responsibility and competency inquires under RCM 706, MCM.

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

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

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

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

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

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

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

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

CHAPTER D

ENLISTED ADMINISTRATIVE SEPARATIONS

TABLE OF CONTENTS

I. REFERENCES.

A. Department of Defense Instruction (DoDI) 1332.14, Enlisted Administrative Separations

B. DoDI 1332.29, Involuntary Separation Pay (Non-Disability)

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

D. AR 135-178, Enlisted Administrative Separations

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

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

G. AR 600-20, Army Command Policy

H. AR 600-85, Army Substance Abuse Program

I. AR 601-280, Army Retention Program

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

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

L. Army Directive (AD) 2013-21, Imitating Separation Proceedings and Prohibiting Overseas Assignment for Soldiers Convicted of Sex Offenses

II. INTRODUCTION.

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

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

C. When analyzing enlisted administrative separations, consider:

1. *What is the reason* for the separation action (e.g., exceeds army body composition standards, misconduct)?

2. Is the separation *voluntary or involuntary*?

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

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

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

III. THE AUTHORITY TO ORDER SEPARATIONS.

A. AR 635-200, para. 1-20 [hereinafter, citations without reference to a regulation will be to AR 635-200].

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

C. General Court-Martial Convening Authority (GCMCA). May approve all separations, except: SA plenary authority cases (chap 15); reduction in force (RIF), strength limitations, and budgetary constraints (para. 16-6); Qualitative Management Program (QMP) (Ch. 16-12); voluntary separations of Soldiers serving indefinite enlistments (para. 4-4); conviction by a foreign court (paras. 1-42a and b, and 14-9a), and early release from active duty (AD) of RC personnel serving Active Guard Reserve (AGR) tours under Title 10.

D. General officer (GO) in command with a legal advisor. Same separation authority as a GCMCA *except* lack of jurisdiction (para. 5-8) and discharge in lieu of court-martial (Ch. 10). Additionally, may not approve separation of victims of sexual assault (para. 1-20n) or Soldiers who have medical evaluation board findings that indicate referral to physical evaluation board is warranted (para. 1-34d).

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

1. Ch. 5, Convenience of the Government (except para. 5-8, Lack of Jurisdiction);

2. Ch. 6, Dependency or Hardship;

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

4. Ch. 8, Pregnancy;

5. Ch. 9, Substance Abuse Disorder;

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

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

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

9. Ch. 13, Unsatisfactory Performance;

10. Ch. 14, Misconduct;

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

12. Ch. 18, Failure to Meet Army Body Composition Standards.

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

1. Separation of Personnel Who Did Not Meet Procurement Medical Fitness Standards (para. 5-10);

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

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

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

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

6. Selected Changes in Service Obligations (Ch. 16); and

7. Failure to Meet Army Body Composition Standards (Ch. 18).

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

H. Separation Authority's Determinations.

1. Is there sufficient evidence?

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

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

2. Retain or separate?

3. If separation, what characterization of service?

4. Commanders will review all administrative separations involving known victims of sexual assault and any Soldier who answered "Yes" to either of the questions cited under either paragraph 2–2i or 2–4h. Under paragraph 1-15d, this review must consider the following:

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

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

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

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

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

H. Waivers.

1. A Soldier may offer to waive his or her right to a board hearing in exchange for a more favorable discharge (often referred to as a "conditional waiver"). A Soldier may also unconditionally waive his or her right to a board.

2. A SPCMCA or lower authority may not approve a waiver or discharge in a case where the chain of command initiated or recommended an Other Than Honorable (OTH) discharge, or in a case where a board is appointed to consider a separation with a possible OTH discharge even if a Soldier submits a conditional waiver for a General discharge. The separation authority remains the GCMCA or GO in command with a legal advisor (despite a SPCMCA or LTC-level commander's authority to approve a discharge in certain cases where the action was initiated with a General discharging being the least favorable discharge possible).

IV. CHARACTERIZATION OF SERVICE OR TYPE OF DISCHARGE.

Characterization at separation will be based on the quality of the Soldier's service, including the reason for separation . . . subject to the limitation under the various reasons for separation. The quality of service will be determined according to standards of acceptable personal conduct and performance of duty for military personnel. These standards are found in the UCMJ, directives and

regulations issued by the Army, and the time-honored customs and traditions of military service.

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

A. Honorable Discharge.

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

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

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

4. Usually required if the Government introduces limited use information from the Army Substance Abuse Program (ASAP) during discharge proceedings. AR 635-200, para. 3-8a.

B. General Discharge (Under Honorable Conditions).

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

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

3. Impact on benefits.

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

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

c. Many states will not pay unemployment compensation.

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

4. No automatic upgrading of discharges. Upgrading requires application to the Army Discharge Review Board (ADRB) or the

Army Board for Correction of Military Records (ABCMR). The ADRB focuses on uniform policies, procedures, and standards. The ABCMR acts to correct legal or factual errors, or to correct an injustice upon application of the Soldier.

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

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

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

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

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

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

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

7. All Soldiers being administratively separated with an OTH discharge (to include under AR 635-200, Ch. 10) who deployed overseas to a contingency operation or were sexually assaulted within the previous 24 months and are diagnosed with PTSD or TBI or reasonably allege they were influenced by PTSD or TBI must be medically assessed and the separation authority must consider when taking final action. AR 635-200, para 1-33e. and f.

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

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

2. Counseling and rehabilitation essential before separation.

3. No characterization of service.

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

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

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

2. Very rare, used only for void enlistments.

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

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

V. PROCEDURAL CATEGORIES AND ADMINISTRATIVE CONSIDERATIONS.

A. Notification Cases (AR 635-200, paras. 2-2 and 2-3).

1. Counseling and rehabilitative transfer requirements apply to many separations (para. 1-17).

a. Counseling is required for:

(1) Involuntary separation due to parenthood, para. 5-7;

(2) Designated physical or mental conditions, para. 5-14;

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

(4) Unsatisfactory performance, Ch. 13;

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

(6) Failure to meet body composition standards, Ch. 18.

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

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

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

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

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

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

(b) Pregnancy while in entry-level status.

(c) Highly disruptive or suicidal.

(d) Resistant to rehabilitative efforts.

(e) Small installation or remote location.

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

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

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

b. Least favorable characterization of service Soldier could receive;

c. Right to consult with counsel;

d. Right to submit statements;

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

f. Right to a hearing if Soldier has 6 years or more of combined active and reserve service (to include individual ready reserve (IRR) and delayed entry program service) on date separation is initiated.

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

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

5. Legal review.

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

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

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

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

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

b. Board hearing.

c. Submit a conditional waiver.

d. Fifteen-day notice before the hearing.

e. Challenge board members for cause.

f. Request witnesses.

g. Submit matters to the board.

h. Question witnesses.

i. Choose whether or not to submit to examination by the board or make an unsworn statement.

j. Argue to the board.

2. Composition (para. 2-6). Three or more voting members, sergeant first class (SFC) or above, all senior to the respondent. Majority must be commissioned or warrant officers. One must be a MAJ or above. If Soldier is female or member of a minority group and so requests, a board member must be female or a member of a minority group subject to reasonable availability.

3. Formal rules of evidence (i.e., Military Rules of Evidence (MRE), contained in the Manual for Courts-Martial (MCM)) do not apply. *See* para. 2-10 and AR 15-6. Except as modified by AR 635-200, boards will conform to the provisions of AR 15-6 applicable to formal proceedings with respondents (Boards of Officers). See AR 15-6, Chs. 3 and 7 for applicable rules.

    a. Standard for admission of evidence: Relevant and material.

    b. Limited privileges preserved.

    c. Coerced statements excluded.

    d. Bad faith unlawful searches by military members excluded.

    e. Polygraph evidence admitted only by agreement of the parties. Note, no private polygraphs may be admitted.

4. Government represented by a recorder.

5. Unless operationally unfeasible, the convening authority will also appoint a nonvoting legal advisor pursuant to para. 2-6 (modification of AR 15-6). If a nonvoting legal advisor is not appointed, the convening authority, in consultation will his or her servicing attorney in the JAGC, will include a memorandum in the board file explaining why it was not operationally feasible to do so.

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

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

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

    a. Legal review required “by an attorney in the JAGC fully cognizant of applicable regulations and policies to determine

whether the action meets the requirements of this regulation." Para. 2-12a.

b. When the board recommends that a discharge under other than honorable conditions be issued, limited use evidence was introduced in the board proceedings, or the Soldier alleges that there were substantial errors in the board proceedings, the proceedings will be reviewed by a commissioned officer of the JAGC in the grade of O – 4 or higher.

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

9. Board required (unless waived).

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

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

C. Administrative Double Jeopardy (para. 1-18). Soldiers will not be processed for administrative discharge under Chs. 11, 13, 14, or AR 604-10 (Military Personnel Security Program) for conduct that has been the subject of:

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

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

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

4. Exceptions.

a. Conduct or performance after the prior proceeding.

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

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

D. Separation Pay (DoDI 1332.29).

1. General prerequisites.

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

b. Agrees to enter Ready Reserve for 3 years.

c. Involuntary discharge or denial of reenlistment.

2. Full separation pay.

a. Honorable discharge required.

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

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

3. Half separation pay.

a. Honorable or general discharge.

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

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

4. No separation pay.

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

b. Any separation during first term of enlistment.

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

d. Any OTH discharge.

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

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

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

3. Separation authority is withheld to GCMCA for all cases involving a Soldier who filed an unrestricted report within 24 months of initiation of the separation action. AR 635-200, para 1-20(n).

4. Commanders are required to initiate separation proceedings for Soldiers convicted of a sexually violent offense. (*See* AR 635-200, para 14-12(c)(3) and Army Directive 2013-21 (Initiating Separation Proceedings and Prohibiting Overseas Assignment for Soldiers Convicted of Sex Offenses)). If a Soldier convicted of a sex offense is retained, as a result of either the decision of a separation board, or by direction of the separation authority, then the separation authority *must* initiate a new separation action under chap. 15 and forward to HQDA for action by the Secretary of the Army.

VI. SOLDIER-INITIATED (VOLUNTARY) SEPARATIONS.

A. Procedure.

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

2. Forwarded through command channels to approval authority.

3. Limited procedural rights for the Soldier.

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

1. Rarely any JA involvement.

2. Honorable or ELS discharge.

3. Beware of ETS discharge of Soldier for whom the command is contemplating adverse action. *See* AR 635-200, paras. 1-22 through 1-29.

C. Dependency or Hardship (Ch. 6).

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

2. Hardship. Separation from the Army will materially affect the care or support of the family (not resulting from death or disability) by alleviating undue and genuine hardship.

3. Voluntary Request by Soldier. Soldier bears the burden of submitting substantiating evidence. The conditions must have arisen or have been aggravated to an excessive degree since entry on active duty and not of a temporary nature. The Soldier must have made every reasonable effort to alleviate the condition and separation is the only means that will be successful.

4. Separation Authority: SPCMCA.

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

D. Pregnancy (Ch. 8).

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

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

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

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

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

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

7. Separation Authority: LTC-level commander.

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

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

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

1. Conditions.

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

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

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

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

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

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

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

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

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

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

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

VII. COMMAND-INITIATED (INVOLUNTARY) SEPARATIONS.

A. Convenience of the Government (Ch. 15).

1. Involuntary Separation Due to Parenthood (para. 5-7).

a. Parental obligations interfere with fulfillment of military responsibilities, which may include repeated absenteeism, lateness for work, inability to participate in field training exercises or perform special duties (Charge of Quarters

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

b. Counseling with a view towards separation required.

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

d. Separation Authority: SPCMCA.

2. Other Designated Physical or Mental Conditions (para. 5-14).

a. Conditions that potentially interfere with assignment to or performance of duty, but not amounting to disability (e.g. sleepwalking, dyslexia, or claustrophobia) and excluding conditions appropriate for separation under paras. 5-10.

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

c. Counseling and opportunity to overcome deficiency required.

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

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

f. Separation Authority: GCMCA if deployed to an area designated as an imminent danger pay area, or Soldiers who filed an unrestricted report of sexual assault within 24 months of initiation of separation; otherwise, SPCMCA.

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

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

1. Fraudulent Entry.

a. Enlistment, reenlistment, or period of active service through deliberate misrepresentation, omission, or concealment of information which, if known and considered by the Army at the time of enlistment or reenlistment, might have resulted in rejection.

b. Separation authority must apply 3 tests.

(1) Is information disqualifying?

(2) Is the disqualifying information true?

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

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

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

2. Minor.

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

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

3. Erroneous Enlistments or Reenlistments.

a. Enlistment is erroneous if:

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

(2) It was not the result of fraudulent conduct on the part of the Soldier; and

(3) The defect is unchanged in material respects.

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

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

4. Defective or Unfulfilled Enlistment or Reenlistment.

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

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

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

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

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

c. Honorable or ELS discharge.

5. Separation Authority: SPCMCA.

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

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

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

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

c. The chronic treatment required for the Soldier to maintain recovery degrades full mission readiness.

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

3. Notification procedure or board hearing procedure required.

4. Separation authority. LTC-level commander (notification procedure only) or SPCMCA.

5. Honorable, General, or ELS discharges authorized, but an Honorable discharge is required in any case in which the government initially introduces limited use evidence as defined by AR 600-85, paras. 10-11 to 10-13.

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

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

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

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

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

(4) Referral to ASAP.

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

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

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

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

e. Commanders will initiate separation proceedings for Soldiers with a subsequent drug or alcohol incident within 12 months of completing the ASAP program, or within 12 months of being removed from the program.

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

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

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

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

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

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

3. Prior counseling and rehabilitative efforts are required.

4. Notification procedures used.

5. Description of separation.

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

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

4. Separation Authority. LTC-level commander or SPCMCA.

E. Unsatisfactory Performance (Ch. 13).

1. Soldiers beyond entry-level status who meets one or more of the following:

a. The Soldier's performance has been unsatisfactory.

b. After sufficient counseling and rehabilitative efforts have been made, the Soldier's performance continues to be unsatisfactory.

c. The Soldier's performance and potential indicate that he or she will not develop sufficiently to become a fully satisfactory Soldier. Prior counseling with a view toward separation and rehabilitation required.

2. Unless the commander chooses to impose a bar to continued service, separation must be initiated for Soldiers who:

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

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

3. Honorable or General discharge authorized.

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

5. Separation Authority: LTC-level commander (notification procedure only) or SPCMCA.

F. Misconduct (Ch. 14).

1. Bases:

a. Conviction by a civil court;

b. Pattern of minor military disciplinary infractions;

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

d. Commission of a serious offense.

2. Separation Authority.

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

b. SPCMCA.

(1) Discharge under OTH not warranted and notification procedures used. This exception is used frequently. An Honorable discharge may be ordered only when the GCMCA has so authorized in the case.

(2) Discharge under OTH not warranted, board procedures are used, and board recommends an ELS or General discharge.

(3) Board recommends an Honorable discharge and GCMCA has authorized the exercise of separation authority in the case or an Honorable discharge is required because the sole evidence of misconduct is limited use evidence (delegation usually done through a written delegation of authority memorandum or local supplement to AR 27-10 for all such cases). *See* para. 14-3c(2).

3. Conviction by a Civil Court (para. 14-5).

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

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

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

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

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

4. Minor (Military) Disciplinary Infractions (para. 14-12a).

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

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

5. Pattern of Misconduct (para. 14-12b).

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

b. Conduct prejudicial to good order and discipline.

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

6. Commission of a Serious Offense (para. 14-12c).

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

b. Abuse of illegal drugs.

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

(2) All Soldiers identified as illegal drug abusers, with the exception of self-referrals to ASAP, will be processed for separation. Regulation requires initiation of separation proceedings, but does not mandate discharge. The separation action will be initiated and processed through the chain of command to the separation authority, who will exercise discretion, on a case-by-case basis, in directing retention or discharge

of the Soldier. All medically-diagnosed drug dependent Soldiers will be processed for separation after detoxification. Any Soldier involved with illicit trafficking, distributing, or selling will be processed for separation unless the case is referred to a court-martial empowered to adjudge a punitive discharge.

(3) AR 635-200 and AR 600-85, The Army Substance Abuse Program, require mandatory initiation of separation for all Soldiers identified as illegal drug abusers; all Soldiers involved in two serious incidents of alcohol related misconduct within 12 months; all Soldiers involved in illegal trafficking, distribution, possession, use, or sale of illegal drugs; and Soldiers convicted of driving while intoxicated (DWI) or driving under the influence (DUI) a second time during their career. If the command supports retention in these cases, the retention authority will be elevated to the first GO in the chain of command with a judge advocate or legal advisor.

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

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

1. Requires HQDA approval.

2. Honorable, General, or ELS (uncharacterized) discharges.

3. Ordinarily used when no other provision applies (e.g., HIV infection, refusal to submit to medical care, religious practices cannot be accommodated.).

4. Standard: Early separation in the best interest of the Army or Soldier.

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

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

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

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

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

3. Initiation of separation or bar to continued service is mandatory for Soldiers who do not make satisfactory progress (loss of 3-8 lbs. or 1% body fat per month) for 2 consecutive months, or after 6 months, still exceeds the body fat standards and had less than satisfactory progress for 3 or more months (nonconsecutive) during that period.

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

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

6. Notification procedure used; however, Soldiers with more than 6 years combined active and reserve service are entitled to an administrative separation board.

7. Honorable or ELS discharge authorized.

8. Separation Authority: LTC-level commander (if notification procedures used) or SPCMCA.

I. Qualitative Management Program (QMP) (Ch. 16-12).

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

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

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

4. Soldier notified and given opportunity to appeal.

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

6. Honorable Discharge.

7. The program is currently implemented in accordance with annually published guidance through MILPER messages. *See also* AR 600-8-19 and AD 2016-19.

APPENDIX A - SEPARATION ACTIONS

	SECRETARIAL AUTHORITY	PARENTHOOD	PHYSICAL OR MENTAL CONDITIONS	FAILURE TO MEET BODY FAT STANDARDS
Grounds for action.	Best interest of the Army; may apply to reason not covered by other, more specific provision. Soldiers convicted of sex offenses who have been previously retained.	Parental obligations interfere with military responsibilities; e.g., repeated absenteeism, late for work, unavailable for field exercises, CQ, SDO, world-wide deployment or assignment.	Conditions that potentially interfere with assignment or duty, but not disability or para. 5-11 conditions. May use for personality disorder when Soldier has > 24 months service. Diagnosed by psychiatrist or licensed clinical psychologist w/ PhD when personality dis.	Failure to meet body composition standards in AR 600-9. Overweight condition must be only basis for discharge.
Counseling and rehab required?	No.	Yes.	Yes.	Comply w/ AR 600-9.
Who initiates?	Soldier or any commander, including separation authority if board recommends retention.	Immediate or any higher commander.		
Board hearing?	No. If command initiated, use notification procedure only, even if Soldier has more than 6 years of service.	Use notification procedure. Entitled to board if Soldier has 6 or more years of active and reserve service.		
Regulation.	AR 635-200, chap. 15;	AR 635-200, para. 5-7.	AR 635-200, para. 5-14	AR 635-200, para. 18.
Separation Authority.	Secretary of the Army.	SPCMCA.	SPCMCA or GCMCA if Soldier has been in imminent danger pay area and personality dis.	LTC Cdr (or MAJ(P) in LTC cmd) if no board; SPCMCA if board used.
Characterization of service.	Hon, Gen, or ELS.	Hon, Gen, or ELS.	Hon, Gen, or ELS. *See* para. 5-1.	Hon or ELS.

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

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

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

CHAPTER E

OFFICER PERSONNEL LAW

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I. REFERENCES

A. Title 10, United States Code

B. Department of Defense Instruction (DoDI) 1310.02, Original Appointment of Officers

C. DoDI 1320.10, Discharge of Commissioned Officers Not Qualified for Promotion to the Grade of First Lieutenant or Lieutenant (Junior Grade).

D. DoDI 1332.30, Commissioned Officer Administrative Separations

E. DoDI 1332.29, Involuntary Separation Pay (Non-Disability)

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

G. AR 15-6, Procedures for Investigating Officers and Boards of Officers

H. AR 135-175, Separation of Officers

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

J. AR 600-8-29, Officer Promotions

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L. Army Directive (AD) 2013-21, Imitating Separation Proceedings and Prohibiting Overseas Assignment for Soldiers Convicted of Sex Offenses

M. AD 2017-38, Termination of Temporary Early Retirement Authority

II. COMPOSITION OF THE ARMY.

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

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

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

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

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

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

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

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

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

III. OFFICER STATUS, PROMOTIONS, TRANSFERS AND DISCHARGES.

A. Appointment.

1. Proper authority makes appointment.

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

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

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

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

2. Tender of appointment to individual.

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

4. Key Concepts.

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

b. RA v. OTRA.

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

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

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

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

(b) After 28 October 2009, all commissioned officers on the ADL must hold a regular appointment, be completing an ADSO incurred before 1 May 2005, or have a waiver from the Secretary of Defense (SecDef). The officer may also be transferred to the Reserve Active Status List (RASL).

d. Probationary v. Nonprobationary Status.

(1) Probationary Officer. A commissioned officer (RA or OTRA) with less than 6 years of active commissioned or commissioned service. All newly commissioned officers are probationary for 6 years.

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

(3) Probationary Period for Warrant Officers. Warrant officers with less than 3 years from their appointment as a warrant officer are considered probationary.

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

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

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

B. The Active Duty Promotion System for Army Officers.

1. Active Duty List (ADL).

a. All officers on AD regardless of component.

b. Centralized, with minor exceptions.

c. Competitive category.

d. Special Branches: Medical professionals, chaplains, and judge advocates (JAs).

2. Basic Promotion Policies.

a. When promoted while on AD, the officer is promoted within his or her component.

b. Minimum time in grade (TIG) requirements for promotion. The Defense Officer Personnel Management Act (DOPMA) establishes minimum TIG requirements. For instance the TIG requirement for promotion to first lieutenant (1LT) is 18 months; 2 years for promotion to captain (CPT); 3 years for major (MAJ) through LTC; and 1 year for promotion to colonel (COL) and brigadier general (BG). 10 U.S.C. § 619.

c. Selection criteria.

(1) Except for officers eligible for selective continuation, the promotion system has an “up or out” policy. 10 U.S.C. § 580, 631-632

(2) Failure to be selected for promotion to LTC, MAJ, CPT, CW5, CW4, and CW3.

(a) Officers on the ADL who are twice nonselected for promotion will be separated not later than the first day of the seventh calendar month beginning after the month in which SecArmy approves the report of the board that considered them for the second time.

(b) Alternatives include resignation, selective continuation, and retirement (if eligible).

(c) The rules for selective continuation are found in AR 600-8-29, para 1-14.

(3) For ADL officers not recommended for promotion to 1LT, see DoDI 1320.10.

3. Zones of Consideration.

a. Promotion Zone (PZ). The opening and closing dates of the zone are adjusted each year to reflect both the Army's need for officers at the higher grade and established selection rates. Promotion boards review the files of all officers whose date of rank lies within the PZ.

b. Above the Zone (AZ). After evaluating files within the PZ, the promotion board also reviews the files of nonselected officers from previous zones. Previously nonselected AZ officers who are better qualified than those selected from within the zone will displace the less qualified officers on the Order of Merit List (OML). These officers are considered AZ selections.

c. Below the Zone (BZ). Boards also review the files of officers projected to be within the PZ during the next promotion period. Officers selected before they enter the considered PZ are BZ selections.

C. Officer Transfers and Discharges (AR 600-8-24).

1. The regulation divides officer transfers and discharges into 6 areas:

a. Voluntary Release From Active Duty (REFRAD), Ch. 2, paras. 2-5 through 2-20.

b. Involuntary REFRAD, Ch. 2, paras. 2-21 through 2-38.

c. Resignations, Ch. 3.

d. Eliminations, Ch. 4.

e. Miscellaneous Types of Separations, Ch. 5.

f. Retirements, Ch. 6.

2. Purposes of officer transfers and discharges.

a. Provide a way to terminate service prior to the terms of the original contract.

b. Provide authority to transfer officers from one component to another.

c. Provide authority to discharge officers from all military obligations.

d. Support the Army's personnel life-cycle function of transition.

IV. RELEASE FROM ACTIVE DUTY (REFRAD). Applies to OTRA officers only. A REFRAD is the transfer of an OTRA officer from AD status to an inactive status without affecting the officer's commission. REFRAD is not a discharge. It can be voluntary or involuntary. *See* AR 600-8-24, Ch. 2.

A. Voluntary REFRAD. Examples of voluntary REFRAD not discussed below include: National interest (such as to accept public office) and expiration of obligated service. *See* AR 600-8-24, paras. 2-5 to 2-9.

1. Personal Reasons. OTRA officers may submit applications NET 12 months and NLT 6 months prior to the desired release date. Under AR 600-8-24, paras. 2-5 and 2-6, the officer must:

a. Complete at least 1 year of current AD commitment;

b. Complete current prescribed tour if stationed outside the continental United States (OCONUS), and

c. Complete ADSO unless granted an exception to policy.

2. Hardship. Exists when in circumstances not involving death or disability of a member of the Soldier's (or spouse's) immediate family, separation will materially affect the care or support of the family by alleviating undue and genuine hardship. Under AR 600-8-24, para. 2-7, the officer must clearly establish:

a. The hardship is permanent and did not exist prior to entry on AD; or

b. If the hardship existed prior to entry on AD, the condition has since intensified and can only be alleviated by separating from AD; and

c. Upon REFRAD, the officer will be able to eliminate or materially alleviate the condition.

3. Pregnancy. A commander with separation approval authority (SAA) may release a RC officer who requests REFRAD because of pregnancy. AR 600-8-24, para. 9.

a. The officer's immediate commander will counsel the officer to provide information concerning the officer's rights, entitlements, and responsibilities with respect to continued AD or separation.

b. Officers commissioned through funded programs will not be released until completion of their ADSO. When extenuating circumstances exist, officers may request a hardship separation.

c. If before the REFRAD is accomplished a medical officer determines that the pregnancy has terminated for any reason, the authority for separation no longer exists.

B. Involuntary REFRAD. *See* AR 600-8-24, paras. 2-10 to 2-18. Involuntary REFRAD may be divided into two groups: Actions based upon the Soldier's status and actions based upon the Soldier's conduct.

1. Status-based involuntary REFRAD includes: Reaching maximum age, reaching maximum service, and nonselection for Active Guard Reserve (AGR) continuation.

a. Maximum Age or Service. *See* AR 600-8-24, paras. 2-10 to 2-11.

(1) Age. An officer will be released from AD (unless he or she requests voluntary retirement) on the last day of the month in which he or she attains the following maximum age:

(a) For major general (MG) or brigadier general promotable (BG(P)) promotable: 62.

(b) For any other commissioned officer: 60 (if the officer is within 2 years of active federal service (AFS) retirement eligibility, he or she may be retained on AD until eligible for retirement).

(c) For WO who cannot qualify for (non-regular service) retired pay under 10 U.S.C. §§ 12731-12740: 62.

(d) For WO who qualify for (non-regular service) retired pay under 10 U.S.C. §§ 12731-12740: 60.

(e) For certain medical officers: 67. However, the Service may not retain the officer to this age without the officer's consent.

(2) Service. Generally, RC officers will be released from AD after completing 20 years of AFS. There are several exceptions:

(a) Staff College Level School or Senior Service College members will be retained on AD until completing 2 years of AD following graduation.

(b) Officers named by command selection boards will be retained on AD up to 90 calendar days after completing assignment to the designated command position.

(c) LTCs may be retained until 28 years service.

(d) COLs may be retained until 30 years service.

(e) BGs may be retained until 5 years in grade or 30 years service, whichever is later.

(f) MGs may be retained until 5 years in grade or 35 years service, whichever is later.

(g) Lieutenant Generals (LTG) and above may serve 38 years.

b. Nonselect for AGR Continuation. *See* AR 600-8-24, paras. 12.

(1) AGR officers on initial period of duty will be separated from AD 90 days after notification of nonselection.

(2) AGR officers on AD and within 2 years of retirement eligibility will ordinarily not face involuntary REFRAD until eligible for retirement.

2. Conduct-based involuntary REFRAD includes: Board directed actions for poor performance or misconduct; civil conviction, and officer basic course (OBC) failure.

a. REFRAD by the Department of the Army Active Duty Board (DAADB). *See* AR 600-8-24, paras. 13.

(1) Under 10 U.S.C. § 14902, Service Secretaries shall prescribe, by regulation, procedures for the review at any time of the record of any RC officer to determine whether that officer should be required, because of substandard performance, misconduct, moral or professional dereliction, or national security concerns, to show cause for retention in an active status.

(2) The DAADB is the Army's tool for ensuring that only RC officers who consistently maintain high standards of efficiency, morality, performance, and professionalism are permitted to serve on AD.

(a) Referral of a case to the DAADB may be initiated locally or at Department of the Army (HQDA) level.

(b) Bases for REFRAD are similar to bases for administrative elimination: Substandard performance, misconduct, moral or professional dereliction, and national security reasons.

(c) These cases involve minimal due process. The officer is notified and given an opportunity to respond/rebut. The board reviews the record and officer's response/rebuttal and then recommends either retention or release.

(d) The initiating commander can close the case and stop the REFRAD action upon considering the officer's response/rebuttal.

b. Civil Conviction. An officer convicted of a criminal offense or who enters a plea of no contest to a criminal offense in any federal or state court may be released from AD.

(1) Under AR 600-8-24, paras. 2-14, SecArmy, or designee, or the General Court-Martial Convening Authority (GCMCA) may immediately REFRAD an officer when the offense:

(a) Results in conviction and sentence for more than 1 year, or

(b) Results in conviction and sentence for a crime of moral turpitude (regardless of the sentence), including, but not limited to, child abuse, incest, indecent exposure, soliciting prostitution, embezzlement, check fraud, and any felony or other offense against the customs of society.

(2) These cases involve minimal due process. The officer's case is not referred to a board; the officer is only notified and allowed an opportunity to respond.

c. Separation Approval Authority (SAA). *See* AR 600-8-24, para. 2-2.

1. Approval authority varies with type of REFRAD.

2. There is limited approval authority at the installation level. The following officers may exercise SAA and grant voluntary REFRADs:

a. Commanders of units and installations having a GCMCA;

b. General officers (GO) in command of Army medical centers; and

c. Commanders of:

(1) Personnel centers;

(2) Training centers;

(3) OCONUS replacement depots; or

(4) All active Army installations authorized 4,000 or more AD military personnel.

3. There is no denial authority at the installation level. A General Officer Show Cause Authority (GOSCA) may generally approve voluntary REFRADs but has no authority to disapprove a voluntary request. Recommendations for disapproval must be forwarded to Human Resources Command (HRC) or HQDA.

4. The SAA for involuntary REFRAD actions is generally reserved to the Commander, HRC or HQDA level. In any involuntary REFRAD case, reviewing JAs must consult AR 600-8-24.

V. RESIGNATIONS.

A. Unqualified Resignations. *See* AR 600-8-24, paras 3-5.

1. Any officer on AD for more than 90 calendar days may tender an unqualified resignation, unless:

a. Action is pending that could result in resignation for the good of the Service;

b. The officer is under a suspension of favorable action;

c. The officer is pending investigation;

d. The officer is under charges; or

e. Any other unfavorable or derogatory action is pending.

2. Normally, resignations will not be accepted unless, on the requested date of separation, the officer has completed his or her applicable ADSO.

3. Once forwarded to HRC, a resignation may only be withdrawn with HQDA approval. *See* AR 600-8-24, para. 3-2.

B. Failure to Meet Medical Fitness Standards when Appointed. A probationary officer who did not meet medical fitness standards when accepted for appointment may submit a resignation under AR 600-8-24, paras. 3-9 and 3-10.

C. Pregnancy. *See* AR 600-8-24, paras. 3-11 and 3-12.

1. Counseling required. Purpose is to provide information concerning rights, entitlements, and responsibilities with respect to continued AD or separation.

2. Normally, the Army will not grant a tendered resignation for pregnancy until the officer has completed her initial ADSO or any service obligation incurred from the funded program. However, when extenuating circumstances exist, the Army may grant an exception to policy if the officer accepts an indefinite appointment in the RC in order to complete the ADSO.

D. Resignations for the Good of the Service.

1. Officers who resign for the good of the service normally receive an under other than honorable conditions (OTH) characterization of service. Regardless of the characterization of service received, an officer who resigns for the good of the service in lieu of general court-martial may be barred (with minor exceptions) from receiving Veteran's Affairs (VA) benefits.

2. In Lieu of General Court-Martial. *See* AR 600-8-24, para. 3-9.

   a. An officer may submit a resignation for the good of the service in lieu of general court-martial when:

      (1) Court-martial charges have been preferred against the officer with a view toward trial by general court-martial, or

      (2) The officer is under a suspended sentence of dismissal.

   b. Tender of the resignation does not preclude or automatically suspend court-martial proceedings. However, the convening authority may not take action on findings and sentence until HQDA acts on the resignation request.

VI. ELIMINATIONS.

A. Privilege of Service.

1. Commissioned officers are expected to display responsibility commensurate to that special trust and confidence and to act with the highest integrity at all times. All commanding officers (and others in authority) are required:

   a. To show in themselves a good example of virtue, honor, patriotism, and subordination;

   b. To be vigilant in inspecting the conduct of all persons who are placed under their command;

   c. To guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; and

d. To take all necessary and proper measures, under the laws, regulations, and customs of the Army, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge. AR 600-20, Army Command Policy, para. 1-6.

2. It is DoD policy to separate those officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence expected of them. *See* DoDI 1332.30.

B. Bases for Elimination.

1. Substandard Performance. There are a variety of performance-related areas covered under AR 600-8-24, para. 4-2a. Some examples include:

a. Downward trend in performance resulting in inefficiency or mediocre service;

b. Poor performance of duty, inefficiency, or poor leadership;

c. Failure to keep pace with contemporaries;

d. Apathy, defective attitudes;

e. Failure of a course at a Service school for academic reasons;

f. Army Physical Fitness Test (APFT) or body composition failure;

g. Testing HIV Positive within 180 days of entering AD;

h. Failure to establish an adequate Family Care Plan (FCP); and

i. Best interest of the Government.

2. Misconduct, Moral or Professional Dereliction, or in the Interests of National Security. AR 600-8-24, para. 4-2b, outlines a non-exclusive list of reasons that support this basis for elimination:

a. Discreditable or intentional failure to meet personal financial obligations;

b. Mismanagement of personal affairs;

c. Intentional omission or misstatement of fact in official statements or records;

d. Acts of personal misconduct (including acts committed while in a drunken or drug intoxicated state);

e. Intentional neglect or failure to perform duties;

f. Conduct unbecoming;

g. Loss of professional qualifications or security clearance denial;

h. Drug dependence or misconduct involving drugs (in cases involving drugs, the command must initiate elimination action);

i. Failure to respond to rehabilitation efforts for Family abuse/violence;

j. Failure at a service school course because of misconduct; and

k. Conviction by court-martial not including a punitive discharge for a sexually violent offense. Elimination must be initiated under Army Directive 2013-21, Imitating Separation Proceedings and Prohibiting Overseas Assignment for Soldiers Convicted of Sex Offenses.

3. Derogatory Information. The Army's receipt of, or filing of, unfavorable information relating to an officer may result in the initiation of an elimination action. AR 600-8-24, para. 4-2c.

a. Required record review is triggered by:

(1) Punishment under Article 15, Uniform Code of Military Justice (UCMJ);

(2) Conviction by court-martial;

(3) Denial or revocation of security clearance;

(4) Relief for cause Officer Evaluation Report (OER);

(5) Official Military Personnel File (OMPF)-filed administrative reprimand; or

(6) Failure of a course at a Service school.

b. In considering whether to terminate his or her appointment, the Army must review the officer's overall record.

C. Procedural Issues.

1. Elimination actions may be initiated by either HQDA (CG, HRC; DCS, G-1, SecArmy; Chief of Staff of the Army) or a GOSCA. After reviewing the packet, HQDA or GOSCA shall either close a case, in which an officer should not be required to show cause for their continued retention, or forward the matter to the officer to show cause for retention. Nonprobationary officers are entitled to have the matter referred to a Board of Inquiry (BOI). Officers may be considered for separation for one or more reasons; however, separate findings are required for each.

2. There is a "double jeopardy" limitation upon the initiation of show cause boards.

a. Generally, an officer will not be required to show cause for conduct that was the subject of administrative elimination proceedings that resulted in a final determination that the officer should be retained.

b. Likewise, officers will not be required to show cause for conduct that has been the subject of judicial proceedings that resulted in acquittal.

c. There are several exceptions to these limitations. Show cause actions may be based upon:

(1) New evidence;

(2) Fraud in the earlier hearing; or

(3) Subsequent conduct.

(a) If the later show cause action is based upon substandard performance, the Army must wait 1 year if the officer was originally required to show cause for retention for the same reason(s).

(b) If the action against the officer is based upon misconduct, moral or professional dereliction, or is in the interest of national security, the officer may again be required to show cause at any time.

3. In misconduct cases in which the officer is retained, the officer may again be required to show cause for retention; however, the second show cause action may not be based solely upon the conduct presented to the previous BOI unless the findings and recommendation of the BOI are determined to have been the result of fraud or collusion.

4. Notification and Rebuttal.

   a. The initiating authority must provide the officer with a "show cause" notice that identifies the reason(s) for elimination.

      (1) Bases for elimination may be combined.

      (2) If combined, separate findings are required for each separation basis identified.

   b. Notice to show cause must also outline the officer's option to:

      (1) Submit a resignation in lieu of elimination.

      (2) Request discharge from the RA under 10 U.S.C. § 1186.

      (3) Submit a request for Retirement in Lieu of Elimination, if eligible, under 10 U.S.C. § 1186.

      (4) Appear before a BOI, if eligible, under 10 U.S.C. §§ 1182 and 14903.

   c. Without regard to the officer's probationary or nonprobationary status, he or she is entitled to submit a written response or rebuttal to the headquarters that initiated the show cause action. At any point in the process, a decision to retain the officer stops the show cause action.

5. The characterization of service for officers facing show cause actions may be honorable, general, or OTH.

   a. The characterization is normally based on a pattern of behavior and duty performance rather than an isolated incident.

   b. If the sole reason for elimination is substandard performance, the officer is entitled to an honorable discharge.

6. Probationary officers have limited due process in show cause actions.

   a. Prior to forwarding the case to SecArmy for action, the officer must receive:

      (1) Formal notification of the bases for the action, and

      (2) An opportunity to submit a rebuttal to initiating authority.

   b. Probationary officers are not entitled to a board unless OTH discharge is recommended.

   c. If officer loses probationary status during processing, the command must process the officer as nonprobationary.

   d. A decision to retain the officer, at any point, stops the show cause action.

7. Nonprobationary officers are afforded greater due process.

   a. The officer is first provided with both formal notice to show cause and an opportunity to submit rebuttal matters to the initiating authority. The decision to retain the officer, at any point, stops the show cause action.

   b. The officer is referred to a BOI. If the BOI recommends the officer's retention, the action is terminated. In all other cases, the case is referred to HQDA.

   c. For actions initiated on or before to 9 December 2016, HQDA next appoints a Board of Review (BOR) to review the BOI proceedings. If the BOR recommends the officer's retention, the action is terminated. For actions initiated after 9 December 2016, HQDA appoints an Ad Hoc Review Board to review the BOI proceedings. The Ad Hoc Review Board makes a nonbinding recommendation concerning the disposition of the case. *See* Secretary of the Army Memorandum for Assistant Secretary of the Army (Manpower and Reserve Affairs), subject: Specific Delegation of Authority to the Assistant Secretary of the Army (Manpower and Reserve Affairs) to Administer Component Boards of the Army Review Boards Agency, dated 9 December 2016. In all other cases for which the officer did not appear before a BOI, the case is referred to SecArmy.

d. SecArmy takes final action in the officer's case.

8. Referral to BOI: Full due process. 10 U.S.C. §§ 1182 and 14903.

a. BOI procedures are the same for probationary officers facing OTH discharge eliminations as for nonprobationary officers.

b. The BOI "will give a fair and impartial hearing to an officer required to . . . show cause . . . . The hearing provides a forum for the officer concerned to present reasons the contemplated action should not be taken." DoDI 1332.30, para. 4.3a.

c. At the BOI, the officer:

(1) Will be provided with military counsel and may hire civilian representation;

(2) Will have a reasonable time to prepare his case, but in no case will he or she have less than 30 days;

(3) Will be permitted to be present at all stages of the proceedings, and have full access to all of the records, except when SecArmy determines that national security requires the protection of classified documents;

(4) May challenge any member of the board for cause;

(5) May present documents from his service record, letters, depositions, sworn or unsworn statements, affidavits, evidence, and may require the production of witnesses deemed to be reasonably available;

(6) May cross examine any witness brought before the board; and

(7) May elect to testify by sworn or unsworn statement or may remain silent. If the officer testifies, he or she may be required to submit to examination by the board as to any matter concerning the testimony, but not in contravention of Article 31, UCMJ. *See* AR 600-8-24, para. 4-11.

d. Composition of the BOI.

(1) Locally appointed by GOSCA.

(2) Comprised of at least 3 voting officers. The members must be:

(a) On ADL or RASL;

(b) From the same military service as respondent; and

(c) Senior in *grade and rank* to the officer. President shall be a COL or higher, and other members must be LTC or higher.

(d) If the officer is an OTRA officer, an RC member must serve on the BOI. All warrant officers in the grade of WO1 are considered RC even if they are presently serving on AD.

(e) When the officer is a female, minority, or member of a special branch, the BOI will, upon the officer's written request, include a female, minority, or special branch member. Such request must be made within 7 days of the notification.

(f) When the reasons for elimination include substandard performance, the board will include a member of the same branch as the respondent officer.

(3) Other Participants. The BOI will also include a legal advisor, a recorder, and respondent's counsel, all of whom are nonvoting members.

e. Except as modified by AR 600-8-24, the BOI will conform to the provisions of AR 15-6 applicable to formal proceedings with respondents (Boards of Officers). See AR 15-6, Chs. 3 and 7 for applicable rules.

f. Determinations.

(1) The BOI will decide the case based only on the evidence received or developed during open hearings.

(2) The BOI conducts its voting in closed session with only voting members in attendance.

(3) All findings and recommendations shall be determined by a majority vote.

(4) If the BOI determines that retention is warranted, the case is closed.

(5) If the BOI determines that retention is not warranted, the case is forwarded to the GOSCA who will "report" the case to a BOR/Ad Hoc Review Board.

9. Board of Review/Ad Hoc Review Board.

a. Convened at HQDA level.

b. Limited due process. The BOR reviews the administrative record of the case. There is no personal appearance at the BOR.

c. Composition. Same composition requirements as a BOI. The BOR shall review the entire record of the BOI.

d. Recommends either retention or elimination.

(1) If officer "shows cause" or establishes that retention is warranted, the case is closed.

(2) If the documentation establishes that retention is not warranted, the BOR recommends separation action and the appropriate characterization for the officer's discharge certificate, then forwards the case to SecArmy for final action.

e. Actions initiated after 9 December 2016, will be referred to an Ad Hoc Review Board instead of a BOR. *See* Secretary of the Army Memorandum for Assistant Secretary of the Army (Manpower and Reserve Affairs), Subject: Specific Delegation of Authority to the Assistant Secretary of the Army (Manpower and Reserve Affairs) to Administer Component Boards of the Army Review Boards Agency, dated 9 December 2016. Of note, the Ad Hoc Review Board makes a nonbinding recommendation concerning the disposition of the case. *Cf.* BOR.

10. Action by Service Secretary. 10 U.S.C. § 1184. SecArmy has two choices: Retain or separate. SecArmy's decision is final.

D. A commissioned officer must receive a medical examination to determine if the effects of post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) could be related to the basis for involuntary separation in order to comply with 10 U.S.C. § 1177. DoDI 1332.30, para. 9.1. This assessment will occur if the officer:

1. Is separated under a characterization that is other than honorable.

2. Was deployed overseas to a contingency operation or was sexually assaulted during the previous 24 months.

3. Is diagnosed by a physician, clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse as experiencing PTSD or TBI, or reasonably alleges the influence of PTSD or TBI based on deployed service to a contingency operation or sexual assault during the previous 24 months.

4. Is not separated by a court-martial or other Uniform Code of Military Justice proceeding. Separation in lieu of court-martial does not constitute a court-martial or other Uniform Code of Military Justice proceeding, and therefore, compliance with 10 U.S.C. § 1177 is required.

VII. MISCELLANEOUS SEPARATIONS.

A. AR 600-8-24, Ch. 5, prescribes disposition and procedures for miscellaneous types of separations whereby an officer may be dismissed, released, separated, and discharged from AD. These include:

1. Lack of jurisdiction, or cases in which the officer obtains a court writ ordering release from AD;

2. Chaplain's loss of professional qualifications, if the command did not initiate elimination action under Ch. 4, para. 4-2b;

3. Officers twice nonselected for promotion by an HQDA centralized board, unless selectively continued (SELCON), the officer has more than 18 years of service, or is retirement eligible;

4. Second lieutenant (2LT) and WO1 nonselected for field promotion;

5. Conviction by foreign tribunal, in cases when sentence includes confinement of greater than 6 months;

6. Dropped From the Rolls (DFR): AD or retired when confined, absent without leave (AWOL) for at least 3 months, or loses retired pay; and

7. Dismissed by general court-martial, after appellate review is complete.

B. Procedures. The steps necessary to separate officers vary with the type of separation. In all Ch. 5 cases, the command must follow the separation steps outlined in the regulation.

VIII. RETIREMENT.

A. Types of Retirement. *See* AR 600-8-24, Ch. 6.

1. Voluntary Retirements.

a. Voluntary Retirement (VR): GCMCA approval. The Army is the only service to include voluntary retirements in its officer separation regulation; however, this area is primarily governed by statute. Temporary Early Retirement Authority (TERA) has been terminated. *See* Army Directive 2017-38, Termination of Temporary Early Retirement Authority.

b. Voluntary Retirement in Lieu of Mandatory, i.e., pending REFRAD, elimination, or nonselection.

c. Retirement in lieu of elimination, in cases involving misconduct or moral or professional dereliction, requires referral to Army Grade Determination Board (AGDB).

d. Retirement in lieu of permanent change of station (PCS): Officer must have at least 19 years, 6 months time in service; must submit within 30 days of notice of PCS.

2. Involuntary Retirements.

a. Mandatory Retirement: Maximum age or service.

b. Selective Early Retirement: Based on selection by Selective Early Retirement Board (SERB). 10 U.S.C. § 638 provides authority for SecArmy to convene boards to select officers for retirement before their mandatory retirement date. *See* AR 600-8-24, para. 6-29.

c. Enhance Selective Early Retirement: Enhanced authority whereby the Secretary of Defense authorizes SecArmy to expand the pool of officers eligible for selection by a SERB. *See* 10 U.S.C. § 638a.

B. Retired Grade. *See* 10 U.S.C. § 1370.

1. Minimum TIG Requirements (Voluntary Retirements).

   a. 6 months for MAJ and below.

   b. 3 years for LTC through MG. The President may waive this requirement in individual cases involving extreme hardship or exceptional or unusual circumstances.

   c. Under previous drawdown authority, SecArmy could reduce the TIG requirement to 2 years for LTC and COL.

2. SecArmy makes satisfactory grade determination (delegated to Assistant Secretary of the Army (Manpower and Reserve Affairs (ASA(M&RA)) or Deputy Assistant Secretary of the Army (Review Boards) (DASA-RB)).

C. Retired Pay. *See* 10 U.S.C. § 1401-1412.

1. Member before 8 September 1980 = "Multiplier" x number of years x high month's pay.

2. Member after 7 September 1980 = "Multiplier" x number of years x average monthly base pay for member's high 3 years.

3. Determining the retired pay "multiplier." 10 U.S.C. § 1409.

   a. Member before 1 August 1986: "multiplier" equals 2.5% per year.

   b. Member after 31 July 1986: "multiplier" equals 2.5% per year minus 1% for each year of service less than 30 years. For a 20-year retirement, officer will receive 40%. NOTE: As a result of the FY00 NDAA, members who entered the service after July 31, 1986 will be given a choice of retirement plans at their 15th year of service. There are two options:

      (1) Take the pre-1986 retirement system (high-three year average system), or

      (2) Elect the post-1986 retirement system (Military Retirement Reform Act (MRRA) of 1986, commonly referred to as REDUX) and take a $30,000 career retention bonus.

   c. Retired pay readjusted at age 62 regardless of the basic active service date (BASD).

4. The FY16 NDAA created a new military retirement system that blends the traditional legacy retirement pension with a defined contribution to Soldier's thrift savings plan account. The new blended retirement system went into effect on 1 January 2018.

D. Other Retirement Related Actions: Selective Continuation on AD (SELCON). *See* 10 U.S.C. § 637.

1. Applies to RA and OTRA officers. The SA may (based on the needs of the service for specific skills) convene SELCON boards to retain twice nonselected officers who wish to remain on AD. CPTs may be retained until 20 years of active commissioned service (ACS); MAJs until 24 years of ACS, unless thereafter promoted AZ.

2. FY02 NDAA, sec. 505(d), extended SELCON to OTRA officers.

a. If selected, MAJs with less than 14 years TIS are not required to be SELCON until 20 years. SELCON normally operates in increments of 3 years.

b. If selected, MAJs with more than 14 years TIS will normally be SELCON until 20 years. Officers who refuse to accept SELCON through retirement eligibility are not authorized to receive separation pay.

c. Non-SELCON officers will be separated within 7 months.

E. Reserve Component Retirement Based on Active Duty Performance.

1. Pursuant to the FY08 NDAA and a 28 May 2009 Office of the Chief, Army Reserve Memorandum, an RC Soldier/officer may have his/her retirement age reduced from age 60 to a lesser age not below 50 for those who have served on AD on or after 29 January 2008. The AD period must be for the express purpose of overseas contingency operations or its derivatives.

2. Each day of service on AD counts toward a reduction in retirement age, to be aggregated in 90 day increments within any fiscal year.

IX. FINANACIAL CONSIDERATIONS RELATED TO SEPARATIONS

A. Separation Pay for Involuntarily Separated Officers. *See* DoDI 1332.29, Section 3.

1. Basic eligibility requirements.

a. 6 years AD;

b. Honorable service;

c. Involuntary separation; and

d. Written agreement to serve in Ready Reserve for at least 3 years.

2. Full Separation Pay.

a. Officers who are involuntarily separated for the following reasons may receive full separation pay.

(1) Fully qualified but denied continuation on AD.

(2) Fully qualified but being separated under a reduction in force (RIF).

b. Computation Formula: 10% of annual base pay times the number of years of service.

3. Half Separation Pay. Officers who are involuntarily separated for cause may receive half separation pay in certain situations. *See* DoDI 1332.29 para. 3.2 and AR 600-8-24, para. 1-14.

4. Officers involuntarily separated due to substandard performance or misconduct do not receive separation pay unless eligible for half separation pay as identified in DoDI 1332.29.

5. All programs are subject to the availability of appropriations.

B. Recoupment. 10 U.S.C. § 2005.

1. Policy. The Government will recoup educational costs from individuals who participate in certain advanced education or bonus programs and fail to complete their educational requirements or military service obligations. 10 U.S.C. § 2005; s*ee also* AR 600-8-24, para. 1-16, and AR 37-104-4, Ch. 31. This applies to both voluntary and involuntary separations.

2. Procedures.

a. Defense Finance and Accounting Service (DFAS) procedure initiated by the officer's local commander.

b. Recoupment must be accomplished prior to separation.

c. Army policy is to attempt recoupment in all cases. SecArmy directs recoupment in most cases.

d. Separation boards (boards of review and ad hoc boards) may be required to make findings and recommendations on recoupment.

X. OTHER CONSIDERATIONS RELATED TO SEPARATIONS.

A. Involuntary Separation of Officers with Access to Sensitive Programs. *See* AR 600-8-24, para. 1-20.

1. Coordination with supporting security officials required. Separation will not occur unless the security official concurs with the action.

2. Applies to officers in the following categories:

a. Knowledge of sensitive compartmented information (SCI);

b. Nuclear Weapon Personnel Reliability Program assignment;

c. Knowledge of Single Integrated Operational Plan-Extremely Sensitive Information (SIOP-ESI);

d. Special Access Program (SAP) knowledge; and

e. Presidential Support assignment.

B. Separation in a Foreign Country. *See* AR 600-8-24, para. 1-30.

1. Normally, officers are not fully separated from OCONUS commands. Rather, these officers are returned to the United States and processed for final separation at CONUS-based separation/transfer points.

2. Exceptions.

a. An officer's request for separation in a foreign country may be approved if the foreign government concerned consents.

(1) The officer must obtain all necessary documents for his or her lawful presence in the foreign country prior to separation.

(2) The officer's Major Army Command (MACOM) may disapprove the request for overseas separation.

b. The Army may separate officers confined in a foreign penal institution pursuant to the sentence of a foreign court, but there are limits to this exception:

(1) HRC must approve separation during confinement;

(2) Foreign authorities must take final action on the case before separation; and

(3) The foreign government concerned must consent to the officer's separation in its territory.

C. Referral for Physical Disability Evaluation. *See* AR 600-8-24, para. 1-25.

1. Triggered when it is determined that an officer being processed for REFRAD, separation, retirement, or elimination has a medical impairment that does not meet medical retention standards.

2. Officers under investigation for an offense chargeable under the UCMJ that could result in dismissal or punitive discharge may not be referred for or continue disability processing unless:

a. The investigation ends without charges;

b. The commander exercising court-martial jurisdiction dismisses charges; or

c. The commander exercising court-martial jurisdiction refers the charge(s) for trial to a court-martial that cannot adjudge a dismissal or punitive discharge.

3. Officers pending certain involuntary REFRAD or involuntary elimination under AR 600-8-24, Ch. 4, or who request resignation for the good of the service or separation, and resignation or retirement in lieu of elimination, will be processed under both AR 600-8-24 and the medical/physical evaluation board system.

a. If the physical disability evaluation results in a finding of physical fitness, the Army Physical Disability Agency will approve the findings for SecArmy and forward them for processing with the separation action.

b. If the physical disability evaluation results in a finding of physical unfitness, both actions will be forwarded to SecArmy for determination of appropriate disposition.

4. When an officer is processed for separation or retirement for reasons other than those listed in AR 600-8-24, para. 1-24b (e.g., REFRAD due to civil conviction, elimination, and resignation for the good of the service), then physical disability processing takes precedence.

XI. COMMANDER'S RESPONSIBILITIES.

A. Documentation.

B. Ensure counseling requirements of AR 600-8-24, para. 1-14, are properly completed.

1. Required for commissioned officers with less than 10 years active federal commissioned service.

a. Triggered when such officers submit a request for voluntary REFRAD or an unqualified resignation.

b. Counseling is by the first COL in the officer's chain of command or supervision. Chaplains, JAs, and medical officers will be counseled by a senior officer of their branch in the chain of technical supervision or as specifically designated by their branch.

2. Counseling must include the following:

a. Advice concerning the opportunities available in the military;

b. Discussion of the officer's previously achieved investment in the Army;

c. A determination as to whether the officer has satisfied all applicable service obligations;

d. A determination that the officer is not under investigation or charges, awaiting the results of trial, or being considered for administrative elimination;

e. A determination that the officer is not AWOL, in the confinement of civil authorities, suffering from a severe mental disease or defect, or in default in respect to public property or public funds;

f. Advice encouraging a RA officer to accept an appointment in the USAR (RC officers will be encouraged to retain their commissioned status in the USAR); and

g. The addresses of agencies that can provide the officer with information about USAR career opportunities.

C. Take the Proper Action. In determining what action to take when faced with officer misconduct or poor performance, the commander should decide:

1. Should the officer be retained on AD?

2. Should the officer be eligible for reappointment or recall to AD at some later time?

3. Should the officer lose his or her commission?

CHAPTER F

ADVERSE ADMINISTRATIVE ACTIONS

TABLE OF CONTENTS

I. INTRODUCTION.

Commanders have a spectrum of administrative military personnel actions which they can use to train, motivate, improve, and rehabilitate Soldiers whose performance is unsatisfactory or who exhibit other problems which interfere with duty performance or the unit's mission. If Soldiers fail to respond to motivation and rehabilitation, other administrative tools are available which commanders can use to take appropriate remedial or adverse action, or to separate Soldiers from the Army.

This outline reviews common administrative actions short of administrative separation which you can expect to see most often. Appendix A is a chart which lists these actions in a tabular form. Each section also lists the appropriate references (a consolidated list of Army references is provided below). Always reference the Army Publishing Directorate or National Guard Bureau Publications and Forms Library to ensure you are using the most up-to-date regulation.

This outline should be supplemented by reference to the applicable regulation and to appropriate local regulations and policies. In particular, when discussing certain adverse administrative actions, this outline frequently makes reference to certain provisions of AR 635-200, Active Duty Enlisted Administrative Separations. For actions involving reserve component Soldiers, readers should use the appropriate provisions of AR 135-178, Enlisted Administrative Separations.

II. CONSOLIDATED LIST OF ARMY REFERENCES.

A. Army Regulation (AR) 25-400-2, The Army Records Information Management System (ARIMS).

B. Department of the Army Pamphlet (DA Pam) 25-403, Guide to Recordkeeping in the Army.

C. AR 27-3, The Army Legal Assistance Program

D. AR 27-10, Military Justice.

E. AR 190-5, Motor Vehicle Traffic Supervision.

F. AR 380-67, Personnel Security Program.

G. AR 600-8-2, Suspension of Favorable Personnel Actions (Flags).

H. AR 600-8-10, Leaves and Passes.

I. AR 600-8-19, Enlisted Promotions and Reductions.

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

K. AR 600-20, Army Command Policy.

L. AR 600-37, Unfavorable Information.

M. AR 600-85, Army Substance Abuse Program.

N. AR 601-280, Army Retention Program.

O. AR 614-200, Enlisted Assignments and Utilization Management

P. AR 623-3, Evaluation Reporting System

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

R. Army Directive (AD) 2016-19, Retaining a Quality Noncommissioned Officer Corps.

III. DUE PROCESS OF LAW: THE STARTING POINT.

A. The Constitution.

1. Bill of Rights (e.g., Fourth, Fifth, and Sixth Amendments) generally inapplicable to military administrative proceedings.

2. When challenged in court on alleged denial of constitutional due process (Fifth Amendment), military position is there is no constitutional life, liberty, or property interest affected by our administrative actions.

B. Our Regulations.

1. Must follow procedures in regulations—they are more than "guidelines." Regulatory requirements ensure consistency and fairness in the processing of actions and the full development of necessary administrative records. Although federal courts are very hesitant to second guess the armed forces on the substance of decisions, they will grant relief if we fail to follow our own regulations.

2. "Minimum" due process. Even when our regulatory procedures do not have formal due process requirements, commanders should always provide basic due process protections, at a minimum. Soldiers should be afforded notice of the intended action and the reason therefore, as well as an opportunity to be heard.

3. When reviewing past actions, the courts look at the regulations in effect at the time and any representations made by the agency that rise to a modification in policy, to determine whether the individual received due process and what, if any, remedy they are entitled.

IV. SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS).

A. Reference. AR 600-8-2, Suspension of Favorable Personnel Actions (Flags).

B. Purpose.

1. A suspension of favorable personnel action (or "flag") is an administrative hold placed on a Soldier that prevents most favorable personnel actions (e.g., promotion, awards, school attendance, payment of reenlistment bonuses, etc.) while the Soldier's status is "unfavorable." A separate flag is required for each investigation, incident, or action.

2. A flag itself is not an adverse action. Its purpose is to stay favorable proceedings, delaying their effective date until a Soldier is in good standing. Flags can have an adverse effect, however, based on the delayed timing of favorable actions (i.e. missed training opportunities and hampering career progression).

3. Proper flagging is essential to appropriately handling administrative actions. This includes ensuring flags are removed promptly.

C. Types. There are two types of flags, "transferable" and "nontransferable" actions. The impact of the action will vary depending upon the flag's basis and type:

a. Non-transferable flags. Prevent transfer to another unit; appointment, reappointment, reenlistment, extension, entry on active duty or active duty for training (for reserve personnel); reassignment; promotion or reevaluation for promotion; awards and decorations; attendance at civil or military schools;

unqualified resignation or discharge; retirement; advance or excess leave; payment of enlistment or selective reenlistment bonus; assumption of command; family member travel to an overseas command; and command sponsorship of family members in overseas command. A Soldier flagged with a non-transferrable flag may PCS if it is in the best interest of the Army, decided on a case by case basis (*See* paras. 2-1, 2-8, and 3-1, AR 600-8-2).

b. Transferable flags. The flagged Soldier may be transferred to another unit. Headquarters, Department of the Army (HQDA) directs reassignment of a flagged Soldier.

D. Requirements for Imposing a Flag. The regulation requires a commander to impose a flag under the following circumstances:

a. Non-transferable:

(1) Commander's Investigation. When suspect or subject of investigation. Interpreted broadly to include any action that could result in disciplinary action or other loss to Soldier's rank, pay, or privileges (excluding Financial Liability Investigation of Property Loss).

(2) Law Enforcement Investigation. When subject of a U.S. Army CID (or service equivalent), military police, or civilian law enforcement investigation.

(3) Subject to Adverse Actions. Includes non-judicial punishment; UCMJ (preferral of charges or pretrial confinement); civilian criminal charges; administrative reduction; non-punitive reprimand; and absent without leave (AWOL).

(4) Pending administrative separation or discharge.

(5) Pending removal or consideration of removal from command, promotion, or school selection list.

(6) Referred Officer Evaluation Report (OER) or Relief for Cause Non-Commissioned Officer Evaluation Report (NCOER).

(7) Security violations.

(8) Drug abuse or alcohol abuse adverse action.

(9) Non-recommendation for an automatic promotion (Private through Specialist, Chief Warrant Officer 2, First Lieutenant)

(10) Lautenberg Amendment. Soldiers with qualifying conviction of domestic violence.

(11) Family Care Plan. Soldiers who fail to provide and maintain a valid family care plan.

(12) Professional Licensing/Credentialing/Certification (Army Medical Department (AMEDD) healthcare workers and veterinarians; Chaplains; and Judge Advocate personnel)

b. Transferable:

(1) Punishment phase of non-judicial punishment, court-martial, or civil court (that does not include confinement, restraint, or geographic travel restrictions).

(2) Army Physical Fitness Test (APFT) failure.

(3) Non-compliance with Army Body Composition Program.

E. Procedure.

1. Any commander may direct the imposition of a flag.

2. Battalion S1 prepares DA Form 268, Report to Suspend Favorable Personnel Action (FLAG), and submits Standard Installation/Division Personnel System (SIDPERS) transaction. Properly administered, the flag system has two components:

   a. A SIDPERS transaction that codes a Soldier's records in the Army's automated personnel database and prevents favorable personnel transactions.

   b. The battalion adjutant (S1 or equivalent) manages the flagging system at their unit, keeping unit leadership and unit personnel clerks aware of the flag, and permitting lifting the flag when appropriate. The battalion Personnel Action Center (PAC) produces a monthly report for each of its companies, listing all Soldiers with flags and their type. This report should be screened at both battalion (in the PAC) and at unit (company) levels to ensure that all Soldiers who should be flagged are, and those who should have had their flags removed no longer are on the roster. Unit (company) level commanders will review and validate the monthly flag report. *Battalion Commander must review and validate the report for flags over 6 months old.*

3. The flagging authority, unit commander, or first line supervisor will notify the Soldier in writing within three working days unless notification would compromise an ongoing investigation.

4. Commanders remove flags within three days when the incident, investigation, or action has concluded, using the same form (DA Form 268) and supporting documentation. The date the Soldier's status changed is the effective date of the suspension's removal.

F. Approval Authority. Any commander or general officer staff head.

G. Appeal. None.

H. Records. DA Form 268 and supporting documentation maintained for closed flags for one year. DA Form 268 and supporting documentation maintained for one year for all Soldiers discharged while flagged. No permanent record of flag itself, although there may well be a permanent record of the underlying adverse action which required the flag.

V. EXTRA OR CORRECTIVE TRAINING.

A. Reference. AR 600-20, Army Command Policy, paragraph 4-6b, 4-19; AR 27-10, Military Justice, paragraph 3-3c.

B. Purpose. An effective, non-punitive, administrative corrective measure used when a Soldier's duty performance has been substandard or deficient.

C. Procedure. No formal procedure.

1. Any leader may order a Soldier to train to overcome a deficiency.

a. Must be appropriately tailored to curing the deficiency.

b. Must be aimed at improving the Soldier's performance.

2. Not punishment; continues until deficiency is overcome.

D. Approval Authority. Any commander. An inherent power of command. May be delegated.

E. Appeal. No specific procedure; *however*, "[c]are should be taken at all levels of command to ensure that training and instruction are not used in an oppressive manner to evade the procedural safeguards applying to imposing nonjudicial punishment." AR 600-20, paragraph 4-6b. Additionally, must comply with the provisions related to treatment of persons in AR 600-20, paragraph 4-19.

F. Records. None; *however*. . .

1. "Deficiencies *satisfactorily corrected* by means of training and instruction will not be noted in the official records of the Soldiers concerned." AR 600-20, paragraph 4-6b(3) (emphasis added).

2. If the problem merits it, consider counseling with a view towards separation and, if appropriate, proceed to separation.

VI. REVOCATION OF PASS PRIVILEGES.

A. Reference. AR 600-8-10, Leave and Passes, Chapter 5, Section XIV; AR 27-10, Military Justice, paragraph 3-3a.

B. Purpose. To reinforce training and to maintain good order and discipline.

C. Procedure. No formal procedure.

1. Regular passes usually do not require a DA Form 31 (although one may be used). If a Soldier's pass privileges are revoked, the Soldier's immediate commander or his or her representative should inform the Soldier in writing. If DA Form 31 is used for regular passes, indicate disapproval on the form.

2. Commanders should grant passes (defined as short, nonchargeable, authorized absences from post or place of duty during normal off-duty hours) to those Soldiers whose performance of duty and conduct merits approval. If a Soldier's performance of duty and conduct do not merit approval, do not approve a pass.

D. Approval Authority. Unit commander.

E. Appeal. No special procedures.

F. Records. None required. Consider written counseling with a view towards separation.

VII. COUNSELING WITH A VIEW TOWARDS SEPARATION.

A. Reference. AR 635-200, Active Duty Enlisted Administrative Separations, paragraph 1-17 and Chapter 17.

B. Purpose. An administrative prerequisite to many administrative separations; a counseling with a view towards separation serves as a warning to a Soldier to improve performance or face discharge. It also is an attempt by the Army to protect its investment in the Soldier's recruiting and training costs. *Compare with* general counseling (AR 600-20, paragraph 2-3) (basic leadership tool used to ensure Soldiers are prepared to carry out the duties efficiently and accomplish the mission). Performance counseling is a command obligation.

C. Procedure.

1. May be used at any time. As a prerequisite to processing a Soldier for discharge under the following provisions of AR 635-200, the command must complete at least one recorded counseling:

a. Involuntary separation due to parenthood, paragraph 5-8.

b. Personality disorder, paragraph 5-13.

c. Other designated physical or mental condition, paragraph 5-17.

d. Entry level performance and conduct, Chapter 11.

e. Unsatisfactory performance, Chapter 13.

f. Minor disciplinary infractions or a pattern of misconduct, paragraphs 14-12a and 14-12b.

g. Failure to meet body composition standards, Chapter 18.

2. Under Chapter 17, the counseling should formally notify the Soldier of:

a. The date and reason for counseling;

b. The fact that separation may be initiated if behavior continues;

c. The type of discharge that could result from possible separation;

d. The effect of each type of discharge; and

e. The likelihood that the Soldier will be successful in any attempt to have the discharge characterization changed.

D. The command must give the Soldier a reasonable opportunity to overcome the deficiencies. Evidence must document that the deficiency continued after the initial formal counseling.

E. Approval Authority. None. Counseling may be conducted by "a responsible official." AR 635-200, paragraph 1-17b.

F. Appeal. None. However, DA Form 4856 (Counseling Form), includes a section for the Soldier's comments, including a block for "agree" and a block for "disagree".

G. Records.

1. To be used as a prerequisite for separation, each counseling session must be recorded in writing.

2. DA Form 4856 (General Counseling Form) normally should be used for this purpose.

3. Filed in unit personnel files. No permanent, long-term record, unless incorporated into separation action. Maintain until Soldier departs unit; disposition thereafter per AR 25-400-2, The Army Record Information Management System (ARIMS).

4. Commander's Notebook. Generally may not be used in lieu of counseling given to Soldier. Beware of Freedom of Information Act (FOIA) and Privacy Act access. Generally, no right to access under FOIA if:

   a. Prepared voluntarily.

   b. Used only as a memory aid by preparer.

5. Article 15 (DA Form 2627) does not satisfy requirement in and of itself.

VIII. REHABILITATIVE TRANSFER.

A. References. AR 635-200, Active Duty Enlisted Administrative Separations, paragraph 1-17c.

B. Purpose. A Soldier must be recycled or reassigned to a new unit at least once before separation action can be initiated under AR 635-200 for:

   1. Entry level performance and conduct, Chapter 11.

   2. Unsatisfactory performance, Chapter 13.

   3. Minor disciplinary infractions or a pattern of misconduct, paragraphs 14-12a and 14-12b.

C. Procedure.

1. Period required.

   a. Trainees: Recycle between training companies where feasible; if not, between training platoons.

   b. Soldiers other than trainees: Reassign between battalion-sized or brigade-sized units at least once, with a minimum of three months in each unit, where possible.

2. Due process and appeal rights are very limited. The company-level commander requests the transfer, and the request is processed through command channels to the approval authority. No other formal due process rights for the Soldier.

3. PCS is normally not available. Exception for "meritorious cases where . . . a Soldier [has] potential to be a distinct asset to the Army [with] a change in commanders, associates, and living or working conditions." AR 635-200, paragraph 1-17c(3). GCMCA may authorize PCS within the same command. Requests for transfer to another command may also be submitted to HQDA.

D. Approval Authority.

1. Not specified in AR 635-200, paragraph 1-17. Logically, first commander with authority over the gaining and losing unit.

2. Separation Authority may waive requirement for rehabilitative transfer.

   a. Routine, common practice in many units.

   b. If the commander wishes to waive the requirement, he/she may do so where "common sense and sound judgment indicate that such transfer will serve no useful purpose or produce a quality Soldier." Make sure there is something in the file to *support* the commander's *conclusion* that transfer would:

(1) Create serious disciplinary problems or a hazard to the military mission or to the Soldier, or

(2) Be inappropriate because the Soldier is resisting rehabilitation attempts, or

(3) Rehabilitation would not be in the best interest of the Army as it would not produce a quality Soldier.

c. Waiver of rehabilitative transfer may be granted at any time on or before the date the separation authority approves or disapproves the separation proceedings.

E. Appeal. No specific provisions.

F. Records. No specific provisions. In practice, losing unit should document reasons for rehabilitation in counseling with a view towards separation. The Record Retention Schedule – Army (RRS-A) classifies documents related to counseling of rehabilitative transfers as "KEN" or Keep Event No Longer Needed. The triggering "event" is rehabilitative transfer, at which point the documents are forwarded to the gaining activity, whether it is an on or off post transfer.

IX. ADMINISTRATIVE REPRIMAND, CENSURE, OR ADMONITION.

A. References. AR 600-37, Unfavorable Information; AR 25-400-2, The Army Records Information Management System (ARIMS).

B. Purpose.

1. Documents unfavorable information (i.e. misconduct or poor performance) in official personnel files.

2. Ensures unsubstantiated, irrelevant, untimely or incomplete, unfavorable information is not filed in official personnel files.

3. Be wary of information originating *solely* from intelligence and personnel security files containing derogatory information concerning loyalty and subversion. This information requires special handling (*See*, *e.g.*, AR 600-37, Unfavorable Information, Chapter 4; AR 380-67, Personnel Security Program, Chapter 8).

C. The terms “reprimand,” “censure,” and “admonition” are not defined in AR 600-37 and any distinction between the three has been lost. AR 27-10, Military Justice, provides definitions of reprimands and admonitions in its glossary. The Manual for Courts-Martial discusses punitive censures with reprimands and admonitions both being forms of censures, with a reprimand constituting a more severe form of censure than an admonition. Memoranda of reprimand have become the standard administrative measure.

D. Procedure.

1. Drafting and initiating the letter.

a. For enlisted Soldiers. Initiated by the person's immediate commander, any higher commander in the chain of command, a supervisor, school commandant, general officer, or GCMCA. (all, but the supervisor may direct filing in the “local” file unless the supervisor is serving on one of the other capacities listed).

b. For officers. As above, plus any rating official, and less “supervisor” and “school commandant.” (Commanders must be senior in grade and date of rank to the recipient).

2. Contents. (*See* Figure 1, *infra*)

a. Reason for reprimand.

b. A statement that the reprimand was imposed as an administrative measure and not as punishment under Article 15, UMCJ.

c. If intended for filing in the Army Military Human Resources Record (AMHRR), the reprimand and the document referring the reprimand must indicate where the drafter intends to file the reprimand and the length of time the record is intended to remain filed.

d. A statement providing direction to the Soldier on how to correct his or her behavior.

e. Notice and rebuttal by the Soldier. AR 600-37, paragraphs 3-2, 3-5c and 3-7.

(1) Notice (a copy of the reprimand & subsequent information). Notice will include the opportunity to review the documentation that serves as the basis for the proposed filing. Redactions of such documents will comply with normal government information practices.

(2) Rebuttal. May include statements and evidence rebutting, explaining, or mitigating the unfavorable information.

(3) No right to counsel, but local legal assistance and Trial Defense Services will often try to see Soldiers, time permitting. *See* AR 27-3, The Army Legal Assistance Program.

E. Note: Under AR 600-37, paragraph 3-4, if the reprimand (or another adverse administrative action) is for a sex-related offense, commanders must ensure the action is reflected in the Soldier's AMHRR. The Soldier will be given the opportunity to respond and the response will be filed with the adverse administrative action, but the issuing authority has no local filing option. Additional coordination and processing is required in such cases.

F. Appeal. AR 600-37, chapter 7.

1. Local filing. May appeal to individual who initially directed filing or to a higher-level commander in writing with evidence justifying removal prior to specified date.

2. AMHRR filing. Appealed to DA Suitability Evaluation Board (DASEB).

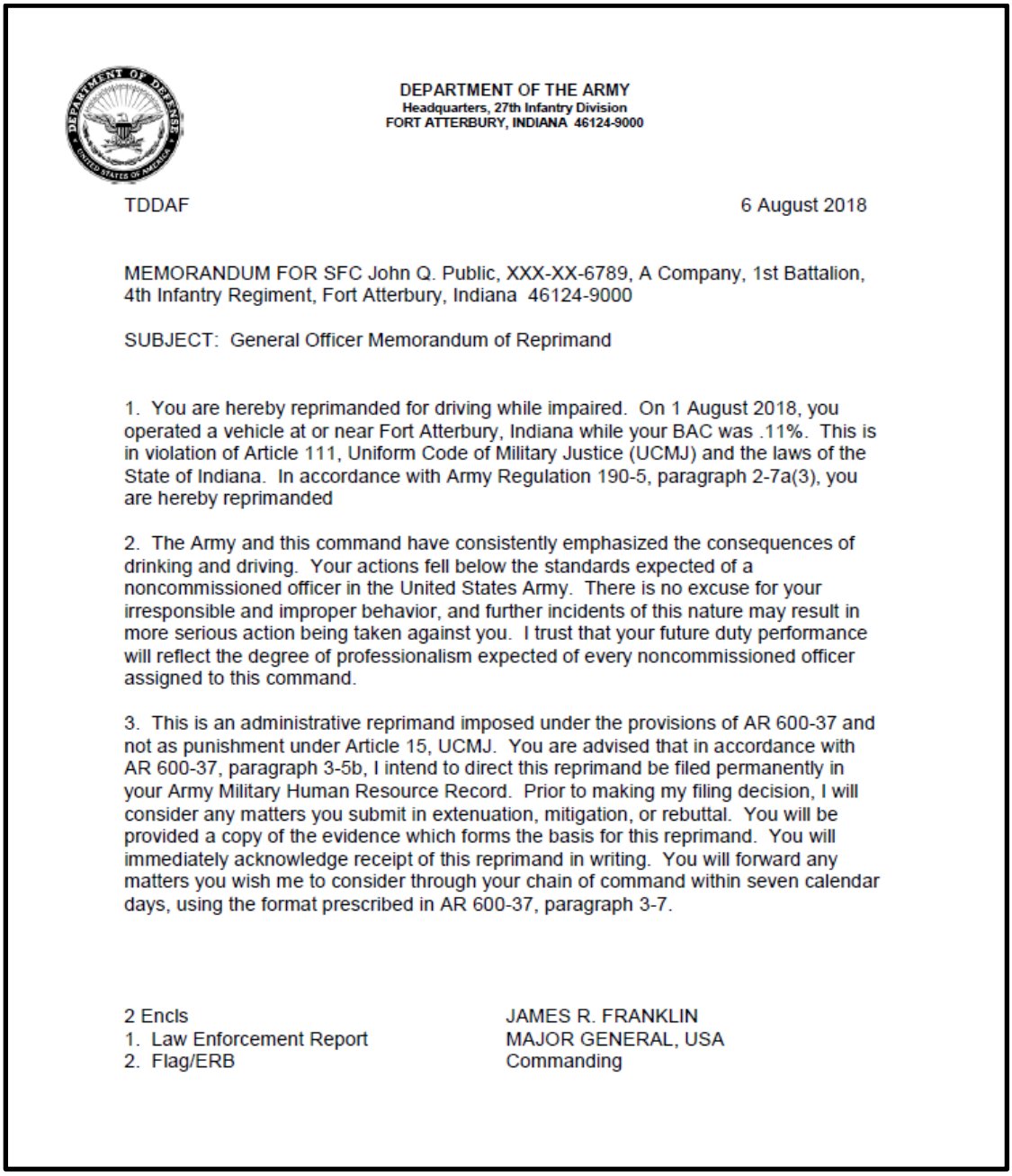
a. Removal: Document is untrue or unjust, in whole or in part. Normally, consideration of these appeals is restricted to SSG and above. The burden rests with the Soldier to provide evidence of a clear and convincing nature.

b. Transfer to restricted file of AMHRR: Reprimand has served its intended purpose and its transfer would be in the best interests of the Army. Again, appeals normally restricted to SSG and above. The burden is twofold:

(1) Must provide substantial evidence that the conditions have been met, and

(2) Must wait at least one year since imposition of the reprimand and have received at least one evaluation report other than academic.

F. Records. Memorandum maintained in local unit files for the period stated in the letter, not to exceed <u>eighteen months</u>, or until reassignment of recipient to a new GCMCA, whichever is sooner, or permanently in the AMHRR.



DEPARTMENT OF THE ARMY
Headquarters, 27th Infantry Division
FORT ATTERBURY, INDIANA 46124-9000

TDDAF

6 August 2018

MEMORANDUM FOR SFC John Q. Public, XXX-XX-6789, A Company, 1st Battalion, 4th Infantry Regiment, Fort Atterbury, Indiana 46124-9000

SUBJECT: General Officer Memorandum of Reprimand

1. You are hereby reprimanded for driving while impaired. On 1 August 2018, you operated a vehicle at or near Fort Atterbury, Indiana while your BAC was .11%. This is in violation of Article 111, Uniform Code of Military Justice (UCMJ) and the laws of the State of Indiana. In accordance with Army Regulation 190-5, paragraph 2-7a(3), you are hereby reprimanded

2. The Army and this command have consistently emphasized the consequences of drinking and driving. Your actions fell below the standards expected of a noncommissioned officer in the United States Army. There is no excuse for your irresponsible and improper behavior, and further incidents of this nature may result in more serious action being taken against you. I trust that your future duty performance will reflect the degree of professionalism expected of every noncommissioned officer assigned to this command.

3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under Article 15, UCMJ. You are advised that in accordance with AR 600-37, paragraph 3-5b, I intend to direct this reprimand be filed permanently in your Army Military Human Resource Record. Prior to making my filing decision, I will consider any matters you submit in extenuation, mitigation, or rebuttal. You will be provided a copy of the evidence which forms the basis for this reprimand. You will immediately acknowledge receipt of this reprimand in writing. You will forward any matters you wish me to consider through your chain of command within seven calendar days, using the format prescribed in AR 600-37, paragraph 3-7.

2 Encls
1. Law Enforcement Report
2. Flag/ERB

JAMES R. FRANKLIN
MAJOR GENERAL, USA
Commanding

Figure 1

X. LOCAL (FIELD INITIATED) BAR TO CONTINUED SERVICE.

A. Reference. AR 601-280 (Army Retention Policy), and AR 140-111 (U.S. Army Reserve Reenlistment Program).

B. Purpose.

1. "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. . . . Soldiers who cannot, or do not, measure up to such standards . . . will be barred from further service . . . ." AR 601-280, para. 8-2a.

a. Untrainable Soldiers: Soldiers who are found lacking in abilities and aptitudes to the extent that they require frequent or continued special instruction or supervision. This includes Soldiers who meet the minimum standards, but lack the potential to supervise.

b. Unsuitable Soldiers: Soldiers who may exhibit their unsuitability through interests or habits that are detrimental to the maintenance of good order and discipline and who may have records of minor misconduct requiring repetitive corrective or disciplinary action.

2. Replaces the bar to reenlistment (RA and USAR only).

3. A rehabilitative tool, puts pressure on Soldier to shape up, and sets up Soldiers who fail to do so for separation.

C. Procedure.

1. Initiating the bar.

a. Any commander in Soldier's chain of command may initiate by completing DA Form 4126-R. Soldier must be flagged under AR 600-8-2 upon initiation of the bar.

b. Bars should not be initiated during a Soldier’s first 90 days in a unit. If warranted, the Soldier may be barred, but the commander’s certificate will include an explanation.

c. Discretionary Grounds.

(1) Soldiers may be barred for one or a combination of infractions or reasons.

(2) Reasons include, but are not limited to lateness; AWOL for 1- to 24-hour periods; loss of clothing and equipment; substandard personal appearance or hygiene; indebtedness; non-judicial punishment; frequent traffic violations; excessive sick calls without medical justification; inability to follow orders; failure to adapt to military life; failure to manage personal affairs; causing trouble in the civilian community; behavior which brings discredit upon the unit or Army; failure to achieve weapons qualification or pass the record APFT; not recommended for promotion by commander; and lack of potential to become a supervisor or senior technician.

d. Mandatory Grounds. Commander must initiate a bar to continued service or separation proceedings (as applicable under AR 635-200).

(1) Single Soldier and dual-service couples with dependent Family members when Soldier has been counseled under AR 600-20, and does not have an approved Family member care plan on file within two months after counseling.

(2) Single Soldiers and dual-service couples with dependent Family members with assignment instructions to overseas location if unable to provide the names of guardians who will care for their Family members in CONUS in the event of evacuation from overseas.

(3) Failure to make satisfactory progress in the Army Body Composition Program (*see* AR 600-9).

(4) Failing two consecutive APFTs (*see* AR 350-1).

(5) Removal for cause from Noncommissioned Officer Education System (NCOES) courses.

(6) Loss of PMOS qualification due to the fault of the Soldier.

(7) Denied by commander for automatic integration onto sergeant or staff sergeant promotion standing list under AR 600-8-19 (*see* AR 2017-28 and ALARACT 114/2017 for additional information).

(8) Incident involving the use of illegal drugs or alcohol within the current enlistment resulting in an officially filed reprimand, a finding of guilty at an Article 15, a civilian criminal conviction, or a court-martial conviction.

(9) Two or more separate field grade Article 15's resulting in a finding of guilty (during the current enlistment period).

(10) AWOL more than 96 hours during the current enlistment and/or reenlistment period.

2. Notice and rebuttal.

   a. Refer DA Form 4126-R to the Soldier and allow Soldier to submit a statement, if desired, as required by AR 600-37.

   b. If Soldier requests, allow seven days to prepare comments and collect documents or pertinent materials. An extension may be granted by the initiating commander on a case-by-case basis.

   c. No right to counsel. Legal assistance will generally try to see Soldier. *See* AR 27-3, The Army Legal Assistance Program.

3. Initiating commander attaches Soldier's statement (if any) and forwards through chain of command to approval authority. Each commander (or acting commander) will personally endorse DA Form 4126-R. Any commander may disapprove the action and return it to the initiating commander.

4. Restrictions.

   a. May not approve bar after Soldier separates from active duty.

   b. May not enter bar in Soldier's records after Soldier separates from active duty.

   c. May not retain Soldier involuntarily past ETS in order to approve bar.

   d. May not bar Soldier with 18 years or more of active duty to prevent retirement eligibility.

5. Unit level commander informs Soldier that the bar was reviewed and what action was taken using back side of DA Form 4126-R, Bar Certificate, if bar is approved.

6. Periodic review.

a. At least once every three months after date of approval, and 30 days before the Soldier's departure from the unit or separation from service.

b. At the three month periodic review, if the command does not intend to lift the bar, must advise Soldier that separation action will ensue if the bar is not lifted at the completion of the second three month review.

c. After the second review, the command must lift the bar or initiate separation under AR 635-200 unless Soldier has more than 18 years, but less than 20 years, of active federal service. These Soldiers will be required to retire on the last day of the month when retirement eligibility is attained. Chapter 13, AR 635-200 often serves as the basis for separation unless there is a more appropriate basis.

D. Approval Authority. Depends upon Soldier's active federal service (AFS) *on date of bar initiation*. (Note: many commands may improperly rely upon previous practice, when AFS at ETS controlled.)

1. Less than 10 years AFS: First LTC or above in chain of command, or SPCMCA, whomever is in the most direct line to the Soldier.

2. 10 or more years AFS: First brigade-level commander in chain of command, or GCMCA, whomever is in the most direct line to the Soldier.

3. Commander who initiates bar cannot take final action to approve bar.

E. Appeal.

1. Soldier has seven days to submit appeal.

2. If otherwise qualified, Soldier will not be involuntarily separated while appeal is pending.

3. Appellate Authority. Depends upon Soldier's AFS *on date of bar initiation* and approval authority.

a. Less than 10 years AFS: First colonel (brigade commander) or general officer in chain of command or GCMCA.

b. 10 or more years AFS: First GO in chain of command.

c. Final approval of appeals will be at least one approval level higher than initiating authority.

d. Final disposition should be accomplished within 30 days after Soldier submits appeal. Commander will counsel Soldier in writing on the final disposition.

F. Records. When proper authority has approved bar to continued service, the custodian of the Soldier's personnel records will upload a signed copy into the Soldier's AMHRR.

XI. THE QUALITATIVE MANAGEMENT PROGRAM (QMP) DENIAL OF CONTINUED SERVICE.

A. Reference. AR 635-200, Chapter 19.

B. Purpose. Eliminate Soldiers who are either unproductive or unlikely to be promoted. Meant to enhance the quality of the career enlisted force, selectively retaining the best qualified, denying continued service to nonproductive Soldiers and encouraging Soldiers to maintain their eligibility for further service. Not intended to be rehabilitative; in reality a fast track to separation.

C. Procedure.

1. DA promotion boards annually review the files of all Soldiers in the grades of Staff Sergeant (E-6) or higher. The boards select Soldiers who are candidates for QMP.

2. Notification packet mailed from DA to installation or overseas command, who forwards packet to first LTC (or higher) commander in Soldier's chain of command. Commander must serve packet on Soldier expeditiously. Packet contains:

    a. Instruction letter to commander;

    b. Instruction letter to Soldier;

    c. Document(s) which triggered the decision; and

    d. Soldier's statement of option.

3. Using DA Form 4941-R, a Soldier has seven days from date of receipt to elect one of five options:

    a. Appeal;

    b. Do nothing and face separation;

    c. Request immediate voluntary discharge under AR 635-200 and forfeit any chance to receive separation pay;

    d. Retire, if retirement eligible; or

    e. Extend to retirement eligibility, if memorandum date is between 17 years, 9 months AFS and 20 years AFS.

D. Approval Authority. Deputy Chief of Staff, G-1. Action has already been approved when it is received in the field. Soldier's action is just a statement of option, and perhaps an appeal.

E. Appeal.

1. Grounds.

a. Material error in Soldier's record when reviewed by selection board.

b. Improved duty performance.

2. Must be submitted to chain of command within 60 days of completing DA Form 4941-R.

3. Must arrive at HRC within 30 days of receipt from Soldier.

4. Due to limitations on access to commanders and legal advisors, USAR AGR Soldiers have 90 days to submit DA Form 4941-R to chain of command. Command has 30 days of receipt from Soldier to submit comments to HRC.

5. Considerations on appeal. Appeals, particularly those submitted on the basis of improved duty performance, without strong, personal chain of command support are rarely successful.

F. Records. Maintained by DA as part of AMHRR.

XII. THE ARMY BODY COMPOSITION PROGRAM.

A. Reference. AR 600-9, The Army Body Composition Program; AR 635-200, Active Duty Enlisted Administrative Separations.

B. Purpose. To ensure that all Soldiers:

1. Are able to meet the physical demands of their duties under combat conditions, and

2. Present a trim military appearance at all times.

C. Procedure.

1. Commanders and supervisors will monitor Soldiers to ensure that they maintain proper weight. At minimum, Soldiers will be weighed when they take the APFT or at least every 6 months. Commanders may direct weight check if a Soldier presents an overweight appearance.

2. All Soldiers scheduled to attend professional military schooling will be screened before departure. If the Soldier exceeds the screening table weight, the Soldier will not be allowed to depart unless the Soldier's commander determines that he or she meets body fat composition standards. Soldiers arriving overweight at any DA select school or those who PCS to a professional military school will be processed for disenrollment.

3. Soldiers exceeding the screening table weight will be tested for body fat using the "tape" test.

4. Commanders will flag overweight personnel under AR 600-8-2. Flagged personnel:

a. Are non-promotable;

b. Cannot receive awards and decorations;

c. Will not be assigned to command positions;

d. Will not be authorized to attend professional military schooling (provided GCMCA finds the Soldier's failure to meet body fat standards was the result of a lack of self-discipline and approves disenrollment); and

e. Will not be allowed to reenlist or extend unless:

(1) The GCMCA approves an extension of a Soldier who either has a temporary medical condition that precludes weight loss or is pregnant and otherwise qualified for reenlistment (AR 600-9, paragraph 3-18b); or

(2) The GCMCA approves an extension of a Soldier who has completed a minimum of 18 years active federal service. Application for retirement will be submitted at the time the extension is approved. (AR 600-9, paragraph 3-18e).

5. Flagged personnel will be enrolled in the Army Body Composition Program (ABCP).

a. The loss of 3-8 pounds or 1% of body fat per month is deemed to be satisfactory progress. Overweight Soldiers who fail to make satisfactory progress within 6 months will either be processed for a bar to continued service or will have separation proceedings initiated against them. The commander must notify the Soldier in writing that separation is being considered, and must consider the Soldier's response.

b. Overweight Soldiers who are reenrolled in the ABCP within 12 months of successfully completing a previous enrollment in the ABCP will be processed for separation, provided no medical condition exists. *See* AR 635-200, paragraph 18-2a.

c. The ABCP provides a “grace period” for second-time enrollees. Soldiers are afforded 90 days to achieve standard when reenrolled in the ABCP after 12 months, but within 36 months from the date of previous removal from the ABCP if no medical cause.

6. There are specific requirements to refer the Soldier for medical evaluation/screening and nutrition counseling. Additionally, the unit is responsible for properly weighing and measuring the individual each month to monitor progress. In order to be removed from the program, the Soldier must meet the body composition standards (body fat) and not merely meet the screening table weight.

D. Approval Authority.

1. Authority to place a Soldier in the body composition program is the company-level commander.

2. Separation authority for active-component enlisted Soldiers:

a. LTC-level commander (if using notification procedures) or SPCMCA.

b. Soldiers with six or more years of service may elect to have their case heard before an administrative board.

E. Appeal. No specific procedure.

F. Records.

1. Records will be maintained in unit (Battalion S1/PAC) files as active during period that individual is in the program.

2. Upon transfer from one unit to another, the losing commander will forward a memorandum to the gaining commander indicating the status of the Soldier's participation in a body composition program, and forward any records.

XIII. DRUNK OR DRUGGED DRIVING: ADMINISTRATIVE SANCTIONS.

A. Reference. AR 190-5, Motor Vehicle Traffic Supervision; AR 600-85, Army Substance Abuse Program.

B. Purpose. Drunk driving (including drugged driving) administrative sanctions operate in concert with the Army's Alcohol and Substance Abuse Program (ASAP) to prevent alcohol and drug abuse, identify abusers, rehabilitate those abusers who warrant retention, and separate those who do not. NOTE: The treatment portion of ASAP is now under the responsibility of Army Medical Command as Substance Use Disorder Clinical Care (SUDCC). Installation Management Command retains responsibility over ASAP's drug deterrence, testing, and training programs.

C. Procedures.

1. Withdrawal of driving privileges. AR 190-5, paragraph 2-4a(3).

a. Suspension is immediate pending resolution of drunk driving charges, regardless of the geographic location of the incident for all DoD affiliates, brought in the following circumstances:

(1) Refusal to take or complete a lawfully requested chemical test to determine contents of blood for alcohol or other drugs;

(2) Operating a motor vehicle with a blood alcohol content (BAC) of 0.08% by volume or higher or in violation of the law of the jurisdiction that is being assimilated on the installation;

(3) Operating a motor vehicle with a BAC of at least 0.05% by volume but less than 0.08% blood alcohol by volume in violation of the law of the jurisdiction in which the vehicle is being operated, if the jurisdiction imposes a suspension solely on the basis of the BAC; or

(4) On an arrest report or other official documentation of the circumstances of an apprehension for intoxicated driving.

b. Limited hearing. AR 190-5, paragraph 2-6. A person whose driving privileges are suspended has 14 days from the notice of suspension in which to request a hearing. If requested, the installation commander or designated hearing officer must conduct the hearing within 14 days. The hearing officer must issue a decision within 14 duty days of the hearing. If no decision has been made by that time, full driving privileges will be restored until the individual is notified of the decision. Issues addressed:

(1) Did the law enforcement official have reasonable grounds to believe the person was DWI or in actual physical control of the motor vehicle while under the influence of alcohol or other drugs?

(2) Was the apprehension or citation lawful?

(3) Was the person lawfully requested to submit to a test for alcohol or other drug content of blood, breath, or urine and was he informed of the consequences of refusal to take or fail to complete such test?

(4) Did the person refuse to submit to the test for alcohol or other drug content of blood, breath, or urine? Did the person fail to complete the test? Do the results of a completed test indicate a BAC of 0.08% or higher? Do the results indicate the presence of other drugs?

(5) Was the testing method used valid and reliable? Were the results accurately evaluated?

c. Revocation for period of one year is mandatory on conviction or other findings that confirm the charge. AR 190-5, paragraphs 2-4b and 2-6c.

(1) Lawfully apprehended for DWI and refused to submit to or to complete a test to measure the alcohol content in the blood, or detect the presence of any other drug.

(2) Conviction, NJP, or military or civilian administrative action resulted in suspension or revocation of a driver's license for DWI.

(3) Compute from date of original suspension, exclusive of periods when full driving privileges restored pending resolution of charges.

d. Restricted privileges. AR 190-5, paragraph 2-10. Specifically tailored to permit the subject to drive under restricted conditions (e.g., for mission requirements and unusual personal or family hardship).

(1) May be requested at any time.

(2) GCMCA acts on all DWI/DUI requests for restricted privileges.

(3) Such privileges will not be granted to any person whose driver's license or right to operate a motor vehicle is under suspension or revocation by a state, federal, or host nation licensing authority.

2. Referral for evaluation by the alcohol and substance abuse program. AR 190-5, paragraph 2-8.

a. Mandatory (within 14 days).

b. Enrollment results under AR 600-85.

3. General Officer Memorandum of Reprimand (GOMOR). AR 190-5, paragraph 2-7. (*See* Figure 1, *supra*).

a. Mandatory. Must be issued to all active duty Soldiers.

b. General officer or officer frocked to the grade of Brigadier General may issue.

c. Based on:

(1) Conviction of intoxicated driving or driving under the influence of alcohol or other drugs, on or off the installation;

(2) Refusal to take or failure to complete a lawfully requested test to measure alcohol or drug content of the blood, breath, or urine, either on or off the installation, when there is reasonable belief of driving under the influence of alcohol or drugs;

(3) Driving or being in physical control of a motor vehicle on post when the blood alcohol content is 0.08% or higher, irrespective of other charges, or off post when the blood alcohol content is in violation of state laws; or

(4) Driving or being in physical control of a motor vehicle, either on or off the installation, when lawfully conducted chemical tests reflect the presence of illegal drugs.

d. Filing is under AR 600-37. The General Officer may:

(1) Decide not to file the GOMOR,

(2) Decide to file the GOMOR in the Soldier's local personnel file, or

(3) Decide to file the GOMOR in the Soldier's AMHRR.

4. Consider other administrative actions. AR 190-5, paragraph 2-7b.

a. Administrative reduction per AR 600-8-19.

b. Bar to continued service per AR 601-280.

c. Administrative separation per AR 635-200.

XIV. REMOVAL FROM PROMOTION LIST.

A. Reference. AR 600-8-19, Chapter 2, Section II (Processing Enlisted Promotion to Private E-2, Private First Class, and Specialist); Chapter 3, Section VII (Recommended List Maintenance) and Chapter 4, Section V (Processing Removal from a Centralized Promotion List).

B. Purpose. To take administrative action against those Soldiers who have been selected for promotion, but whose conduct or duty performance no longer merits promotion.

C. Procedure.

1. Decentralized Promotions: Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4). Eligible Soldiers will be automatically promoted, without waivers. Unit commander may promote eligible Soldiers, with waivers, provided they have promotion capability within their percentage waiver restriction. Unit commander may also decide to withhold automatic promotion by submitting a DA Form 4187 in the month preceding the automatic promotion. DA Form 268 denying the promotion will be submitted NLT than the 20th day of the month preceding the automatic promotion.

2. Semi-Centralized Promotions: Soldiers selected for promotion to SGT (E-5) and SSG (E-6). A local board considers Soldiers for promotion to SGT and SSG. Field grade commander of unit authorized LTC commander or higher approves the list.

a. The command will inform Soldiers through normal channels of the removal action in writing NLT 5 duty days after removal. Immediate removal from the promotion list without further due process is required under certain circumstances listed in paragraph 3-27c, including:

(1) Failure to qualify for cause for MOS-required security clearance;

(2) Failure to reenlist or extend to meet a remaining service obligation;

(3) Exceeding requirements of the Army Body Composition Program;

(4) Signing a Declination of Continued Service Statement;

(5) Local bar or DA denial of continued service;

(6) Mandatory reclassification as result of inefficiency or misconduct;

(7) Promoted to cadet because of entering Warrant Officer Course, OCS, or ROTC;

(8) Dropped From Rolls as a Deserter;

(9) Denied waiver to reenlist;

(10) Soldier fails to complete training required for MOS for cause or academic reasons;

(11) Failure of record APFT;

(12) When promotion authority has approved removal board recommendation that Soldier be removed from a recommended list;

(13) Erroneous selection (that is, did not meet one or more of the eligibility criteria);

(14) Reduction in grade;

(15) Declines promotion;

(16) Soldier requests removal or becomes an unsatisfactory participant by AR 135-91; and

(17) While processed for discharged.

b. In addition to these conditions, the following adverse actions require removal of a Soldier from a recommended list:

(1) Conviction by court-martial, including summary court-martial;

(2) Non-judicial punishment imposed under provision of Article 15, UCMJ (not including summarized proceedings), regardless of whether the punishment is suspended;

(3) Initiation of administrative separation proceedings under the provisions of AR 635-20 or AR 135-178;

(4) AMHRR filed memoranda of reprimand; and

(5) A qualifying conviction of domestic violence under the Lautenberg Amendment IAW AR 600-20.

c. A removal board under AR 600-8-19, paragraph 3-28, will be convened if immediate removal is not justified, as stated above, under paragraph 3-27, provided the Soldier receives written explanation for the proposed removal 15 days prior.

(1) AR 15-6 procedures do not apply.

(2) Commander will give at least 15 days written notice to Soldier.

(3) Soldier may be present and the unit HR specialist will arrange for presence of requested witnesses, if reasonably available.

(4) Soldier will be provided statements of witnesses who cannot attend the board to the Soldier and the board members.

(5) Soldier may:

(a) Appear personally or decline to appear;

(b) Challenge members for cause;

(c) Request any reasonably available witness whose testimony he/she believes pertinent;

(d) Question witnesses;

(e) Present written affidavits of witnesses unable to appear; and

(f) Remain silent, make a sworn or unsworn statement, and submit to examination by the board.

(6) The board will:

(a) Fully and impartially evaluate the case;

(b) Make a recommendation; and

(c) Prepare a written report and submit it to the promotion authority.

(7) The promotion authority will approve or disapprove the board's recommendation and notify the Soldier of his decision. The promotion authority may lessen but not increase severity of board's recommendation.

(8) A new board may be directed if the promotion authority determines that the board failed to consider all available evidence in the case or there was an error in conducting the board that has a material adverse effect on an individual's substantial rights if the error cannot be corrected without prejudice to the Soldier.

3. Centralized Promotions: Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9). (Soldiers selected for promotion by DA-level board.)

a. Commanders may recommend removal from a DA list. Removal may be based on substandard duty performance. The recommendation for removal must be fully documented and justified.

b. Commanders must submit a recommendation for removal if the Soldier is flagged due to noncompliance with AR 600-9 (Army Body Composition Program).

c. Removal without referral to the Soldier (AR 600-8-19, para. 4-15a(2)). Commanders will notify CDR, HRC, by message for immediate removal of any Soldier who:

(1) Has been reduced;

(2) Has been discharged (without reentry within 24 hours);

(3) Has been dropped from the rolls;

(4) Has an approved retirement as of the date the selection list is approved;

(5) Is ineligible to reenlist due to a declination of continued service statement, AWOL, confinement, local bar to continued service, qualitative management program, or court-martial conviction;

(6) Was considered in error;

(7) Was recommended by an approved reduction board to be removed from a promotion list;

(8) Declines promotion in accordance with regulation;

(9) Is defined as failing to attend, having failed to complete for cause or academic reasons or being denied enrollment to the U.S. Army Sergeants Major Course;

(10) Is a SFC(P) or MSG(P) who lost his/her security clearance for cause, or is permanently disqualified from receiving a security clearance;

(11) Has a qualifying conviction for domestic violence under the Lautenberg Amendment IAW AR 600-20;

(12) Declines attendance at the U.S. Army Sergeant Major Course when selected for the purpose of promotion to SGM; or

(13) Has failed to qualify for by-name selection upon expiration of selection list.

d. Other cases. If the reason for removal is not listed in paragraph 4-15a(2), the recommendation for removal must be referred to the Soldier and the Soldier must be given 15 days to submit matters in rebuttal.

(1) Upon initiation, must impose flag. Once imposed the flag can only be removed by HQDA. *See* AR 600-8-2, paragraph 2-9.

(2) Forward recommendation and Soldier's rebuttal for review through command channels to the GCMCA.

(3) Recommendation may be disapproved at any level of command. The disapproval will be returned through command channels to the originator with the reason for disapproval.

(4) GCMCA take action which is forward to HRC for DA Standby Advisory Board.

D. Approval Authority.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4): unit commander.

2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6): Field grade commander of unit authorized a LTC commander or higher.

3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9): CDR, HRC.

E. Appeal. No specific procedure. Soldiers removed from recommended list and later "completely" exonerated will be reinstated. To be completely exonerated, the action that caused the initial removal must have been erroneous or should not have been imposed because the Soldier is free of any blame or accusation.

F. Records.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4). Maintain copy of enlisted advancement report and all DA Forms 4187 in unit (battalion) current file area (CFA) until the completion of action. When no longer needed for conducting business, then retire to Records Holding Area/Army Electronic Archive (RHA/AEA).

2. Documents relating to removal from promotion lists for enlisted selection boards held in offices other than those having Army-wide responsibility and in TOE units should be kept in CFA until the record is 5 years old, and then destroyed. This applies to files associated with both semi-centralized and centralized promotions.

3. Files held at offices having Army-wide responsibility will be kept in CFA until no longer needed for conducting business, then retired to RHA/AEA. The RHA/AEA will transfer to the National Archives when record is 20 years old.

XV. ADMINISTRATIVE REDUCTION FOR MISCONDUCT OR INEFFICIENCY.

A. Reference. AR 600-8-19, Chapter 10.

B. Purpose.

1. Misconduct. A Soldier convicted by a civil court (domestic or foreign) or adjudged a juvenile offender by a civil court (domestic or foreign) will be reduced or considered for reduction. AR 600-8-19, paragraph 10-3a.

2. Inefficiency. "Inefficiency is a demonstration of characteristics that shows that the person cannot perform duties and responsibilities commensurate of the Soldier's current rank and MOS. For the purpose of administrative reduction, inefficiency must be predicated on a pattern of acts, conduct or negligence that clearly shows the Soldier lacks the abilities and qualities normally required and expected of the Soldier's rank and experience. Although CDRs may consider misconduct, including conviction by civil court, as bearing on inefficiency, misconduct alone will not be the basis for an administrative reduction under this paragraph. Soldiers may be administratively reduced under this authority for longstanding unpaid personal debts that he or she has not made a reasonable attempt to pay. An administrative reduction for inefficiency is limited to SGT and above and to one grade." AR 600-8-19, paragraph 10-5.

C. Reduction Authorities.

1. SPC/CPL and below - Company, troop, battery, and separate detachment commanders.

2. SGT and SSG - Field grade commander of any organization authorized a LTC or higher grade commander.

3. SFC, MSG, and SGM - Commanders of organizations authorized a COL or higher grade commander.

D. Procedure.

1. Reduction for Misconduct. AR 600-8-19, Table 10-2.

a. Soldier will be reduced to PVT, E-1, if sentence includes death or confinement for one year or more (not suspended). Board action not required. Reduction proceeds regardless of appeal status. If the conviction is reversed the Soldier will be reinstated.

b. The command will consider reducing the Soldier (one or more grades) if sentenced to confinement for more than 30 days but less than one year (not suspended) or confinement for one year or more (suspended). Board action not required to reduce one grade. However board action required for all Soldiers (except PFC and below) when reducing a Soldier more than one grade.

c. The command may consider reduction for all other offenses. Board action required for SGT or above and SPC/CPL when seeking to reduce the Soldier more than one grade.

2. Inefficiency. AR 600-8-19, paragraphs 10-5 and 10-6.

a. Soldier cannot perform duties and responsibilities of the grade and MOS. Inefficiency includes long standing unpaid debts that the Soldier has not made a reasonable effort to pay.

b. Command must document inefficiency. Should establish a pattern of inefficiency rather than identify a specific incident.

c. Soldier must have been in unit at least 90 days.

3. Soldier gets notice and opportunity to respond.

a. SPC/CPL - board required when reducing more than one grade.

b. SGT and above - reduction board is required.

4. Reduction Boards. AR 600-8-19, paragraph 10-7.

a. Must have both officers and enlisted members.

b. At least three voting members.

c. Members unbiased.

d. Recorder without vote appointed.

e. Board has officer or enlisted Soldier or both of same gender as Soldier being considered for reduction.

f. For inefficiency cases only, one board member will be familiar with Soldier's MOS or field of specialization.

g. If Soldier is a minority and requests (in writing) a minority member on board, must include a minority member (normally of the same minority) if reasonably available.

E. Appeal.

1. SSG and below - next higher authority.

2. SFC and above - first general officer in chain of command.

F. Records. RRS-A is the same as that for files associated with removing Soldiers from promotion lists.

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

POSITIVE TOOLS FOR PROMOTING GOOD ORDER AND DISCIPLINE

	COMMUNICATE	COUNSELING	TRAINING OR INSTRUCTION	BUDDY TEAMS	ANY NUMBER OF OTHER TOOLS…
Grounds for Action	Need to communicate with Soldier	Need to communicate with Soldier	Need to improve Soldier	Need to improve Soldier	
Ultimate Result	Soldier becomes a better Soldier	Soldier becomes a better Soldier	Soldier becomes a better Soldier	Soldier becomes a better Soldier	Soldier becomes a better Soldier
Regulation	FM 6-22; AR 600-20	FM 6-22; AR 600-20	AR 600-20, para. 4-6b	FM 6-22; AR 600-20	FM 6-22; AR 600-20
Who Initiates	Any leader	Any leader	Any leader	Any leader	Any leader
Board hearing	No	No	No	No	No
Entitled to Counsel	No	No	No	No	No
SJA Review	No	No	No	No	No
Approval Authority	Inherent power of command.	Inherent power of command.	Inherent power of command.	Inherent power of command.	Inherent power of command.
Appeal Authority	No formal appeal	No formal appeal	No formal appeal	No formal appeal	No formal appeal

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

TOOLS FOR PROMOTING GOOD ORDER AND DISCIPLINE – ADVERSE ADMINISTRATIVE ACTIONS

	ORAL ADMONITION	WRITTEN COUNSELING	EXTRA/CORRECTIVE TRAINING	REVOCATION OF PASS PRIVILEGES	SUSPENSION OF FAVORABLE PERSONNEL ACTION
Grounds for Action	Misconduct or unsatisfactory performance	Misconduct or unsatisfactory performance	Soldier deficient in any aspect of duty or conduct	Soldier deficient in any aspect of duty or conduct	Other adverse action contemplated or investigation pending
Ultimate Result	Soldier corrects the problem	Soldier corrects the problem	Soldier corrects the problem	Soldier not permitted to leave post or place of duty during normal off-duty hours	Many favorable personnel actions barred temporarily
Regulation	FM 6-22; AR 600-20	FM 6-22; AR 600-20	AR 600-20, para. 4-6b; AR 27-10, para. 3-3	AR 600-8-10, para. 5-27; AR 27-10, para. 3-3	AR 600-8-2
Who Initiates	Any leader	Any leader	Any leader	Any leader	Commander or GO staff head
Board hearing	No	No	No	No	No
Entitled to Counsel	No	No	No	No	No (but see AR 27-3, para. 3-6g(4)(i))
SJA Review	No	No	No	No	No
Approval Authority	Inherent power of command.	Inherent power of command.	Inherent power of command.	Unit Commander	Cdr or GO staff head
Appeal Authority	No formal appeal	No formal appeal	No formal appeal	No formal appeal	No formal appeal

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

TOOLS FOR PROMOTING GOOD ORDER AND DISCIPLINE – ADVERSE ADMINISTRATIVE ACTIONS

	WRITTEN ADMINISTRATIVE REPRIMAND/ADMONITION	GENERAL OFFICER MEMORANDUM OF REPRIMAND	LOCAL BAR TO CONTINUED SERVICE	DA OR QMP DENIAL OF CONTINUED SERVICE
Grounds for Action	Misconduct or unsatisfactory performance	Misconduct or unsatisfactory performance	Untrainable, unsuitable, APFT failure, NCOES RFC, ABCP failure; other mandatory and discretionary reasons	Moral or ethical problems; declining performance; no potential for continued service
Ultimate Result	Written reprimand may be filed in Soldier's permanent records	Written reprimand may be filed in Soldier's permanent records	Soldier cannot reenlist, and may face separation action in six months	Soldier will be separated in 90 days, unless appeal successful
Regulation	AR 600-37, chap 3	AR 600-37, chap 3	AR 601-280 or AR 140-111	AR 635-200, chap 19
Who Initiates	Cdr, supervisor (enl) or rater (off), school cmdt	Cdr, supervisor (enl) or rater (off), school cmdt, GO or GCMCA	Any commander	SSG & above: All records reviewed automatically by HQDA promo boards
Board hearing	No	No	No	Record review; see above
Entitled to Counsel	No (but see AR 27-3, para. 3-6g(4)(j))	No (but see AR 27-3, para. 3-6g(4)(j))	No (but see AR 27-3, para. 3-6g(4)(f))	No (but see AR 27-3, para. 3-6g(4)(u))
SJA Review	No	No	No	No
Approval Authority	AMHRR: GO or GCMCA	AMHRR: GO or GCMCA	<10 yrs svc: LTC cdr or SPCMCA; >10: SPCMA or GCMCA	HQDA promotion selection board (DCS, G-1)
Appeal Authority	AMHRR: DASEB	AMHRR: DASEB	<10 yrs svc: SPCMA or 1st GO; >10 yrs: 1st GO	Commander, US Army Enlisted Records Center

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

TOOLS FOR PROMOTING GOOD ORDER AND DISCIPLINE – ADVERSE ADMINISTRATIVE ACTIONS

	REMOVAL FROM SGT OR SSG PROMOTION LIST	REMOVAL FROM SFC, MSG, OR SGM PROM LIST	REMOVAL FROM OFFICER PROMOTION LIST	REDUCTION FOR INEFFICIENCY (ENLISTED)	REDUCTION FOR CIVIL CONVICTION (ENLISTED)
Grounds for Action	Poor duty performance; Art. 15 punishment; pending discharge; see reg. for other grounds	Substandard duty performance; see reg. for other grounds	Referred OER or AER, Art. 15, OMPF reprimand; body comp. failure; other derogatory info	Unable to perform duties & responsibilities required of rank and MOS	Any civilian conviction. Mandatory if confined for 1 yr or more (unsuspended)
Ultimate Result	Soldier is removed from promotion standing list			Soldier is reduced one rank	Soldier is reduced one or more ranks
Regulation	AR 600-8-19, chap 3	AR 600-8-19, chap 4	10 U.S.C. § 629; AR 600-8-29	AR 600-8-19, chap 10	
Who Initiates	Any commander	Any commander	Any commander	Any commander	Any commander
Board hearing	Yes (not full AR 15-6 board)	No	DA Promotion Review Board considers paper case	Yes (not full AR 15-6 board), if Soldier is SGT or above, unless reduction is for unsuspended sentence of confinement for one year or more	
Entitled to counsel	No	No	No	Yes (Provided by Trial Defense Service)	
SJA Review	No	No	No	No	No
Approval Authority	LTC-level commander	DA Standby Advisory Board	The Secretary of the Army	PV2-CPL: Company level commander SGT-SSG: Field grade commander SFC-CSM: COL or higher commander	
Appeal Authority	No formal appeal	No formal appeal	No formal appeal	Next higher Cdr for SSG & below First GO for SFC & above	

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

TOOLS FOR PROMOTING GOOD ORDER AND DISCIPLINE – ADVERSE ADMINISTRATIVE ACTIONS

	INVOLUNTARY MOS RECLASSIFICATION	FLYING EVALUATION BOARD	ADVERSE NCOER/OER	RELIEF FOR CAUSE	SUSPENSION OR REVOCATION OF SECURITY CLEARANCE
Grounds for Action	Misconduct, loss of qualifications, medical reasons, conviction	When a pilot's performance is doubtful, including misconduct, unsatisfactory performance, and lack of proficiency	Unsatisfactory performance, misconduct, lack of promotion potential	Failure in the performance of duty such as unsatisfactory performance or misconduct	Credible derogatory information
Ultimate Result	Soldier is re-classed	Loss of flight status	Adverse NCOER/OER in file	Soldier is relieved	Security clearance is suspended or revoked
Regulation	AR 614-200, paras. 3-15 to 3-17	AR 600-105, Ch. 6	AR 623-3; DA Pam 623-3	AR 623-3; DA Pam 623-3; AR 600-20, para. 2-17	AR 380-67, Ch. 8
Who Initiates	Commander	Brigade and regimental commander, or higher	Rater	Rater (or other authorized)	Commander (forwards to Cdr, CCF)
Board hearing	No	Yes	No	No	No, just investigation
Entitled to Counsel	No	Yes	No (but see AR 27-3, para. 3-6g(4)(c)-(e))	No (but see AR 27-3, para. 3-6g(4)(c)-(e))	No (but see AR 27-3, para. 3-6g(4)(h))
SJA Review	No	Yes	No	No	No
Approval Authority	HRC, Field Reclassification Authority	GCMCA	Senior Rater	Senior Rater; may be GCMCA. CDR must be by GCMCA	CCF Commander
Appeal Authority	HRC	MACOM Commander	HRC	HRC	Higher level of authority

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

TOOLS FOR PROMOTING GOOD ORDER AND DISCIPLINE – ADVERSE ADMINISTRATIVE ACTIONS

	DRUNK DRIVING SANCTIONS	COUNSELING WITH VIEW TOWARDS SEPARATION	REHABILITATIVE TRANSFER	ADMINISTRATIVE SEPARATION
Grounds for Action	Refusal to test; BAC > .08% (or between .05% and .08% depending on local law); or any official report of DWI	Cdr contemplates separation for parenthood (para. 5-8), personality disorder (para. 5-13), entry level perf (Ch. 11), unsat. performance (Ch. 13), or minor/pattern misconduct (Ch. 14)		Parenthood, personality disorder, unsatisfactory performance, ASAP failure, misconduct, overweight
Ultimate Result	Privilege to drive on post or in overseas command suspended or revoked	Soldier on notice that continued poor performance may lead to separation and consequences	Soldier gets a fresh start in a new unit	Separation from the Army
Regulation	AR 190-5, Ch. 2	AR 635-200, para. 1-16 and Ch. 17		AR 635-200
Who Initiates	Installation commander or designee not assigned to law enforcement duties	A "responsible official"	Commander	Commander
Board hearing	W/in 14 days, on request	No	No	Depends on year in service and type of discharge
Entitled to Counsel	No (but see AR 27-3, para. 3-6g(4)(w))	No	No	Yes
SJA Review	No	No	No	Yes
Approval Authority	Installation commander	None	Commander w/ authority over losing and gaining unit	BN level cdr w/ legal aadivosr and SPCMCA (General Discharge); GCMCA (OTH Discharge)
Appeal Authority	GCMCA may grant restricted privileges	No formal appeal	No formal appeal	No formal appeal, but Army Discharge Review Board & ABCMR

APPENDIX A ADVERSE ADMINISTRATIVE ACTIONS

TOOLS FOR PROMOTING GOOD ORDER AND DISCIPLINE – PUNITIVE ACTIONS

	ARTICLE 15	SUMMARY COURTS-MARTIAL	COURTS-MARTIAL
Grounds for Action	Misconduct, crime	Misconduct, crime	Misconduct, crime
Ultimate Result	Fine, loss of rank, restriction	Fine, loss of rank, confinement	Fine, loss of rank, punitive discharge, confinement, death
Regulation	UCMJ Article 15, AR 27-10	AR 27-10, MCM, UCMJ Articles	AR 27-10, MCM, UCMJ Articles
Who Initiates	Commander	Commander	Commander
Board hearing	No	Court-martial with SCMO	Court-martial with panel or judge alone
Entitled to Counsel	Advice of counsel	Advice of counsel	Yes
SJA Review	Yes	Yes	Yes
Approval Authority	Commander	SCMCA	SPCMCA, GCMCA
Appeal Authority	Next higher cdr	Next higher cdr	Army Court of Criminal Appeals

CHAPTER G

RESERVE COMPONENT LEGAL ISSUES AND FAMILIARIZATION

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RC LEGAL ISSUES AND FAMILIARIZATION

I. REFERENCES.

A. AR 15-6, Procedures for Investigating Officers and Boards of Officers

B. AR 27-10, Military Justice

C. AR 135-18, The Active Guard Reserve (AGR) Program

D. AR 135-91, Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures

E. AR 135-175, Separation of Officers

F. NGR 635-100, Termination of Appointment and Withdrawal of Federal Recognition

G. AR 135-178, Enlisted Separations

H. NGR (AR) 600-200, Enlisted Personnel Management

I. AR 140-1, Army Reserve: Mission, Organization, and Training

J. AR 140-10, Assignments, Attachments, Details, and Transfers

K. NGR 614-1, Inactive Army National Guard

L. AR 140-111, U.S. Army Reserve Reenlistment Program

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

N. NGR (AR) 600-5, The Active Guard/Reserve (AGR) Program Title 32, Full Time National Guard Duty (FTNGD)

O. NGR 635-101, Personnel Separations, Efficiency and Physical Fitness Boards

P. AR 600-20, Army Command Policy

Q. AR 623-3, Evaluation Reporting System

R. AR 630-10, Absence Without Leave, Desertion, and Administration of Personnel Involved in Civilian Court Proceedings

S. AR 635-200, Enlisted Personnel

II. INTRODUCTION.

A. PURPOSES. This outline has two purposes:

1. To acquaint the Active Army judge advocate with the Reserve Components and Army National Guard environment and some of its key terminology.

2. To highlight some of the significant legal and regulatory provisions applicable to Soldiers of the Reserve Components belonging to the Army Reserve (USAR) and Army National Guard of the United States (ARNGUS) and the Army National Guard (ARNG).

III. THE RESERVE COMPONENTS IN GENERAL.

A. The Reserve Components of the armed forces are:

1. The Army National Guard of the United States (ARNGUS)
2. The Army Reserve (USAR)
3. The Navy Reserve (USNR)
4. The Marine Corps Reserve (USMCR)
5. The Air National Guard of the United States (ANGUS)
6. The Air Force Reserve (USAFR)
7. The Coast Guard Reserve (USCGR)[1]

B. The USAR. Members of the USAR only serve in a Title 10 duty status as RC members.

C. The ARNGUS. The ARNGUS is a Reserve Component; the ARNG is not a Reserve Component. National Guard members have a dual membership in both the ARNGUS and their respective state's, territory's or the District of Columbia's ARNG.[2] The individual state National Guard (AL ARNG, MS ARNG, HI ARNG, DC ARNG, etc.) is the organized militia of that state. When serving as members of the ARNG, National Guard personnel serve in a Title 32 or State Active Duty status and fall under the command and control of state authorities; however, when serving in their other capacity as members of the ARNGUS, they do so as members of the RC in a Title 10 status.

D. The Purpose of the Reserve Components. The purpose of the Reserve component is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency, and at such other times as the national security may require, to fill the needs of the armed forces

[1] 10 U.S.C. § 10101 (2000).

[2] For the remainder of this outline, the term "state" refers to states, territories, and the District of Columbia.

whenever, . . . , more units and persons are needed than are in the regular components.[3]

IV. THE RESERVE COMPONENTS OF THE U.S. ARMY.

A. The U.S. Army Reserve (USAR).

1. The USAR consists of units (primarily combat support and combat service support) known as Troop Program Units (TPU).

2. Other Soldiers, not assigned to units, are assigned to the Individual Ready Reserve (IRR), or the Standby Reserve.

3. Reserve Soldiers and units normally serve under FORSCOM with the units reporting through the U.S. Army Reserve Command (USARC).

4. Army Reserve Organization.

a) Office of the Chief, Army Reserve (OCAR).

(1) DA Staff element.

(2) Chief, Army Reserve is a LTG and also serves as the CG, USARC.

(3) Manages USAR policy, programs, priorities, and resources.

b) U.S. Army Reserve Command (USARC).

(1) Located at Fort Bragg, NC.

(2) Commands, controls, and supports USAR forces.

(3) Oversees the organization and training of USAR forces.

(4) The CG, USARC is a LTG and dual hatted as the Chief, Army Reserve.

c) Human Resources Command

(1) Supports the assignment of USAR Soldiers and their records management.

(2) Provides some veterans' services as well as retirement and transition assistance.

d) Geographic Commands.

(1) Four Readiness Divisions (RD) are geographically based entities located CONUS, each responsible for roughly one-quarter of the Army Reserve installations. RDs provide installation support to units in their geographical area, but

[3] 10 U.S.C. § 10102 (2000).

have no command and control relationship with any units in their geographical area.

(a) Each RD commanded by a MG.

(2) Three Mission Support Commands (MSC). Each commanded by a BG.

e) Training Commands.

(1) Three commands. Organized based on type of training: initial entry, advanced individual training schools, leader development, and battle command training.

(2) All are commanded by MGs.

f) Operational and Functional Commands.

(1) Nineteen commands: support, sustainment, signal, engineer, medical, military police, civil affairs & psychological operations, aviation, military intelligence, joint and special troops support (includes Army Reserve Legal Command).

(2) Most are commanded by MGs, others by BGs.

B. The Army National Guard of The United States (ARNGUS).

1. Each state National Guard is generally made up of a variety of combat, combat support, and combat service support units.

2. Each state has its own joint headquarters, consisting of that state's Air and Army National Guards. While each state has a joint headquarters, ARNG units may, for mobilization purposes, have an association with other states' ARNG units or Active Component Army units.

3. Dual Membership.

a) Federal statute requires National Guard members take an oath that "I do solemnly swear that I will support and defend the Constitution of the United States **and the** State of _____ . . .; and that I will obey the orders of the President **and the** Governor of (state) ."[4]

b) Consequently, members of the Army National Guard hold a dual membership in both the Reserve Component – ARNGUS – and their respective state's Army National Guard – ARNG.

4. National Guard duty status.

a) Federal status. National Guard units and Soldiers may be "federalized" into active duty service under various provisions of Title 10 of the United States Code. They are "federalized" in their

[4] 32 U.S.C. § 304 (1956) (emphasis added).

ARNGUS status as members of the Reserve Components and thereby fall under the command of the President.

b) State status.

(1) Title 32. Typically, the ARNG trains for their federal military mission under the provisions of Title 32 of the United States Code. In this capacity they are under the command and control of their state authorities; however, the Federal government (DoD) funds the training. There is limited authority to conduct operational missions (vice training) under Title 32.[5] While serving under Title 32, there is no jurisdiction under the federal UCMJ; the state exercises criminal jurisdiction under state law.

(2) State Active Duty (SAD). ARNG Soldiers often serve in a SAD status when performing disaster relief and civil disturbance missions. It is in this status that a state governor typically "calls out the National Guard." In this capacity they are brought to duty under state law and remain commanded by state authorities. State active duty missions are funded with state money, and the state must reimburse the federal government for federal equipment use. Likewise, the state exercises criminal jurisdiction under state law.

c) The U.S. Supreme Court decided that members of the National Guard may only serve in one status (wear one hat) – Civilian, State, or Federal – at a time.[6] Subsequent federal statutes authorized a federalized National Guard officer serving in a Title 10 (ARNGUS) status to retain his Title 32 (ARNG) status, to command both National Guard (Title 32 and SAD) and Active Component (Title 10) forces.[7] This command authority is generally referred to as a "dual-hat command" status.

5. National Guard Organization.

a) National Guard Bureau (NGB).

(1) DA and Department of Air Force joint bureau.

(2) Purposes – The National Guard Bureau is the channel of communications on all matters pertaining to the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States between (1) the

[5] 32 U.S.C. 502(f) (1993).
[6] *See* Perpich v. Department of Defense, 496 U.S. 334, 347 (1991). *See also* 32 U.S.C.S. § 325(a)(1) (LEXIS 2006).
[7] 32 U.S.C. § 325 (2008).

Department of the Army and the Department of the Air Force, and (2) the several States.[8]

(3) Serves to assist units with meeting Federal training, organizational, and operational standards.

(4) Chief, National Guard Bureau (CNGB) is a GEN and a member of the Joint Chiefs of Staff.

(5) Director, Army National Guard (DARNG) is a LTG.

(6) Neither the CNGB nor DARNG command and control National Guard units. National Guard units fall under the command and control of state authorities.

b) State and Territorial Headquarters.

(1) All 50 States.

(2) Commonwealth of Puerto Rico, the territories of Guam and the Virgin Islands, and the District of Columbia.

(3) Led by a major general (The Adjutant General ("TAG")).

c) Divisions.

(1) Eight Infantry Divisions.

(2) Headquartered in one state with units in several states.

(3) Example: 38th Infantry Division, Indianapolis, IN. Units from Indiana, Illinois, Michigan, and Ohio national guards.

d) Brigades.

(1) Currently 37 Multifunction Support Brigades.

(2) 27 Brigade Combat Teams (BCTs).

e) Two Special Forces Groups.

(1) 19th SF Group, Utah.

(2) 20th SF Group, Alabama.

V. ADDITIONAL TERMINOLOGY.

A. No military organization could function without a plethora of terms and acronyms. The USAR and ARNGUS/ARNG are no different. Along with the terms already discussed, the following list hopefully serves to help one better understand the reserve components.

B. Basic Terminology.

1. AT - Annual Training.

[8] 10 U.S.C. 10501(b) (2008).

a) Usually a two-week period of training performed as a unit pursuant to Federal orders. Some headquarters units are allowed to have their members perform duty in fragmented periods (Frag AT), rather than in the traditional two-week increments.

b) Statutorily limited to 29 days per year.

2. ADT - Active Duty Training. Like AT, it is a type of active duty. National Guard members may perform ADT in Title 32 status.

3. IADT - Initial Active Duty Training. Basic Training and Advanced Individual Training. Same training as performed by Active Army counterparts, but may be split into two periods. (Example: College student enlists with this option. Attends basic training during summer break and AIT during the next year's summer break.)

4. ADT-S - Active Duty Training, Schools. Funds coded into these accounts are used to send Soldiers to MOS-producing schools and other professional development courses.

5. ADSW - Active Duty, Special Work. Tours of varying length in support of USAR and ARNG missions (Term superseded by ADOS-RC).

6. ADOS – Active Duty, Operational Support and CO-ADOS – Contingency Operation Active Duty, Operational Support.

7. TTAD - Temporary Tours of Active Duty (Term superseded by ADOS-AC & CO-ADOS).

a) Used to support Active Army needs.

b) CO-TTADs: Contingency Temporary Tours of Active Duty: Used for OCONUS missions.

8. Drill / Battle Assembly.

a) Weekend training, usually conducted one time per month. (See "IDT.") In 2004, the USAR began using the term "Battle Assembly" instead of "drill."

b) Drills / BAs are normally divided into four-hour blocks, called Unit Training Assemblies (UTAs) with four UTAs constituting a drill weekend and with two or more consecutive drill periods constituting a Multiple Unit Training Assembly (MUTA).

9. IDT - Inactive Duty Training. Normally the weekend drill / BA, but other types exist.

10. ADAs - Additional Drill Assemblies.

a) RMAs - Readiness Management Assemblies. Additional periods of funded service allowing Soldiers to do those things necessary to prepare the unit for a drill. For example, Soldiers scheduled to present instruction to their unit may use an RMA, if available, to prepare for the instruction.

b) ATAs - Additional Training Assemblies. Used to conduct training when training beyond that conducted at regularly scheduled drills is necessary.

c) AFTP: Additional Flight Training Periods. Additional training time available to pilots and crew members to allow them time to conduct required training.

11. M-Day: Mobilization Day (National Guard); TPU: Troop Program Unit (USAR).

a) M-days consist of National Guard training days, such as AT or IDT.

b) National Guard military personnel are often called “M-day” Soldiers, where Army Reserve personnel who belong to a unit are called TPU Soldiers.

12. AGR: Active Guard Reserve. USAR Soldiers who serve on active duty with the USAR or the ARNGUS, in a Title 10 status. Also used to describe FTNG, below.

13. FTNG: Full Time National Guard. ARNG members serving in a full-time, Title 32, National Guard duty status. Also often termed “State AGR.”

14. IMA: Individual Mobilization Augmentee. USAR Soldiers who do not perform regularly scheduled drills. AT is spent with Active Army units.

C. The Basic Annual Cycle.

1. Normally, USAR and ARNG Soldiers perform duty for one weekend each month. They also participate in a two-week annual training period. If the two week period is divided into multiple, shorter periods it is called “fragmented annual training,” or “frag AT.”

2. An M-Day or TPU Soldier is required, by statute, to attend 48 Unit Training Assemblies (drills) each year. By regulation, the drill period can be four to twelve hours long. Hence, a drilling USAR or ARNG Soldier can serve four drill periods on a drill weekend in each of the twelve months in order to accumulate the required number of drills.

3. Retirement.

a) USAR and ARNGUS/ARNG Soldiers may draw retired pay, depending on their election, at either age 60 or age 65.

b) To be eligible, they must accumulate twenty years of qualifying service.

c) A qualifying year is based on the accumulation of fifty retirement points in any year.

(1) One retirement point is awarded for each day of annual training or each day of other active duty performed.

(2) One retirement point is awarded for each drill period performed.

(3) A Soldier assigned to a TPU ordinarily receives a minimum of 77 retirement points each year (14 days AT, plus 48 drill periods, plus a flat 15 points for being a member or the USAR each year).

d) The value of USAR retired pay is a function of points accumulated (minimum of 20 good years, absent special circumstances) multiplied by a value per point, determined by retirement rank.

VI. MILITARY JUSTICE AND THE RESERVE COMPONENTS.

A. Jurisdiction.

1. USAR Soldiers always perform duty in Title 10 status; consequently, they are always subject to the UCMJ while in a duty status.

2. ARNG Soldiers serving in a Title 10 (ARNGUS) status are subject to UCMJ jurisdiction. ARNG serving in Title 32 or State Active Duty status are under state command and control and are subject to state law jurisdiction. Most states have their own version of the UCMJ, which may differ substantially from, or be very similar to the UCMJ.

B. Common UCMJ Jurisdictional Issues.

1. Many offenses, involving USAR and ARNG Soldiers, such as minor drug offenses, cannot be prosecuted under the UCMJ. Although it may be possible to determine when the offense was committed, if the Soldier was not in a duty status, when the offense was committed there is no UCMJ jurisdiction.

2. This result is true for both courts-martial and non-judicial (Article 15) punishment.

3. Adverse administrative action is often possible.

VII. ARMY REGULATORY LAW AND THE RESERVE COMPONENTS.

A. U.S. Army Regulation applicability. Before consulting a U.S. Army regulation regarding an administrative law issue, review the “applicability” paragraph to determine the regulation’s application to the Reserve Components (USAR/ARNGUS) and/or the ARNG.

1. Many regulations apply only to the Reserve Components.

a) For example, different regulations are necessary because the reserve components perform duty during limited periods of time.

b) Differing contractual obligations, and the like, also necessitate a broader regulatory scheme.

c) Many regulations applying to the Reserve Components, apply to the ARNGUS, but not the ARNG.

2. Many U.S. Army regulations apply to Soldiers serving either on active duty, in the USAR, the ARNGUS, and the ARNG in a Title 32 status.

3. Various other regulations apply to members serving on active duty, the U.S. Army Reserve, and the ARNGUS; consequently, only applying to National Guard members serving in a Title 10 status.

4. U.S. Army regulations do not apply to ARNG Soldiers serving in a SAD status.

B. National Guard Regulations (NGRs). Regulations published by the U.S. Army and the National Guard Bureau typically apply only to the ARNG in a Title 32 status. A good source to locate these regulations is http://www.ngbpdc.ngb.army.mil/publications.htm.

VIII. ENLISTED ADVERSE SEPARATION ACTIONS.

A. Different regulations apply BASED ON DUTY STATUS.

1. AR 635-200, Active Duty Enlisted Administrative Separations, applies to enlisted Soldiers serving on active duty in the Active Army, USAR Soldiers serving on extended active duty, and ARNGUS Soldiers serving on active duty under Title 10. It does not apply to ARNG members serving in a Title 32 Full-Time National Guard (FTNG) status, which is commonly called State AGR duty.

2. AR 135-178, Enlisted Administrative Actions, applies to the ARNG/ARNGUS and the USAR in a TPU status and ARNG serving in a Title 32 FTNG status.

3. NGR 600-200 also applies to ARNG serving in a Title 32 status.

a) When Soldiers are discharged only from the state ARNG, however, they become members of the Army Reserve if they have remaining contractual obligation. The separation of enlisted personnel from the ARNGUS is accomplished through discharge by appropriate state authorities. NGR (AR) 600-200 provides policies and procedures to discharge Soldiers from both the State ARNG and as a Reserve of the Army or from the State ARNG only.

b) To separate a Soldier from both the ARNG and as a Reserve of the Army (ARNGUS), NGR (AR) 600-200 requires following the provisions of AR 135-178, below.

B. Separation under AR 135-178.

1. Counseling and Rehabilitative Transfers Before Initiation of Separation Action.

a) Counseling is required at least once before initiation of some separation actions. AR 135-178, para 2-4.

b) Rehabilitative transfer within commuting distance for a minimum of 2 months is required, but the separation authority may waive transfer. AR 135-178, para 2-4c & d.

2. Command-Initiated Separation Actions.

a) Notification Procedures. (AR 135-178, Chapter 3, Section II). Generally, the immediate commander initiates the process by giving written notice. The notice must contain:

(1) Specific allegations on which the proposed action is based.

(2) Cite the specific provision in the regulation authorizing separation.

(3) Advise the Soldier that the separation could result in discharge.

(4) State the least favorable characterization of service or a description of separation he or she could receive.

(5) The Soldier must be advised of the following rights:

(a) To consult with consulting counsel, or to consult with civilian counsel at no expense to the government.

(b) To submit statements.

(c) To obtain copies of documents that will be sent to the separation authority.

(d) To present the case to an administrative board, if he or she has 6 or more years of total Regular and Reserve service or if being considered for a discharge under other than honorable conditions.

(e) To waive these rights in writing.

(f) If an intermediate commander makes a recommendation based upon additional information outside the proposed action he must give written notice to the Soldier and afford him/her an opportunity

to rebut the additional information. Military counsel will be made available to prepare rebuttal.

(6) The Soldier will be given 30 days to respond to the notice. Failure to respond to the notice within 30 days constitutes a waiver.

(7) The Soldier has the right to submit a conditional waiver.

(8) The notification of separation must include a sample of the victims of sexual assault statement for administrative separations.

b) Administrative Board Proceedings.

(1) Notice must contain the same information as notification procedure (basis for separation; authority for initiation of the action; characterization of discharge). The additional notice provisions concerning the intermediate commander are also required.

(2) All the rights provided in notification procedures.

(3) Soldier has a right to representation before the board by military counsel, or by civilian counsel at Soldier's expense and no expense to the Government.

3. Separation Authority.

a) USAR Soldiers:

(1) CG, HRC: IRR, the Standby Reserve, the Retired Reserve, and IMA Soldiers.

(2) Area commanders: The USARC Commander is the area commander for Troop Program Unit (TPU) members, except for overseas units. Delegation by Area Commanders is authorized under AR 135-178, para 1-11b(2) to any subordinate general officer commander who has a staff judge advocate or legal advisor. Most Soldiers attached or assigned to troop program units of the Selected Reserve fall under USARC.

(3) The State Adjutants General for the Army National Guard of the United States.

(4) Secretary of the Army: Separation authority for Soldiers with 18-20 qualifying years of service for retired pay

b) ARNGUS/ARNG Soldiers:

(1) With less than 18 and more than 20 years – State adjutant generals have the authority to discharge Soldiers from the ARNG and have been delegated the authority by

the Secretary of the Army to discharge ARNG Soldiers from their Reserve of the Army status.

(2) The Chief, National Guard Bureau: Separation Authority for Soldiers with 18-20 qualifying years of service for retired pay –authority to separate from ARNGUS and Reserve of the Army.

4. Separation authority action upon receipt of recommended separation packet when a board is not required.

a) If there is sufficient factual basis for separation, the separation authority must determine whether separation is warranted by applying the criteria in Chapter 3, AR 135-178.

b) Separation Authority may:

(1) Direct retention.

(2) Direct separation.

(3) Suspend separation.

5. Separation authority's action on recommended separation packet requiring an administrative board.

a) Enlisted Soldiers having six or more years of service on date of initiation of recommendation of separation is entitled to separation board. AR 135-178, para 3-5a(7). Soldiers with less than six years of service also have a right to a board if they may receive an Under Other Than Honorable characterization.

b) If there is sufficient factual basis for separation, determine whether separation is warranted. If separation is warranted, the separation authority must convene a separation board.

C. Actions of Separation Authority Before Board Hearing.

1. Separation authority must appoint a board of at least three commissioned, warrant or noncommissioned officers. AR 135-178, para 3-18.

a) At least one member must be a Major or above.

b) A majority of the board must be commissioned or warrant officers.

c) Noncommissioned officers may not serve on a board when an other than honorable (OTH) discharge is authorized.

d) Qualifications of board members.

(1) Experienced Soldier of mature judgment.

(2) Impartial and fully cognizant of the regulations and policies related to separation actions.

e) Female or minority representation on the board is not required, but the regulation does express that they will be given an opportunity to serve.

f) Standing board appointment orders are encouraged.

2. Appearance of Respondent's Witnesses. AR 135-178, para 3-18c.

a) If the Respondent seeks witnesses whose appearance will require TDY or invitational travel orders, the request must be in writing, provide certain specified information, and meet five restrictive conditions. Note: strong preference for telephonic rather than in person testimony for non-local witnesses.

b) If the Respondent does not seek Recorder assistance in obtaining witnesses, no requirement to notify the Recorder of Respondent's witnesses. (Recorder is required to provide notice to Respondent of government witnesses.)

D. Separation Authority's Action. AR 135-178, para 3-19.

1. Options when board recommends separation.

a) Approve the board's recommendations. Separation authority may also do the following: 1) modify recommendations by approving the separation but suspending the execution, or change the characterization of service to a more favorable characterization of service. Note: the separation of authority cannot direct a less favorable characterization than was recommended by the board.

b) Disapprove the recommendation and direct retention when grounds for separation are not documented in the file.

c) Suspend the execution of the discharge for a period not to exceed 12 months.

2. Options when board recommends retention.

a) Approve recommendation and direct retention, or

b) Request Secretary of the Army, under Ch. 13, to discharge Soldier for the convenience of the government. (Rarely invoked and should be used only under extraordinary circumstances.)

3. Separation authority cannot direct discharge if a board recommends retention or discharge of a Soldier with a less favorable characterization than recommended by the board.

4. Options when error or defects in board action.

a) If approving authority determines the errors to be harmless, take final action.

b) If errors are substantial (failure to make required findings and recommendations; action which materially prejudiced a substantial

right of the respondent; or there was fraud or collusion in obtaining the findings of the board) the separation authority may:

(1) Direct retention.

(2) Return case to board to make findings and recommendations required by the regulation.

(3) Set aside the proceeding and direct a new board.

E. Limitations of Separation Actions. AR 135-178, para 2-3.

1. No Soldier will be considered for separation, if the conduct was subject to a judicial proceeding resulting in an acquittal or "similar action."

2. No Soldier will be considered for separation if the conduct was subject to a prior administrative separation board in which the board determined the evidence did not sustain the factual allegation except when the conduct is subject to a rehearing ordered on the basis of fraud or collusion.

3. If the conduct was the subject of a separation action resulting in the separation authority directing retention.

4. If Government introduces limited use information (Soldier-supplied voluntary information of drug use for purposes of rehabilitation), then Soldier must be given an honorable discharge in misconduct proceedings, except when the action is under Chapter 10 (drug rehab failure).

5. Unlawful command influence in the administrative separation proceeding may result in voiding separation action as a violation of minimal due process. May also be a criminal violation. See UCMJ, Article 134, Manual for Courts-Martial, para 96a (wrongful interference with adverse administrative proceeding).

F. Judge Advocate Involvement in the Separation Process.

1. Consulting Counsel and Counsel for Representation. Provides advice and assistance to respondents in a fully independent manner.

2. Legal Review.

a) No pre-board legal review is required at any stage. However, it is strongly recommended that prior to referral of an action to a separation board that a judge advocate review the action to ensure the adequacy of the notice and that there is sufficient factual basis to warrant separation, and so inform the appointing authority in writing.

b) Post-hearing legal review by a judge advocate only required in those cases in which the board has recommended an OTH or when limited use evidence was introduced into the board proceeding, or where the respondent identifies specific legal issue for consideration by the separation authority. AR 135-178, para 3-19.

3. Legal Advisor. Appointment of a legal advisor to the board is optional. However, it is recommended that whenever possible a legal advisor be appointed.

4. Recorder. A nonvoting recorder may be appointed. The recorder does not have to be a judge advocate, but it is strongly recommended that the recorder be a judge advocate.

5. Several alternate recorders and legal advisors and additional voting board members should be listed on standing board orders. In cases of unavailability or disqualification, the commanding general appointing authority may delegate to his staff judge advocate (or principal legal advisor) authority to excuse and substitute recorders and members before the first session of the board, IAW AR 15-6, para 17-2a.

G. Reasons for Separation.

1. Unsatisfactory Performance AR 135-178, Chapter 9.

a) If in the judgment of the commander

(1) The Soldier will not develop sufficiently; or

(2) Soldier's retention would have an adverse impact on discipline, good order and morale; or

(3) Soldier would be disruptive; or

(4) Potential for advancement or leadership is unlikely.

(5) Two consecutive APFT failures or elimination for cause from NCOES.

b) Generally, notification procedures are used in Chapter 9 actions. No board required unless Soldier has more than 6 years of service.

c) Soldier will receive Honorable Discharge or General Discharge under honorable conditions.

d) Counseling and rehabilitation efforts required. See para 2-4, AR 135-178.

2. Misconduct. AR 135-178, Chapter 11.

a) Minor disciplinary infractions. Relates to conduct in a military environment.

(1) Counseling and rehabilitative efforts required before separation action may be initiated.

(2) May utilize notification procedures.

b) Pattern of misconduct.

(1) Counseling and rehabilitative efforts required before separation action may be initiated.

(2) Conduct may have occurred in the military or civilian communities.

(3) Involves conduct that does not carry with it a punitive discharge.

(4) Must be more than one incident.

c) Conviction by Civilian Court.

(1) Soldier is convicted by civil authorities and;

(2) A punitive discharge would be authorized for the same or similar offense under the UCMJ or the civil sentence includes confinement for 6 months or more.

(3) Conviction does not have to be final. If the conviction has been appealed or the Soldier indicates an intention to appeal and the period for appeal has not expired, the execution of the separation will be held in abeyance until the appeal is finalized.

(4) To avoid having to delay a discharge in a case in which there is an appeal, may be advisable to pursue separation on multiple bases, such as conviction by civilian court and the commission of a serious offense (see next item).

d) Commission of a Serious Offense.

(1) Commission of military or civilian offense if a punitive discharge is authorized for the same or similar offense under the UCMJ.

(2) Abuse of illegal drugs constitutes serious misconduct.

(a) Separation action must be initiated and the Soldier processed for discharge.

(b) Administrative board notification should be used.

(3) Soldier is not required to be in a Title 10 status at the time of the activity that gave rise to the separation action.

3. Substance Abuse Rehab Failure. AR 135-178, Chapter 10.
4. Other reasons. AR 135-178, Chapter 14. Some examples:
   a) Medically unfit for retention.
   b) Noncitizens who are members of the ARNG or USAR.
   c) Ministers of religion and divinity students.
   d) Attainment of maximum allowable age.
5. Unsatisfactory Participation. AR 135-178, Chapter 12.

a) Soldier is determined to be an unsatisfactory participant under provisions of AR 135-91, Chapter 4:

(1) Nine or more unexcused UTAs per rolling twelve month period.

(2) Fails to attend or complete Annual Training.

(3) Soldier verbally or in writing refused to comply with orders or correspondence or a second notice sent by certified mail was refused, unclaimed, or otherwise undeliverable.

b) Administrative board procedures apply, unless an OTH is not warranted or the SM has less than six years total military service.

c) All limitations on separations, rights associated with board actions, appointment of counsel apply.

6. Failure to Meet Body Composition Standards. AR 135-178, Chapter 15. Highly restrictive provisions designed to minimize separations for failure to meet body composition standards.

IX. OFFICER ADVERSE SEPARATION ACTIONS.

A. As with Enlisted Separations, Different regulations apply BASED ON DUTY STATUS.

1. AR 135-175, Separation of Officers. This regulation applies to all officers of the Army National Guard of the United States and the U.S. Army Reserve, except for officers serving on active duty or on active duty for training for a period in excess of 30 days. . See applicability paragraph of AR 135-175.

2. NGR 635-100, Termination of Appointment and Withdrawal of Federal Recognition, applies to ARNG officers in a state status.

a) The termination of an officer's appointment in the Army National Guard is a function of the State.

b) The withdrawal of Federal recognition of an officer is the function of the Chief, National Guard Bureau, acting for the Secretary of the Army.

c) The discharge of an officer from his appointment as a Reserve of the Army is a function of the Secretary of the Army. An ARNGUS officer will be discharged as a Reserve of the Army when Federal Recognition has been withdrawn, based on approved recommendations of a fitness or efficiency board convened under 32 U.S.C. 323 (NGR 635-101).

B. USAR, ARNGUS Command Initiated Actions.

1. Who may inititate separation action against a USAR or ARNGUS officer? AR 135-175, para 2-17.

a) The SECARMY, the Chief of Staff, and such officials as are designated by them.

b) b. The Surgeon General, TJAG, and the Chief of Chaplains for officers within their branches.

c) The DCS, G–1, when recommendations are made by HQDA promotion, school, or command selection boards that an officer should be required to show cause for retention in an active status.

d) The CNGB, when notified by the DCS, G–1 that an HQDA promotion, school, or command selection board recommends an ARNGUS officer be required to show cause for retention in an active status.

e) A general officer show cause authority (GOSCA) with respect to an officer assigned or attached to that com-mand.

2. Rights of the Officer. AR 135-175, paras 2-20.

3. Reasons requiring involuntary separation.

a) Substandard Performance of Duty. AR 135-175, para 2-12. If this is the sole reason for separation, an Honorable Discharge Certificate will be furnished.

b) Acts of Misconduct or Moral or Professional Dereliction. AR 135-175, para 2-13. An OTH Discharge is authorized.

4. Board proceedings.

a) Appointing authority must appoint a board of at least three commissioned officers. AR 135-175, para 2-25.

(1) Senior in rank to the respondent. (Additionally, by statute and regulation, the minimum rank for the board president is COL and the minimum rank for the other two board members is LTC.)

(2) One member will be a Regular Army officer or a reserve officer on active duty or on active duty operational support. The remaining members will be Reserve officers on AD/ADOS or in an active Reserve status.

(3) If the respondent is minority, one member of the board must be a minority, female or special branch, if reasonably available, as this provision is not an entitlement.

(4) The appointing authority may appoint a judge advocate as legal advisor.

(5) A commissioned or warrant officer will be named as recorder. Generally, a judge advocate officer should act as recorder.

(6) Commands should use standing boards for the same reasons mentioned for enlisted elimination boards.

b) Notice of Proceeding. The officer must be notified in writing at least 30 days before the hearing of the reasons for which he or she is required to show cause for retention in military service and of the least favorable characterization of discharge for which the officer may be recommended. AR 135-178, para. 2-20. In addition, the recorder will notify respondent of the time and place of the hearing at least 10 days prior to date of the board. AR 15-6, para 7-5.

c) Conduct of the hearing.

(1) The recorder is responsible for presenting the government's case. [Recorder has an obligation to do more than just present the drug lab litigation packet and the Soldier's 201 file. Witness testimony (non-local witnesses by phone) and prehearing preparation is essential to success.]

(2) If a legal advisor is not assigned, the President makes all rulings on procedure and evidence. When legal advisors are lawyers, they should not act as judges. The board is not a court-martial and is operated under relaxed rules of evidence, no briefs or written decisions are required. The President of the board is still in charge.

(3) Formal rules of evidence do not apply to separation boards. AR 15-6 applies in determining the procedures and rules to be applied as to evidence, unless the regulation under which the board is convened is more specific.

(4) The standard of proof for the government is a preponderance of the evidence, not "substantial evidence."

(5) The board must make a finding on each allegation stated in the notification memorandum. If the board finds the allegation is supported by the evidence, it must make a finding as to whether the conduct warrants separation. AR 135-175, para 2-26.

(6) The board must make a recommendation of retention or separation and the characterization of the discharge.

d) Record of the Proceeding. No verbatim record is required unless required by the appointing authority. Only the findings and recommendations must be verbatim. The proceedings must be summarized as fairly and accurately as possible. Officer boards require that there be a statement that the findings and

recommendations were determined by secret written ballot in closed session. AR 135-175, para 2-26.

5. Limitation of separations. AR 135-175, para 2-5.

a) An officer who exhibits substandard performance of duty that is documented in the Evaluation Reporting System and has a service-connected exposure to events that may have resulted in TBI or PTSD will be referred to a physician or behavioral health specialist for evaluation to determine whether the officer should be referred for disability evaluation. The results of the evaluation will be considered to determine whether an officer separation is appropriate.

b) All officers being administratively separated with an OTH discharge who deployed overseas to a contingency operation or were sexually assaulted within the previous 24 months and are diagnosed with PTSD or TBI or reasonably allege they were influenced by PTSD or TBI must be medically assessed and the separation authority must consider when taking final action (10 U.S.C. § 1177).

c) No officer will be considered for separation if the conduct was subject to a judicial proceeding resulting in an acquittal on the merits.

d) No officer will be considered for separation if the conduct was subject to a prior administrative separation board resulting in a final determination that the member should be retained.

C. ARNG Officer Separation Actions.

1. NGR 635-100, Termination of Appointment and Withdrawal of Federal Recognition (1983).

a) Prescribes the policies, criteria and procedures governing the separation of commissioned officers of the Army National Guard.

b) Provides reasons for termination of State appointment.

c) Provides reasons for withdrawal of federal recognition.

(1) Includes discharge from State appointment as officer of National Guard. Unless discharged as a Reserve of the Army officer, an officer discharged from the ARNG retains his ARNGUS status and becomes a member of the Army Reserve when Federal recognition is withdrawn.

(2) Includes reasons that would require discharge or removal from active status as a Reserve Officer of the Army (see AR 135-175).

2. Board Proceedings under NGR 635-101, Efficiency and Physical Fitness Boards (1977).

a) Provides additional guidance for withdrawal of Federal recognition for:

(1) Substandard performance of duty;

(2) Moral or professional dereliction;

(3) In the interest of national security; or

(4) Medical, physical, or mental condition.

b) Contains many similarities to AR 135-175 and AR 15-6, but NGR 635-101 must be consulted for ARNG withdrawal of Federal recognition.

X. RECURRING PROBLEMS IN ENLISTED AND OFFICER SEPARATION CASES.

A. Inadequate notice and findings.

1. Failure to state the factual basis for the separation action. Notice should tell the Soldier the act or acts that were relied upon for the separation.

2. Failure to state the worst type of discharge the Soldier may receive.

3.

4. Failure to make separate findings with respect to each allegation in the notification.

B. Improper signature in the consulting counsel portion of the notification form.

1. Commanders have signed as consulting counsel. If an individual refuses to consult with counsel the commander is to annotate the form indicating that the Soldier declined to consult with counsel. He or she is not to sign as consulting counsel.

2. Other staff officers have signed as consulting counsel.

XI. USAR AND ARNGUS AGR SOLDIERS.

A. USAR and ARNGUS AGR Soldiers serve in a Title 10 duty status.

B. Must receive counseling and rehabilitative transfer (or waiver), if being processed for involuntary separation IAW AR 600-8-24 (officers) and AR 635-200 (enlisted). The DA Form 4856, General Counseling Form, must meet the rights advisement requirements listed in the Active Army regulations, not AR 135-178 or AR 135-175.

C. USAR and ARNGUS AGR officers may also be involuntarily released from active duty (REFRAD) through a DA Active Duty Board (DAADB). AR 600-8-24, para 2-13.

1. Secretary of the Army is the approval authority for DAADB boards and the Secretary's decision is final. No AGR Soldier will be processed before a DAADB board if they have between 18-20 years of Active Federal Service, without the written approval of the Secretary.

2. The bases for DAADB actions are similar to those under AR 135-175. A case may be initiated by any commanding officer, the Chief, Army Reserve, Commander, HRC, or Chief, National Guard Bureau.

3. The officer will be notified in writing by CG, HRC; OCAR; or Commander or designee for Chief, NGB; TJAG; or DACH, as appropriate, through the general officer show cause authority (GOSCA) (a GOSCA could also be the initiating officer if DAADB is field-initiated) that their record is being referred to the DAADB to be considered for involuntary REFRAD. The Officer is given 30 days to respond in writing. There are no personal appearances before the board.

4. If the board recommends separation and the recommendation is concurred with by the Secretary of the Army, the officer will be released from active duty no earlier than 5 calendar days and no later than 14 calendar days from notification by ARADMD when misconduct, moral or professional dereliction is found. Separation solely because of substandard performance will result in release from active duty not less than 30 days from notification by ARADMD. Officers released under DAADB board REFRAD procedures for misconduct or substandard performance receive no separation pay.

5. Enlisted USAR and ARNGUS AGR Soldiers may be removed from active duty by administrative separation board UP AR 635-200.

XII. ARNG FTNG (TITLE 32 AGR) SOLDIERS

A. ARNG FTNG Soldiers are those serving in a full-time, Title 32, National Guard duty status. Also often termed "State AGR."

B. The ARNG FTNG AGR Program is governed by NGR (AR) 600-5.

1. An ARNG member may be separated from Title 32 FTNG status, but retain membership in the ARNG in a drilling status.

2. Separation may be based on:

a) Medical reasons;

b) Voluntary separation;

c) Mandatory separation provisions (MRD, loss of security clearance if required, etc.); and

d) For cause.

(1) Guidelines require counseling or reprimand unless the reason for release would require no such action.

(2) After notification of involuntary separation recommendation, Soldier has 15 days to submit rebuttal or comment. No entitlement to separation board.

(3) Adjutant General reviews recommendation, rebuttal, and makes final determination.

XIII. OTHER ADVERSE PERSONNEL ACTIONS.

A. USAR, Involuntary Transfer to the IRR. AR 140-10.

1. Unsatisfactory participation. Soldiers who receive nine unexcused absences in one year may be transferred to the IRR. Note: USARC CG may have policy requiring initiation of separation for unsatisfactory participants within USARC.

2. Exception: Soldiers who have not completed initial entry training or are within 3 months of ETS will not be transferred to the IRR. Paragraph 4-15.

B. ARNG, Transfer to ING or IRR, NGR 614-1.

1. The Inactive National Guard (ING).

a) The ING is an administrative category that allows Soldiers in the ARNG to remain in the ARNG when for some reason they are unable to participate satisfactorily in regularly scheduled training assemblies or annual training.

b) ING status is typically for one year. If the Soldier cannot return to his unit within one year, the Soldier should be transferred to the IRR IAW NGR 600-200.

c) ING Soldiers must attend one training assembly per year.

C. Dropped from Rolls. AR 135-178, Chapter 14, Section III.

1. A Soldier who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final, may be dropped from the rolls of the Army. For purposes of this regulation, a conviction is final when the authorized time for an appeal has expired or final action on an appeal has been taken

2. This action is not a discharge.

3. Approval authority is the area commander [usually USARC] for USAR TPU Soldiers, State Adjutants General for ARNG Soldiers, and Commander, HRC for IRR and IMA USAR Soldiers.

D. USAR Bars to Continued Service AR 140-111, Chapter 1, Section VII.

1. A bar to reenlistment, now known as a Bar to Continued Service, is designed to put the Soldier on notice that he or she:

a) Is not a candidate for reenlistment, and

b) May be separated if the circumstances that gave rise to the bar are not overcome.

2. Categories of Soldiers that should be considered for a bar;

a) Untrainable and unsuitable; conditions listed at AR 140-111, para. 1-30c, are considered adequate basis for initiation of bar.

b) See AR 140-111, chapter 1, Section VII, for procedures.

E. ARNG Bars to Continued Service.

1. NGR 600-200, Chapter 7.

a) Bars to reenlistment may be used for Soldiers who are untrainable, unsuitable, or have documentation disclosing the recurrence of one or a combination of those things listed at para 7-22c.

b) See NGR 600-200, Chapter 7, for procedures.

F. USAR AGR Qualitative Management Program (QMP). AR 635-200, Chapter 19.

1. Enhance the quality of the USAR AGR enlisted force by screening out the nonproductive Soldiers.

2. Unlike its predecessor, the current QMP results in the elimination of active duty (Active Army and AGR) NCOs. It no longer serves merely as a bar to reenlistment.

3. The first LTC (or above) in the effected AGR Soldier's chain of command receives the memorandum and supporting documents, and is required to personally counsel the Soldier, using a DA Form 4856 (General Counseling Statement), and the LTC must have the Soldier fill out a Statement of Options (DA Form 4941-R). The supervisor must explain the effect of the QMP bar to reenlistment, discharge options, and appellate rights.

4. The Soldier or the commander may appeal the QMP to Commander, HRC, on the grounds that the Soldier has overcome the deficiencies listed as the basis for the bar action, or material error in the Soldier's records that were reviewed by the selection board. An appeal stays the discharge process, until the appeal has been finalized or the Soldier elects discharge.

a) Appeal period for Soldier is 90 days from date of receipt of the Statement of Options.

b) Appeal from commander must reach HRC 120 days from notification to the Soldier.

5. Soldiers who do not appeal will be involuntarily discharged.

6. Soldiers who unsuccessfully appeal the QMP decision will be discharged within 90-days from receipt of pre-discharge counseling.

XIV. CONCLUSION.

A. Duty Status determines UCMJ jurisdiction.

B. Before taking action against an active duty, USAR, ARNGUS, or ARNG Soldier, consult the “applicability” paragraph of governing regulations.

CHAPTER H

FEDERAL-STATE RELATIONS

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FEDERAL-STATE RELATIONS

I. INTRODUCTION

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

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

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

II. TENTH AMENDMENT

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

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

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

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

1. The Commerce Clause has been cited as the constitutional basis for a significant portion of the laws passed by Congress over the last 50 years, and it currently represents one of the broadest bases for the exercise of congressional powers. *See Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, CRS Report RL30315, 23 September 2013. In *United States v. Lopez*, however, the Supreme Court brought into question the extent to which Congress can rely on the Commerce Clause as a basis for federal jurisdiction. *See Lopez*, 514 at 566.

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

3. The *Lopez* case was significant in that it is the first time since 1937 that the Supreme Court struck down a federal statute purely based on a finding that Congress had exceeded it powers under the Commerce Clause. In doing so, the Court revisited its prior cases, sorted the commerce power into three categories, and asserted that Congress could not go beyond these three categories: (1) regulation of channels of commerce, (2) regulation of instrumentalities of commerce, and (3) regulation of economic activities that “affect” commerce. *See Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, CRS Report RL30315, 23 September 2013.

[1] This is the language before the statute was amended.

4. It is important to note that 18 U.S.C. § 922(q) was amended which reorganized the offenses and inserted Commerce Clause language into the statute. 18 U.S.C. § 922(q)(2)(A) now reads, "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." Lopez deals with the statute before amendment and is important to illustrate the Court's limitation on Congress's Commerce Clause powers.

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

1. In 1994, Congress enacted the Violence Against Women Act, (currently located at 34 U.S.C. § 12291 (2017).) This legislation provided a federal private right of action for victims of gender-motivated violence. In *Morrison*, the victim of an alleged rape brought suit against the alleged rapist, arguing that this portion of the act was sustainable because it addressed activities that substantially affect interstate commerce. The Supreme Court, however, noted that unlike traditional statutes based on the commerce clause, the activity in question had nothing to do with commerce or an economic enterprise. This point had been made previously in *Lopez*. The Court reaffirmed *Lopez* and found that in order to fall under the acceptable category of laws that "substantially affect commerce," the underlying activity itself must generally be economic or commercial. *Id*. at 609-610.

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

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

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

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

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

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

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

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

5. Qualifying Conviction. A state or Federal conviction for a **misdemeanor** crime of domestic violence is a qualifying conviction 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. 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. *See* AR 600-20, para 4-22(b)(2).

   a. Qualifying Conviction Requires:

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

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

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

b. Soldiers given reasonable time to seek expungement or pardon for a qualifying conviction; may extend up to one year for that purpose. *See* AR 600-20, para 4-22(c)(7).

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

III. ELEVENTH AMENDMENT

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

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

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

D. Recognized Exceptions to the Eleventh Amendment.

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

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

   a. Congress unequivocally expresses its intent to abrogate the immunity & and acts pursuant to a valid exercise of power. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996).

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

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

2. The Court in Seminole found it important to establish what constitutional authority was being exercised by the passage of the Indian Gaming Law. The Court determined that the power being exercised was the Indian Commerce Clause, which is found in Article I. The Court held that as the Eleventh Amendment was ratified after the passage of the Constitution and Article I, it was a limitation on Congress's authority to waive a state's sovereign immunity under that Article. See Seminole Tribe, 517 U.S. at 64-66.

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

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

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

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

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

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

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

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

(1) In 2008, Congress amended USERRA to address the *Velasquez* problem. As amended, USERRA authorizes the Attorney General to initiate a lawsuit against a state in the name of the United States, as plaintiff. *See* 38 U.S.C. 4323(b)(1).

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

2. Judicial Interpretation of USERRA Amendments.

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

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

c. 11th Am. Sovereign Immunity does not bar the United States from enforcing USERRA. Court actions by the Dept. of Justice in the name of the United States on behalf of servicemember-employees deemed constitutional. 11th Cir. held "the United States has a clear and substantial interest in enforcing USERRA to achieve the law's goal of encouraging service in the armed forces." *United States v. Alabama Dept. of Mental Health and Mental Retardation*, 673 F.3d 1320 (11th Cir. 2012).

d. "It is well-settled that States 'surrendered their immunity from suit by the Federal Government' when they ratified the Constitution. *United States v. Alabama Dept. of Mental Health and Mental Retardation*, 673 F.3d 1320 at 1325-1326 (11th Cir. 2012).Quoting *Chao v. Va. Dep't of Transp*., 291 F.3d 276, 280 (4th Cir.2002) (quoting The Federalist No. 39, at 258 (James Madison).

IV. DOUBLE JEOPARDY

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

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

V. POSSE COMITATUS

A. Text of the statute: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1385. (1994).

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

C. "The primary restriction on DoD participation in civilian law enforcement activities is the Posse Comitatus Act." DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies*, Enclosure 3, 27 FEB 13. 10 U.S.C. § 275 (2016) provides that the Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law. *See* 10 U.S.C. § 275 (2016).

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

E. Exceptions to Posse Comitatus.

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

2. The President may call out the armed forces in times of insurrection and domestic violence. See 10 U.S.C. § 251-255 (2016).

3. The armed forces may share information and equipment with civilian law enforcement agencies. *See* 10 U.S.C. § 271-284.

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

1. "Activities which, if undertaken by army or air force, would constitute prohibited active role in law enforcement are arrest, seizure of evidence, seizure of persons, seizure of buildings, investigation of crimes, interviewing witnesses, pursuit of escaped civilian prisoners, and search of an area for a suspect". *See U.S. v. Red Feather*, 392 F. Supp. 916, 925 (D.S.D. 1975).

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

3. "… the feared use which is prohibited by the posse comitatus statute is that which is regulatory, proscriptive or compulsory in nature, and causes the citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority" *United States v. McArthur*, 419 F.Supp. 186 at 194 (D.N.D. 1976).

G. Modern Application of the Posse Comitatus Act.

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

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

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

c. Approval of the use of the National Guard in a duty status pursuant to section 502(f) for DSCA requires receipt of a reimbursable request from a federal department or agency or qualifying entity for DoD assistance; concurrence from the applicable Governor; and determination by the Secretary of Defense to approve the use of the National Guard in a duty status pursuant to section 502(f). *See* DoDI 3025.22, *The Use of the National Guard for Defense Support of Civil Authorities*, 26 JUL 13 (updated 15 May 2017).

2. 10 U.S.C. § 12304(a) expands the use of the federal reserve for domestic disaster assistance. When a Governor requests Federal assistance in responding to a major disaster or emergency, the Secretary of Defense may, without the consent of the member affected, order any unit, and any member not assigned to a unit organized to serve as a unit, to active duty for a continuous period of not more than 365 days.

VI. EXCERCISING FEDERAL AUTHORITY INCIDENT TO LEGISLATIVE JURISDICTION

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

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

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

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

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

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

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

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

2. "[P]urchased" means obtained.

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

D. Types of Jurisdiction.

1. References: 10 U.S.C. 2683 (1983) ; AR 405-20, Federal Legislative Jurisdiction (21 FEB 74).

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

3. Individual States have enacted exclusive jurisdiction statutes.

a. Example: “Exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes, except the service of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such land.” Colorado Revised Statutes § 3-1-103 (2018).

b. Example: “Exclusive jurisdiction in and over any land so acquired by the United States is ceded to the United States for all purposes except the service of all civil and criminal process of the courts of this state . . .” Connecticut General Statutes § 48-1 (2012).

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

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

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

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

E. Types of Acquisition

1. Cession and Acceptance. State at some point cedes jurisdiction of land previously purchased by the U.S.

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

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

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

G. Accepting Legislative Jurisdiction by the United States

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

   a. "When the head of a department, agency, or independent establishment of the Government, or other authorized officer of the department, agency, or independent establishment, considers it desirable that individual may accept or secure, from the State . . . consent to, or cession of, any jurisdiction over the land or interest not previously obtained. The individual shall indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated." 40 U.S.C. § 3112(b) (2002).

   b. It is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in the statute. 40 U.S.C. § 3112(c) (2002).

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

2. Examples:

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

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

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

H. Disposal of Legislative Jurisdiction.

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

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

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

VII. SOURCES OF CIVIL LAW ON EXCLUSIVE JURISDICTION INSTALLATIONS

A. No Congressional Action.

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

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

b. Derived from international law. "Whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country . . . continue in force until abrogated or changed by the new government or sovereign." *Anderson* 168 N.W. 196 (Neb. 1918).

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

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

4. Surviving state law becomes federal law. “After cession of jurisdiction over territory by state to United States, laws of state not inconsistent with transfer still fix private rights of persons in ceded area but they lose their character as state laws and become laws of United States, and such a transformation is implicit in transfer of legislative jurisdiction without express act of Congress.” *See Stokes v. Adair*, 265 F.2d 662 (4th Cir. 1959).

5. Difficulties applying the *McGlinn* Doctrine.

   a. Finding old law can be difficult.

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

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

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

1. Current wrongful death and personal injury state laws apply as federal law. 28 U.S.C § 5001 (2014).

2. State fish and game laws on military installations. 10 U.S.C. § 2671;

3. Conservation on military installations. 16 U.S.C. § 670a.

4. State worker’s compensation laws apply directly: 40 U.S.C. § 3172.

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

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

7. State and local taxes.

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

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

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

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

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

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

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

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

VIII. USING THE SUPREMACY CLAUSE TO PREEMPT STATE LAW

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

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

B. Federal Statutes Preempt State Statutes.

1. Occupation of the field. “If Congress has not entirely displaced state regulation over the matter in question, state law is preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law or where state law stands as an obstacle to accomplishment of the full purposes and objectives of Congress.” *See Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984).

2. Conflict preemption. “Wild Free-Roaming Horses and Burros Act does not establish exclusive federal jurisdiction over public lands in New Mexico, but it overrides New Mexico Estray Law insofar as it attempts to regulate federally protected animals.” *See Kleppe v. New Mexico*, 426 U.S. 529 (1976) (Wild Free-Roaming Horses and Burros Act preempts the New Mexico Estray Law).

C. Federal Regulations Preempt State Statutes.

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

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

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

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

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

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

2. Activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides "clear and unambiguous" authorization for the regulation. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988), citing *EPA v. State Water Resources Control Board,* 426 U.S. 200, 211, (1976).

3. Supremacy principle extends to local government regulation of installation and requires detailed analysis of specific federal statute. *Compare United States v. Town of Windsor*, 765 F.2d 16 (2d Cir. 1985) (invalidating local building permit ordinances applied to federal contractors).

IX. EXERCISING STATE AUTHORITY ON EXCLUSIVE JURISDICTION INSTALLATIONS

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

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

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

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

1. The basic rule – **where there is no friction, avoid the fiction**. *Howard v. Commissioners of Louisville*, 344 U.S. 624 at 627 (1953).

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

2. The exception – it is the potential for friction rather than the existence of friction that controls. *See United States v. McGee*, 714 F.2d 607 at 614 (6th Cir. 1983). "The Court does not doubt that the City . . . would willingly agree at this time to noninterference with the function of the . . . base. But what one board of city commissioners can agree to, another board of city commissioners can reverse. It is this aspect of annexation that is most troubling."

D. Areas of Conflict.

1. Taxing and Regulating Alcohol.

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

b. Malt beverages and wine must be purchased from in-state distributors; liquor <u>generally</u> must be purchased from most competitive source, wherever located. 10 U.S.C. § 2495(a)(2) (2004).

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

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

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

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

a. Financial assistance to Local Educational Agencies.

(1) Per capita aid. 20 U.S.C. § 7703 (2018).

(2) School construction in areas affected by federal activities. 20 U.S.C. § 7708-09 (2015).

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

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

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

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

5. Spouse and Child Welfare Services.

a. Current Policy. Cooperate with responsible civilian authorities and organizations in efforts to address the problems to which this Directive applies. DOD Dir. 6400.1, *Family Advocacy Program* (23 Aug 04); AR 608-18, paras 2-11 to 2-16, *The Army Family Advocacy Program* (30 Oct 07) RAR 13 Sep 11 (note: App. D also defines legislative jurisdiction).

b. State application of child welfare laws on federal enclaves. *In Re Terry Y.*, 101 Cal. App. 3d 178 (Cal. App. 1980) (military base's command invited the county child welfare authorities to exercise jurisdiction over abused children at the base and placed the base's dependents in county foster homes. The trial court's exercise of its statutory jurisdiction to protect the child promoted the federal policy toward abused children, as reflected in the applicable army regulations and federal statutes).

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

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

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

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

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

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

(2) Service includes levy on personal property.

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

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

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

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

1. Permitted where it does not interfere with their military duties. 10 U.S.C. § 982; AR 27-40, ch. 10.

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

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

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

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

C. Disaster Relief.

1. Provide where directed by higher authority, or

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

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

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

2. Requirements:

a. Must fulfill valid training (MOS) requirements.

b. Must avoid competition with commercial sources.

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

XI. EXERCISING FEDERAL AUTHORITY THROUGH THE PROPERTY CLAUSE

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

> The Congress shall have Power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States.

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

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

2. The Property Clause power is “complete.”

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

1. *United States v. Alford*, 274 U.S. 264 (1927). Congress may prohibit acts on private land which "imperil" publicly-owned forests.

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

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

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

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

XII. ENVIRONMENTAL FEDERALISM

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

CHAPTER I

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

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OUTLINE OF INSTRUCTION

I. REFERENCES.

A. Uniformed Services Employment and Reemployment Rights Act (USERRA), P.L. 103-353, 108 Stat. 3149 (1994), as amended, codified at 38 U.S.C. §§ 4301-4335.

B. The Higher Education Opportunity Act of 2008, P.L 110-315, as amended, codified at 20 U.S.C. §§ 1001–1161aa-1 (2012).

C. Department of Labor, Veteran's Employment Training Service (VETS) USERRA Final Rules, 20 C.F.R. Part 1002 (19 Dec 2005).

D. Readmission Requirements for Servicemembers, 34 C.F.R. § 668.18 (2017).

E. Department of Defense Instruction 1205.12, Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Armed Forces (20 May 2016 w/changes).

F. Army Regulation 27-3, The Army Legal Assistance Program, para 3-6e (21 Feb 96) (RAR 2011).

G. Restoration to Duty from Uniformed Service or Compensable Injury, 5 C.F.R. Part 353 (1995).

H. [Merit System Protection Board] Practices and Procedures for Appeals Under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunity Act, 5 C.F.R. Part 1208 (2000).

I. Lieutenant Colonel H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55 (1999).

J. Anthony H. Green, *Reemployment Rights Under the Uniformed Services Employment and Reemployment Rights Act (USERRA)*: *Who's Bearing the Cost?,* 37 IND. L. REV. 213 (2003).

K. Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797 (2004).

L. Jeffrey M. Hirsch, *Can Congress Use Its War Power to Protect Military Employees from State Sovereign Immunity?*, 34 SETON HALL L. REV. 999 (2004).

M. Theresa M. Beiner, *Subordinate Bias Liability*, 35 U. ARK. LITTLE ROCK L. REV. 89 (2012).

N. Lieutenant Colonel Paul Conrad, *USERRA Note, How Do You Get Your Job Back?*, ARMY LAW., Aug. 1998, at 30.

O. Lieutenant Colonel Paul Conrad, *Labor Law Note*, *Merit System Protection Board Addresses the Uniformed Services Employment and Reemployment Rights Act*, ARMY LAW., Sept. 1997, at 47.

P. Government Accountability Office Report (GAO-02-608), *Reserve Forces: DoD Actions Needed to Better Manage Relations between Reservists and Their Employers* (June 2002).

Q. Government Accountability Office Report (GAO-05-74R), *U.S. Office of Special Counsel's Role in Enforcing Law to Protect Reemployment Rights of Veterans and Reservists in Federal Employment* (6 Oct 04).

R. The USERRA Manual: Uniformed Services Employment & Reemployment Rights, Thomson Reuters (2021 Edition).

II. BACKGROUND.

A. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) grants reemployment rights and other benefits to employees who leave civilian jobs to perform military service. The statute also protects employees from employment discrimination and acts of retaliation for enforcing rights under USERRA.

B. The purposes of the statute are:

1. Encourage noncareer military service

2. Minimize disruption to persons performing service as well as their employers.

3. Prohibit discrimination against persons because of their military service.

III. COVERAGE

A. Employer Coverage

1. USERRA defines “employer” as “any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities.” This covers almost all employers, including:

a. Private employers

b. States and local governments

c. Federal employees

2. Coverage is not dependent on the size of the employer. An employer is covered under USERRA with only one employee.

B. Employee Coverage

1. An “employee” is defined as “any person employed by an employer.” Job applicants and former employees are also covered by the statute.

2. USERRA covers temporary, part-time, probationary, and seasonal employees as well. However, employers are not required to reemploy member’s whose employment is a brief, nonrecurrent period and was not reasonably expected to continue indefinitely or for a significant amount of time.

3. Independent contractors are not protected by the statute.

C. Types of Service Covered

1. USERRA covers active duty orders, active duty for training (ADT), Annual Training (AT), Individual Duty Training (IDT), and National Guard serving on Title 32.

2. Members of the National Guard serving on State Active Duty for 14 days or more, in support of a national emergency declared by the President under the National Emergencies Act, or in support of a major disaster declared by the President under Section 401 of the Stafford Act, are now covered under USERRA.

IV. RIGHTS AND BENFITS DURING PERIODS OF SERVICE

A. Under USERRA, employees who leave a civilian job to perform military service are considered to be on a furlough or leave of absence. Members are generally entitled to the rights and benefits not based on seniority that are provided to similarly-situated employees when on furlough or leave of absence.

B. Non-Seniority Benefits. If the employer offers other benefits, not based on seniority, to employees who are on furlough or nonmilitary leave, the employer must make them available to the employee on military service during the service. (For Federal employees, see even more generous rule at 5 C.F.R. §353.106(c).)

1. Examples: paid leave, employee stock ownership plans, low-cost life insurance, holiday bonus or pay.

2. If the employer has more than one leave/furlough policy, the military employee gets the benefit of the most generous. However, if policies vary by length of absence, the military employee may only take advantage of policies geared to similar periods of absence (e.g., 6 months, 1 year).

3. Employee may waive the right to these benefits if the employee states, in writing, that s/he does not intend to return to the job. Note, however, that such a written waiver cannot deprive the employee of his other reemployment rights should he “change his mind” and seek reemployment.

C. Service members are not entitled under USERRA to benefits they would not otherwise be entitled to had they remained continuously employed. However, employers can provide benefits more generous than mandated. If the employers do provide greater benefits, they must still provide all required benefits provided by the statute.

D. Vacation or Annual Leave. Members have the rights to use vacation or annual leave accrued prior to service during their military service. Generally, employees are not entitled to accrue additional leave while performing military service. Employers cannot force military members to use accrued leave while performing service.

V. ENTITLEMENT TO REEMPLOYMENT RIGHTS AND BENEFITS [38 U.S.C. § 4312.]

A. An employee returning from military service is eligible for reemployment rights under USERRA if they meet the following criteria in this chapter.

B. **Employee (service member) must have held a civilian job.**

1. USERRA applies to virtually all employers: the Federal and state governments, and all private employers, with no size-based exceptions.

2. USERRA does not apply if employed for brief, non-recurrent periods; self-employed; an independent contractor; or a student.

C. **Employee must have given prior notice of military service to civilian employer.**

1. Statute requires notice. It does not require written notice. A writing will, however, minimize disputes and proof problems.

2. Notice may be given by the service member or by a responsible officer from the service member's unit.

3. Exceptions: notice is precluded by "military necessity" (e.g., fact of deployment is classified) or where giving notice would be otherwise "impossible or unreasonable." Clear from legislative history, and case law construing predecessor legislation, that this exception will be construed narrowly. If attempting to invoke this exception, when the necessity, impossibility, or unreasonable circumstances cease to exist, the service member should give notice as soon as possible.

D. **Employee's period of military service cannot exceed five years.**

1. The five-year limit on military service is cumulative.

2. The five-year cumulative maximum is calculated "with that employer" and restarts when an employee changes civilian employers.

3. Some types of service (e.g., periodic/special Reserve/NG training, service in war or national emergency, service beyond five years in first term of service) do not count toward the five-year cumulative maximum. See Appendix A for a discussion of exceptions to the five-year rule.

4. The five-year period does not start fresh on 12 December 1994 (effective date of USERRA) - it reaches back to include all periods of military service during employment with a given employer, unless such service was exempted from the Veterans' Reemployment Rights Act's (VRRA)[1] four-year service calculations.

E. **No disqualifying discharge**. Pursuant to Section 4304, the employee's service must have been under "honorable conditions" with no punitive or other than honorable discharge or Dropped from Rolls. USERRA provides reinstatement protection for retroactive upgrade of discharge characterization (but no back pay).

[1] Commonly referred to as "The Veterans' Reemployment Rights Act," the USERRA's antecedent legislation "was never an 'Act' with its own special title." Lieutenant Colonel H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F.L. REV. 55 at n.9, 57 (1999).

1. For service over 30 days, employer can demand proof of honorable conditions.

2. Proof can consist of a DD Form 214, letter from commander, endorsed copy of military orders, or a certificate of school completion.

F. **Employee must report back or apply for reemployment in a timely manner.**

1. If service is up to 30 days, the service member must report at next shift following safe travel time plus 8 hours.

2. If service is from 31 days to 180 days, the service member must report or reapply within 14 days.

3. If service is for 181 days or more, the service member must report or reapply within 90 days.

4. Extensions are available if the employee can show it was impossible or unreasonable, through no fault of the employee, to report or reapply.

5. Reapplication need only indicate that:

   a. Service member formerly worked there;

   b. Service member is returning from military service; and,

   c. Service member requests reemployment pursuant to USERRA.

   d. The request need not be in writing. Written request for reemployment is *preferred* to help avoid disputes and proof problems.

6. Disabled or impaired due to military service has up to two years to request reinstatement. Employers must make “reasonable accommodations” unless doing so results in undue hardship.

7. A service member who fails to comply with USERRA's timeliness requirements does not lose all USERRA protections. The employer, however, is entitled to treat (and discipline) that employee's late reporting just like any other unauthorized absence.

VI. JOB PLACEMENT AND RIGHTS OF REEMPLOYED PERSONS.

[38 U.S.C. §§ 4311-18.]

A. Several protections are available if the service member (employee) meets the prerequisites discussed in Section V above.

B. **Prompt Reemployment.** If the employee was absent 30 (or fewer) days, the employee must be reinstated immediately; if absent over 30 days, the reinstatement should take place within a matter of days.

C. **Job Placement.** Eligible employees are entitled to an "escalator" position upon return from military service. This is the position that the employee would have attained with reasonable certainty if not for the employee's absence due to military service. This can include promotions, but also layoffs or reduction in force.

1. Service 1 to 90 days, the employee must be promptly reemployed in the following order, escalator position, preservice position, or nearest approximation position.

2. Service 91 days or more, service members must be reemployed in the order of, the escalator position or equivalent, preservice position or equivalent, or the nearest approximation position.

D. Training, Retraining, and Other Accommodations. An employee who returns to the job after a long period of absence may find his or her skills rusty or face a new organization or technology. An employer must make "reasonable efforts" to requalify the employee for his or her job.

1. "Reasonable efforts" are those that do not cause "undue hardship" for the employer. A claim of "undue hardship" requires an analysis of the difficulty and expense in light of the overall financial resources of the employer (and several other factors). The USERRA language is similar to that employed in the Americans with Disabilities Act (ADA).

2. If the employer cannot accommodate the employee, the employer must find a position that is the “nearest approximation” in terms of seniority, status, and pay.

E. **Status.** The employee may object to the proffered reemployment position if it does not have the same status as previous employment. Examples:

1. “Assistant Manager” is not the same as “Manager,” even if both carry the same compensation.

2. One location or position may be less desirable than another (geographically, by earnings potential, or by opportunity for promotion).

3. A change in shift work (e.g., from day to night) can be challenged.

F. **Seniority.** If the employer has any system of seniority, the employee returns to the “escalator” as if he or she had remained continuously employed.

1. Seniority also applies to pension plans (including Simplified Employee Pension, 401(k) and 403(b) plans). The seniority principle protects the employee for purposes of both vesting and pension amount. Additional information is provided in IRS Revenue Procedure 96-49, which requires private pension plans to comply with USERRA pension requirements NLT 19 October 1996, and government pension plans NLT 1 January 2000.

   a. If the employer has a plan that does not involve employee contribution, employer must give employee pension credit as if the employee never left.

   b. If the pension depends on a variable that is hard to estimate because of the employee’s absence (e.g., amount of accrued pension depends on percent of commissions employee earns), employer may use employee’s performance during the 12 months before service to determine pension benefits. Employer may not use military earnings as a basis to figure civilian pension accrual.

c. For an employer plan involving employee contributions, the employee must make up the contributions after returning to work. The employee has three times the period of absence for military service, not to exceed five years, to make up the contributions. The employer may not charge interest. Federal employees are entitled to four times the period of absence to make up contributions, per 5 C.F.R. Part §1605.11 (2017).

G. **Health Insurance.**

1. Immediately upon return to a civilian job, the employee (and family) must be reinstated in the employer's health plan. The employer may not impose any waiting period or preexisting condition exclusions, except for Department of Veterans Affairs' determined service-connected injuries.

2. USERRA offers continued employer health coverage, at the employee's option, during military service. Federal employees should refer to 5 C.F.R. §890.305 (2004).

a. Employer must, if requested, continue the employee (and family) on health insurance for up to 30 days of military service. (TRICARE does not cover dependents on tours less than 31 days.) Cost to employee cannot exceed normal employee contribution to health coverage.

b. Employee may request coverage beyond 30 days (and must pay regular share of premiums). Employer must provide this coverage up to 24 months or end of service (plus reapplication period), whichever is first. Employer may charge employee up to 102% of the full premium cost (employee and employer shares plus a 2% administrative fee) from the first day of any tour over 30 days.

H. **Location of Employment**. ***Hill v. Michelin North America, Inc.***, 252 F.3d 307 (4th Cir. 2001).

1. Court notes that "USERRA defines 'benefit of employment' as 'any advantage, profit, privilege, gain status, account or interest' arising from an employment contract, including 'the opportunity to select work hours or location of employment.'" (Citing 38 U.S.C.A. § 4303(2).)

2. Facts in dispute about whether employee's transfer was at his request or improperly motivated due to his service in the U.S. Navy Reserve.

3. Regardless, transfer was from one section of plant described as "a clean working environment [where] employees are allowed to wear street clothes and are not required to shower at the end of their shifts."

4. The work conditions were benefits of employment when employee was transferred to a section of the plant described as "very dirty [where] employees are required to wear coveralls and to shower at the end of their shifts."

I. **Compensation and Related Matters.**

1. ***Wriggelsworth v. Brumbaugh***, 129 F. Supp.2d 1106 (W.D. Mich. 2001).

   a. Facts: Police officer returned from military service. Employer willing to rehire him as a detective. Union objected, saying it would adversely affect other members. Employee hired back at an entry level and sued for declaratory judgment. Hired back approximately five months later than he was otherwise ready to return.

   b. Service member awarded backpay (difference between entry level pay and detective pay), accrued sick leave prior to entry on active duty, accrued sick leave from time he returned from active duty, accrued seniority, and pension benefits.

   c. Service member also awarded clothing allowance even though he did not work as a detective, the position for which the allowance was designed.

2. ***Yates v. Merit Systems Protection Board***, 145 F.3d 1480 (Fed. Cir. 1998).

a. Facts: Plaintiff postal worker entered a 90-day training period with periodic evaluations at 30, 60, and 90 days. She performed two-week annual training (AT) during first 30 days. Was not given a two-week extension. Although there was an evaluation on the 60th day, she was also not evaluated after 30 days.

b. Holding: A two-week extension and evaluation at the 30th day were benefits of employment.

4. ***Fink v. City of New York***, 129 F. Supp.2d 511, 521 (E.D.N.Y. 2001) (denial of opportunity to take a "promotional" test, a test that serves as a benchmark for promotion, held to be an unlawful employment practice).

J. **Paid Military Leave.**

1. ***Butterbaugh v. DOJ***, 336 F.3d 1332 (Fed. Cir. 2003).

a. Issue was whether Federal military leave statute meant that employees would be given military leave against their workdays or calendar days. (5 U.S.C. § 6323(a)(1) grants 15 days per year.)

b. OPM practice, prior to 21 December 2001, was to count calendar days whether or not the employee had been scheduled to work for all of those days unless the days fell at either the beginning or ending of the period. Example: A Reservist who left work for Reserve duty on Friday, the fourth and who returned to work on Monday the fourteenth would be charged eight days of military leave. Even though not scheduled to work at the civilian job on Saturday the fifth or Sunday the sixth, these days would be charged as military leave. A Reservist who left work on Monday the seventh, began training on that day, and returned on Monday the fourteenth, would be charged for only five days.

c. Held that statute giving military leave meant workdays.

d. Petitioners also challenged the practice as a denial of a benefit of employment under USERRA, but the court ruled otherwise noting that the petitioners had not been denied leave. The only real question was the meaning of 5 U.S.C. § 6323(a)(1).

e. OPM put out guidance for employees who wish to make an administrative claim. This guidance notes that the Barring Act (31 U.S.C. § 3702(b)(2)) means "a leave claim against the Government must be received by the agency . . . within 6 years after the claim accrues."

2. ***Miller v. City of Indianapolis***, 281 F.3d 648 (7th Cir. 2002).

a. Similar facts in that firemen worked 24-hour shifts. Local policy construed state military leave statute to mean that the absence from one 24-hour shift amounted to the loss of three days of military leave.

b. Unlike the court in ***Butterbaugh***, the court spent little time interpreting the state statute as state authorities had held that missing a 24-hour shift translated to the loss of three days military leave.

c. As to the plaintiffs' USERRA claims, the court found that there was no discriminatory treatment. Other firemen, who were Guardsmen or Reservists, but who did not work 24-hour shifts, were treated similarly. That is, other employees were caused to use their military leave at an equal rate.

K. **Special Protection from Discharge.** 38 U.S.C 4316(c). Depending on the length of service, there are certain grace periods of post-service employment wherein, if the employee is discharged, the employer will have a heavy burden of proof to show discharge for cause. This provision is a hedge against bad faith or pro forma reinstatement.

1. After reemployment an employee may only be discharged for cause.

a. Service lasting 31 to 180 days, the protection lasts for 180 days after reemployment.

b. Service over 180 days, the protection lasts for one year after reemployment.

2. The meaning of discharge after reemployment includes termination, layoffs, demotion, and a transfer to an inferior position.

3. Employers must show proof of "cause" and have the burden of providing the reasonableness prior to the expiration of the protection period.

a. Based on misconduct

(1) Reasonable to fire the employee for the misconduct.

(2) Employee had notice the conduct would be grounds for discharge.

b. Based on other than conduct

(1) Discharge was a legitimate nondiscriminatory reason.

(2) Would have affected anybody in the employee's position.

4. Federal military veteran/Reserve employees may raise "hostile work environment" discrimination claim based upon the individual's military status. See ***Petersen v. Dep't of Interior*, 71 M.S.P.R 227 (1996)**.

VII. EMPLOYER DEFENSES TO REEMPLOYMENT.

A. The statute, 38 U.S.C. § 4312(d)(1) (2015), provides for three defenses.

1. Employer suffers a change in circumstances that make the reemployment impossible or unreasonable.

2. The reemployment would pose an undue hardship on the employer.

a. "Undue hardship" means actions requiring "significant difficulty or expense …" (38 U.S.C. § 4303(15)).

b. Employer must make "reasonable efforts" to accommodate a person with a disability (38 U.S.C. § 4313(a)(3)) and look to place the person "in any other position which is equivalent in seniority, status, and pay" when "the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer" (38 U.S.C. § 4313(a)(3)(A)).

c. When the employer cannot find a position that is an "approximation" to another position, the employer must still look to employ the person in some position that is "consistent with [the] circumstances of such person's case" (38 U.S.C. § 4313(a)(3)(B)).

d. Others who are no longer qualified, but not disabled, receive similar treatment (38 U.S.C. § 4313(a)(4)).

3. The employment is nonrecurring or brief and such that the person would not have had an expectation of returning.

B. Other potential defenses.

1. Waiver.

2. Estoppel.

3. Laches. ***Miller v. City of Indianapolis***, 281 F.3d 648 (7th Cir. 2002).

C. The burden of proof is on the employer in any proceeding involving the above defenses. [38 U.S.C. § 4312(d)(2).]

VIII. DISCRIMINATION AND RETALIATION [38 U.S.C. §§ 4311]

A. Persons protected from discrimination not only includes current employees, but also job applicants and ex-employees.

1. Members of the uniformed service

2. Applicants for membership in a uniformed service

3. Applicants for service in a uniformed service

4. Persons with an obligation to perform service

5. Persons currently performing service

6. Persons who have performed service

B. Prohibited discrimination. An employer shall not deny any individual "initial employment, reemployment, retention in employment, promotion, or any benefit of employment" because of the individual's military service.

1. Any benefit of employments is defined as, "the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account or interest . . .

2. This includes wages or salary, rights under a pension plan, insurance coverage, awards, bonuses, severance pay, vacations, etc.

C. Person protected from retaliation. USERRA prohibits employers from retaliating against persons who exercise or seek to enforce rights under the statute, or participate in proceedings or investigations.

1. Persons who take an action to enforce USERRA

2. Persons who testify or make a statement in, or in connection with, a proceeding under USERRA

3. Persons who assist or participate in an investigation under USERRA

4. Persons who exercise a right provided for in USERRA

D. Burden of Proof [32 U.S.C. 4311(c) (1) & (c)(2)]

1. Employee must show military service was a "motivating factor" in the employer's decision with one or more of the following:

a. Application for membership or membership,

b. Service application, service, or service obligation,

c. Action taken to enforce USERRA protection afforded any person,

d. Testimony or statement in support of USERRA proceeding,

e. Participation in a USERRA investigation, or

f. Exercise of a USERRA right

IX. ASSISTANCE AND ENFORCEMENT. [38 U.S.C. §§ 4321-27.]

A. Organizations.

1. The National Committee for Employer Support of Guard and Reserve (1-800-336-4590, Option 1 or OSD.USERRA@mail.mil) is a DoD agency that provides information on USERRA to employees and employers, and seeks to resolve disputes on an informal basis. This is a national and state ombudsman program that attempts to be the first step to resolve employer-employee USERRA disputes. Its website is http://www.esgr.mil.

2. The Department of Labor (DOL), which is the implementing authority for USERRA, will investigate to determine if any violation occurred. DOL delegated responsibility under USERRA to the Veterans' Employment and Training Service (VETS) (866-237-0275). Its website is http://www.dol.gov/vets/.

3. VETS assists people experiencing service-connected problems with their civilian employment and provides information about USERRA to employers.

4. In cases of USERRA violation, VETS will attempt to negotiate a suitable resolution with the employer.

5. When resolution is not possible, VETS will refer meritorious cases, which may have an immediate and significant impact on the claimant, to the Department of Justice (DOJ) for civilian employees and the Office of Special Counsel (OSC) for Federal employees.

6. Upon referral, the DOJ or OSC may provide counsel for representation free of charge. If they do not, or the veteran desires private representation, the veteran may hire counsel. The action against the employer is brought in Federal Court or the Merit System Protection Board (MSPB) (for Federal employers).

7. For example, in November 2005, the United States District Court for the Western District of Washington approved a consent decree in a case brought by the DOJ on behalf of a Coast Guard Reservist against the S.O.G. Specialty Knives & Tools Company (SSK). The plaintiff, who was mobilized and deployed to Iraq in 2003 as part of Operation Iraqi Freedom, alleged that he was terminated prior to his deployment, re-employed in a non-equivalent position upon his return, and terminated again within 180 days of his return, all in violation of USERRA. The DOJ Civil Rights Division and the U.S. Attorney's Office in Washington filed suit. The defendant company agreed to an out-of-court monetary settlement and consent decree enjoining them from taking retaliatory action or further action in violation of USERRA. *See White v. S.O.G. Specialty Knives & Tools, Inc.*, No. CV51800 (D. Wash. consent decree signed Nov. 1, 2005).

8. Veteran need not request assistance prior to suing, but must wait for completion of VETS action if requested. *See* 38 U.S.C. § 4323 (a) as amended (2008). (State or private employer only). For specific rules regarding Federal employment and other agencies, see 38 U.S.C. § 4324-25 respectively.

B. **Formal Enforcement.** Course of action depends on employer. *See generally*, 38 U.S.C. § 4323.

1. Private Employers: Action in U.S. Federal District Court. Venue is wherever the private employer maintains a place of business.

2. State Employers: Cases brought on an employee's behalf by the United States are under the jurisdiction of any U.S. Federal District Court located where the state exercises authority.

3. Federal Employees. *See Generally* 5 C.F.R. Part 1208. The MSPB has appellate jurisdiction over probationary and non-probationary Federal employees for USERRA claims. *See* 5 C.F.R. §1208.2. There are no time limits for individuals to file USERRA discrimination claims before the MSPB. *See* 5 C.F.R. §1208.12 (2000). Process:

   a. Veteran may choose to request assistance from VETS or go directly to the MSPB. If assistance from VETS is requested, must wait for VETS process completion before filing MSPB complaint.

   b. File appeal with MSPB. OSC may choose to represent the veteran, or the veteran may retain counsel (and, if a prevailing party, request attorney's fees).

   c. If dissatisfied with the MSPB administrative hearing result, can appeal to the MSPB and, if necessary, to the Court of Appeals for the Federal Circuit (as in other MSPB appeals).

   d. DOL VETS has informally retained its policy, dating from the preceding statutory scheme, of not assisting veterans who are represented by counsel.

4. USERRA includes several "teeth" to the enforcement of reemployment rights.

   a. Gives the DOL (VETS) subpoena power to aid in the conduct of its investigations.

   b. Employees who prevail on their claims may be entitled to reinstatement, lost pay (plus prejudgment interest), attorney's fees, and litigation costs. *See* 5 C.F.R. §1201.202(a)(7) (attorney's fees).

c. If the court finds the violation was willful, the court may double the backpay award. (Does not apply to MSPB cases involving the Federal government as an employer.) Where there is evidence of employer's willful violation of USERRA that could result in liquidated damages, the plaintiff has a right to a jury trial. ***Spratt v. Guardian Automotive Products, Inc.,*** 997 F. Supp.1138 (N.D. Ind. 1998).

5. Extraterritorial Jurisdiction. USERRA gives Reservists and veterans residing overseas protections under the Act, provided that they work for the Federal government or a private company incorporated in the United States or controlled by a United States corporation. There is an exception from coverage for foreign companies whose compliance with the Act would violate local national law.

6. Extension of MSPB Jurisdiction and OSC Representation to pre-USERRA cases filed after USERRA's enactment in October 1994. The 1998 Amendments to USERRA at 38 U.S.C. § 4324(c) provide that the MSPB may now hear complaints "without regard as to whether the complaint accrued before, on, or after October 13, 1994" (the day before USERRA was enacted). The MSPB holds that this provision allows the MSPB to hear and the OSC to represent Federal employees in VRRA cases that accrued on or before October 13, 1994. The MSPB opined that Congress was attempting to ensure the OSC would represent Federal employees on VRRA cases before the MSPB. ***Williams v. Dep't of Army***, 83 M.S.P.R. 109 (1999) and ***Venters v. U.S. Postal Service***, 84 M.S.P.R. 34, (1999).

7. MSPB pleadings. ***Yates v. Merit Systems Protection Board***, 145 F.3d 1480, 1484 (Fed. Cir. 1998).

a. Although plaintiff should specifically plead USERRA, the requirement is easily met.

b. Plaintiff met requirement when she "assert[ed] … (1) performance of duty in a uniformed service with the United States; (2) … a loss of a benefit of employment; and (3) an allegation that the benefit was lost due to the performance of duty in the uniformed service."

8. Arbitration. The Fifth Circuit held in 2006 that the provisions of USERRA do not preempt an otherwise valid agreement to arbitrate between an employer and an employee. In ***Garrett v. Circuit City Stores, Inc.***, the plaintiff, a Marine Reservist, alleged he was terminated in 2003 during the buildup for Iraqi Freedom because of his status as a Marine Reserve officer. In 1995, as part of a nationwide policy for resolving employment related disputes, Circuit City promulgated a program requiring employees who did not opt out of the program to submit employment disputes to binding arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq* (FAA). The plaintiff acknowledged this new program in writing and failed to opt out. Despite this provision of his employment with Circuit City, plaintiff filed his USERRA claim in Federal district court without submitting it to arbitration. The district court denied a defense motion to compel arbitration finding that USERRA preempted the arbitration agreement. The appellate court reviewed this decision *de novo.* After reviewing the text of USERRA, its legislative history, and the underlying principles behind the statute, the appellate court *reversed*, finding that Congress had not intended USERRA to preempt otherwise valid arbitration agreements and holding that USERRA claims are subject to the FAA. ***Garrett v. Circuit City Stores, Inc.***, 449 F.3d 672 (5th Cir. 2006). The appellate court implied its decision would remain the same even if the DOJ had brought the claim on behalf of the plaintiff (see B.4. above relating to enforcement of USERRA rights by a Federal agency on behalf of the plaintiff).

X. OTHER MATTERS.

A. USERRA in state court.

1. ***Miller v. City of Indianapolis***, 281 F.3d 648 (7th Cir. 2002).

a. The decision is largely based on state and local legislation granting Guardsmen and Reservists periods of paid military leave.

b. *See also* ***Koppin v. Strode***, 761 N.E.2d 455 (Ind. Ct. App. 2002); ***Howe v. City of St. Cloud***, 515 N.W.2d 77 (Minn. App. 1994).

2. ***Barreto v. ITT World Directories, Inc.***, 62 F. Supp. 2d 387, 393-4 (D.P.R. 1999) (failure to file under Puerto Rican USERRA-like provision within statute of limitation period).

B. Strict liability. ***Curby v. Archon***, 216 F.3d 549, 556 (6th Cir 2000) ("In enacting [USERRA], Congress intended to lessen, but not eliminate, a veteran's obligation to show that employer's adverse decision was related to his or her service in the armed forces").

C. Intelligence community. ***Dew v. United States***, 192 F.3d 366, 372 92d Cir. 1999) ("Congress intended to preclude judicial review of [USERRA] claims by employees of **Federal intelligence agencies**" (emphasis added)).

D. Lingering VRRA application. ***Lapine v. Town of Wellesley***, 304 F. 3d 90 (1st Cir. 2001).

1. Facts: U.S. Army Reserve member quits job as town police officer, expressing his deep dissatisfaction with the department. Around the time of his resignation, he begins processing a request for active duty as an AGR. His resignation letter says nothing about leaving employment because of active duty. He withdraws $31,021.79 from his state retirement account, explaining he has no interest in ever being employed with the state again.

2. Case decided under VRRA because plaintiff began seeking reemployment with police department in 1993 before USERRA's effective date.

3. Holding: "We agree, therefore, with the magistrate judge that if Lapine—having found there were active duty openings and that his chance of being accepted was good—left his job with the Wellesley police with the intent to go on active duty as soon as the necessary paperwork could be completed and orders issued, and if—as clearly happened—he diligently and successfully carried out this intention, he was entitled to claim reemployment benefits under the VRRA." *Lapine v. Town of Wellesley*, 304 F. 3d 90 at 101-102 (1st Cir. 2001).

XI. NEW/FUTURE DEVELOPMENTS.

A. USERRA was amended recently on January 15, 2021, to add coverage for National Guard service members called to State Active Duty (by their state governors) in response to the COVID-19 pandemic. It is an ever-evolving Federal law.

B. On June 29, 2022, the Supreme Court of the United States, in *Torres v. Texas Department of Public Safety*, decided that a veteran could sue his former employer, the Texas Department of Public Safety (DPS), under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) after the DPS would not accommodate his medical conditions by employing him in a different role. The Court ruled that state employers cannot invoke sovereign immunity as a defense to suits brought under USERRA.

XII. READMISSION RIGHTS: USERRA-LIKE PROTECTIONS FOR STUDENTS.

A. On 14 August 2008, Congress enacted the Higher Education Opportunity Act (HEOA), which reauthorized the Higher Education Act of 1965. Within the HEOA, there are specific protections pertaining to service members. Under 20 U.S.C. § 1091c(b), "a person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform, service in the uniformed services shall not be denied readmission to an institution of higher education on the basis of that membership …."

B. Student-Soldiers must satisfy three prerequisites to qualify for readmission rights. First, the student must give advance written or verbal notice of military service to the appropriate official at the institution of higher education. Second, the cumulative length of the absence (and of all previous absences) from the institution of higher education by reason of service cannot exceed five years. Finally, upon their return, students must submit a notification of intent to reenroll in the institution.

C. Pursuant to 34 C.F.R. § 668.18(a)(2), an institution must promptly readmit a service member, whose absence was necessitated by military service, with the same academic status as the student had when the student last attended the institution. This includes the same enrollment status, the same number of credit hours, and the same academic standing on their readmission to the institution. If the student-Soldier is readmitted into the same academic program, for the first academic year after returning, the tuition and fees will be the same as the academic year during which the student-Soldier left the institution.

D. Under 34 C.F.R § 668.18(a)(2)(iv), if an institution determines student-Soldiers are not prepared to resume their program at the same academic status, the institution must make reasonable efforts at no extra cost to the student to assist them to become prepared. These reasonable efforts may include providing free refresher courses and allowing the students to retake pretests at no extra cost.

1. There are three scenarios in which the institution does not have to reinstate the student-Soldier:

a. After reasonable efforts by the institution, the institution determines that the student is not prepared to resume the program at the point where he or she left off;

b. After reasonable efforts by the institution, the institution determines that the student is unable to complete the program; or

c. The institution determines there are no reasonable efforts the institution can take to prepare the student to resume the program at the point where he or she left off or to enable the student to complete the program.

E. There are two important distinctions between the readmission provisions of the HEOA and employment protections of USERRA.

1. The HEOA only applies to active-duty service “under Federal authority” for 30 or more consecutive days. Inactive duty training (IDT) training pursuant to Title 32 for National Guard Soldiers (except Full-time National Guard duty of a duration of 30 or more days), and active duty for fewer than 30 consecutive days, are excluded from its protections. Conversely, USERRA applies to IDT, Title 32 training periods, and active duty of any duration.

2. The HEOA allows returning Soldiers up to three years to provide notice of intent to return to their educational institution upon completion of their military service. In contrast, USERRA only allows a maximum of 90 days for returning Soldiers to provide notice of their intent to return to their employer.

APPENDIX A

EXCEPTIONS TO 5-YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA]

NOTES:

1. Effective with the enactment of the Reserve Officer Personnel Management Act (ROPMA) on October 6, 1994, several section numbers from Title 10 U.S. Code that are referenced as exceptions to the five-year limit have been changed.

2. The term “Reservist” means any member of the National Guard or Reserve. Sections that apply only to the National Guard or the Coast Guard are identified as such.

3. On/effective January 5, 2021, Section 4303 of USERRA was amended to extend employment and reemployment rights to National Guard members performing State Active Duty, under the authority of a State Governor (paid with State funds for a State mission), as follows:

a. For 14 days or more;

b. In support of a national emergency declared by the President under the National Emergencies Act; or

c. In support of a major disaster declared by the President under Section 401 of the Stafford Act. National Guard members serving on State Active Duty that does not meet the criteria above may have similar protection for such duty under state law (i.e., USERRA is the floor, not the ceiling). Section 7004 of the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020 added a new subsection (15) to section 4303 of USERRA: “The term ‘State active duty’ means training or other duty, other than inactive duty, performed by a member of the National Guard of a State—(A) not under section 502 of title 32 or under title 10; (B) in the service of the Governor of a State; and (C) for which the member is not entitled to pay from the Federal Government.”

4. Title 38, U.S. Code § 4312(c) holds that USERRA protection “... does not exceed five years, except that any such period of service shall not include ...”

a. Obligated Service -- § 4312(c)(1). Applies to obligations incurred beyond 5 years, usually by individuals with special skills, such as aviators.

b. Unable to Obtain Release -- § 4312(c)(2). Self-explanatory. Needs to be documented on a case-by-case basis.

c. Training Requirements -- § 4312(c)(3). 10 U.S.C. § 10147, regularly scheduled IDT (drills) and AT; and 10 U.S. C. § 10148, ordered to active duty up to 45 days because of unsatisfactory participation.

d. 32 U.S.C § 502(a), National Guard regularly scheduled IDT and AT.

e. 32 U.S.C. § 502(f)(2)(A), National Guard responding to National Emergency as authorized by the President or Secretary of Defense.

f. 32 U.S.C. § 503, National Guard active duty for encampments, maneuvers, or other exercises for field or coastal defense.

g. Specific Active Duty Provisions Listed in 38 U.S.C. § 4312(c)(4)(A):

(1) 10 U.S.C. § 12301(a), involuntary active duty in wartime.

(2) 10 U.S.C. § 12301(g), retention on active duty while in a captive status.

(3) 10 U.S.C. § 12302, involuntary active duty for national emergency up to 24 consecutive months.

(4) 10 U.S.C. § 12304, involuntary active duty for operational mission (other than during war or national emergency) up to 365 consecutive days.

(5) 10 U.S.C. § 12305, involuntary retention of critical persons on active duty for a period the President determines is essential to national security.

(6) 10 U.S.C. § 688, involuntary active duty by retirees.

(7) 14 U.S.C. § 331, Coast Guard involuntary active duty by retired officer.

(8) 14 U.S.C. § 332, Coast Guard voluntary active duty by retired officer.

(9) 14 U.S.C. § 359, Coast Guard involuntary active duty by retired enlisted member.

(10) 14 U.S.C. § 360, Coast Guard voluntary active duty by retired enlisted member.

(11) 14 U.S.C. § 367, Coast Guard involuntary retention of enlisted member.

(12) 14 U.S.C. § 712, Coast Guard involuntary active duty of Reserve members to augment regular Coast Guard in time of natural/man-made disaster.

h. War or Declared National Emergency -- § 4312(c)(4)(B). Provides that active duty (other than for training) in time of war or national emergency is exempt from the 5-year limit, ***whether voluntary or involuntary activation***.

i. Certain Operational Missions -- § 4312(c)(4)(C). Provides that active duty (other than training) ***in support of an operational mission*** for which Reservists have been activated under Title 10, U.S. Code § 12304 is exempt from the 5-year limit, whether voluntary or involuntary activation. NOTE: In such a situation, involuntary call-ups would be under § 12304. Volunteers may be ordered to active duty under a different authority.

j. Critical Missions or Requirements -- § 4312(c)(4)(D). Provides that active duty in support of certain critical missions and requirements is exempt from the 5-year limit, *whether call-up is voluntary or involuntary*. This would apply in situations such as Grenada or Panama in the 1980s, when provisions for involuntary activation of the Reserve were not exercised.

k. Specific National Guard Provisions -- § 4312(c)(4)(E). 10 U.S.C. Chapter 15, National Guard called into Federal service to suppress insurrection, domestic violence, etc.

l. 10 U.S.C.§ 12406, Army/Air National Guard called into Federal service in case of invasion, rebellion, or inability to execute Federal law with active forces.

CHAPTER J

2022 MILITARY MEDICAL DISABILITY LAW AND VETERANS LAW OUTLINE

I. References

a. AR 40-501, Standards of Medical Fitness
b. AR 40-502, Medical Readiness
c. AR 40-400, Patient Administration
d. AR 635-40, Disability Evaluation for Retention, Retirement, or Separation
e. AR 40-58, Warrior Care and Transition Program
f. AR 635-200, Active Duty Enlisted Administrative Separations
g. Department of Defense Instruction 1332.18, Disability Evaluation Systems
h. IDES Guidebook With Reference Guide: An Overview of the Integrated Disability Evaluation System (IDES); Approved by Army G1, MEDCOM Publication
i. Veterans Benefits Administration Manual M-21 (Veterans Affairs Claims Manual, electronically available at: http://www.benefits.va.gov/warms/M21_1MR.asp)
j. Title 38, United States Code, Section 5303 (statutory bars to Veterans Benefits).
k. Title 38, Code of Federal Regulations, Section 3.12 (eligibility for Veterans Benefits)

II. Definitions

a. DES – The Army Disability Evaluation System – Encompasses the entire medical evaluation, disability determination, and final disposition process. Includes the MEB, PEB, and appeals, and final disposition on whether Soldier is retired, separated with severance pay, or found "fit". Established under 10 USC 61 and DODD 1332.18.
b. IDES – Integrated Disability Evaluation System - The Joint Army-VA process to determine whether ill or injured Soldiers are fit for continued military service and Army and VA determine appropriate benefits for Soldiers who are separated or retired for disability.
c. MAR2 – Military Occupational Specialty Administrative Retention Review – Replaces MMRB. An Army pre-DES evaluation for Soldiers with P3/P4 profiles that otherwise meet medical retention standards. Results in Soldiers being retained in current MOS, reclassified, or referred to DES.
d. MEB – Medical Evaluation Board – Determines whether Soldier's conditions meet medical retention standards under AR 40-501.
e. MEB-ing / PEB-ing / In the MEB / Going through MEB / Med Boarding – Colloquial terms used by Soldiers and even Commanders to refer to a

Soldier in the DES. Rarely an accurate statement of what stage the Soldier is actually at within the DES.

f. MRDP – Medical Retention Determination Point - A condition is at the MRDP when it is stabilized or cannot be stabilized within 12 months and impacts "successful performance of duty." A condition impacts the successful performance of duty when it impacts performing basic soldiering skills (performing all functional activities and at least one aerobic APFT[1] event) and impacts performing MOS specific duties. The Soldier's condition must be at the MRDP prior to receiving a P3 or P4 profile and being enrolled in IDES.
g. MSC – VA military service coordinator – Receives the Soldier's case from the physical evaluation board liaison officer (PEBLO) during the MEB phase.
h. NARSUM – Narrative Summary – Contains a diagnosis and prognosis of the Soldier's conditions and MRDP statement. This is the heart of the MEB.
i. PEB – Physical Evaluation Board – Makes "fitness" determination; determines if Soldier is to be retained, separated with severance pay, or medically retired; analyzes whether condition was combat-related.
j. Veterans' Administration Schedule for Rating Disabilities (VASRD).

III. Overview

a. **Disability Evaluation System (DES) Overview**
    i. Military Occupational Specialty Administrative Retention Review (MAR2) evaluation.
        1. If applicable, the MAR2 occurs prior to Soldiers enrolling in DES.
        2. MAR2 determines whether Soldiers will be retained in their primary MOS (PMOS), reclassified into another MOS, or referred to DES.
    ii. DES is DOD's process for evaluating the nature and extent of disabilities affecting members of the Armed Forces.
        1. DES consists of MEBs, PEBs, counseling of Soldiers, and mechanisms for final disposition of disability evaluations. At the end of the DES, a Soldier is either returned to duty, separated with severance benefits, or medically retired.
    iii. Three evaluation systems exist under DES:
        1. Integrated Disability Evaluation System (IDES)
            a. Most common
            b. VA determines disability ratings used by both the VA and Army in the IDES process.
        2. Legacy Disability Evaluation System (LDES)

[1] As of this publication, the regulatory language has yet to be updated to reflect the use of the ACFT. Most likely new language will be similar, requiring a Soldier to be able to perform one aerobic ACFT event; however, practitioners should verify when advising on this issue.

a. PEB determines the disability ratings using the same standards used by the VA in IDES, the Veterans' Administration Schedule for Rating Disabilities (VASRD). This was the primary DES used prior to the creation of the IDES.

3. Expedited Disability Evaluation System (EDES)
    a. Used in situations involving catastrophic injuries or diseases.

iv. DES applies to active duty, Reserve, recalled retirees, Cadets of the United States Military Academy, and ROTC cadets (only when injured during training while in a RC Simultaneous Membership Program).

b. **Military Occupational Specialty Administrative Retention Review**

i. MAR2 is an administrative process for Soldiers who meet the medical retention standards of AR 40-501, but who nonetheless may not be able to satisfactorily perform the duties of their PMOS in a worldwide field or austere environment because of medical limitations.
    1. MAR2 replaces the Military Occupational Specialty Medical Retention Board (MMRB)

ii. MAR2 will determine whether the Soldier is to be:
    1. Retained in their MOS,
    2. Reclassified into another MOS or
    3. Referred into the DES.

iii. Some Soldiers are required to be referred to MAR2, therefore, referral to MAR2 should be considered before referral to DES.

iv. IOT be referred to MAR2, the Soldier must have no limitations indicated on the functional activities on their profile (DA form 3349).

SECTION 4: FUNCTIONAL ACTIVITIES		
24. A SOLDIER MUST BE REFERRED TO THE DISABILITY EVALUATION SYSTEM (DES) IF THERE IS AT LEAST ONE PERMANENT (P) "3" IN THE PULHES AND LIMITATION(S) NOTED IN THE FUNCTIONAL ACTIVITIES. TEMPORARY (T) LIMITATIONS DO NOT CAUSE REFERRAL TO DES.		
INDICATE THOSE ACTIVITIES THAT THE SOLDIER CANNOT PERFORM BY PLACING AN "N" IN THE APPROPRIATE COLUMN(S).	P	T
a. Physically and/or mentally able to carry and fire individual assigned weapon?		
b. Ride in a military vehicle wearing usual protective gear without worsening condition?		
c. Wear helmet, body armor, and load bearing equipment (LBE) without worsening condition?		
d. Wear protective mask and MOPP 4 for at least 2 continuous hours per day?		
e. Move greater than 40 lbs (e.g. duffle bag) while wearing usual protective gear (helmet, weapon, body armor, LBE) up to 100 yards?		
f. Live and function, without restrictions in any geographic or climatic area without worsening condition?		
25. ADDITIONAL PHYSICAL RESTRICTIONS (CHECK IF APPLICABLE)		
[ ] a. LIFTING/CARRYING RESTRICTION: MAXIMUM WEIGHT RESTRICTION:	Permanent: ___ lbs.	Temporary: ___ lbs.
[ ] b. STANDING LIMITATION:	Permanent: ___ min	Temporary: ___ min
[ ] c. MARCHING WITH STANDARD FIELD GEAR:	Permanent: Time: ___ min / Distance: _____ mi	Temporary: Time: ___ min / Distance: ___ mi
26. MEDICAL/ADMINISTRATIVE BOARD STATUS:	Not Applicable	

v. Soldiers are <u>required</u> to be referred to MAR2 in the following circumstances:
    1. Soldiers are issued a P3/P4 in at least one of the profile serial factors for a medical condition that meets the medical retention standards of AR 40-501.
        a. Serial Profile Factors are the P-U-L-H-E-S (physical capacity/stamina, upper extremities, lower

extremities, hearing and ears, eyes, and psychiatric) on the profile form (DA 3349).

2. When an MEB determines the Soldier meets medical retention standards and returns the Soldier to duty with a P3 or P4 profile.
3. A Soldier previously evaluated by MAR2 which resulted in retention in the MOS or reclassification to new MOS, or a Soldier determined fit by PEB, when one of the follow occur:
    a. Soldier's initial conditions, which led to a prior referral to MAR2 or MEB, cause additional functional limitations.
    b. Soldier receives a P3/P4 for condition that meets medical retention standards.

vi. Soldiers previously retained by MAR2 or DES, may be referred to MAR2 again for the same condition when the condition precludes the Solider from satisfactorily performing their duties, when recommended by the first O-6 in the Soldier's chain of command, and occur NET 120 days from the Soldier's previous evaluation.

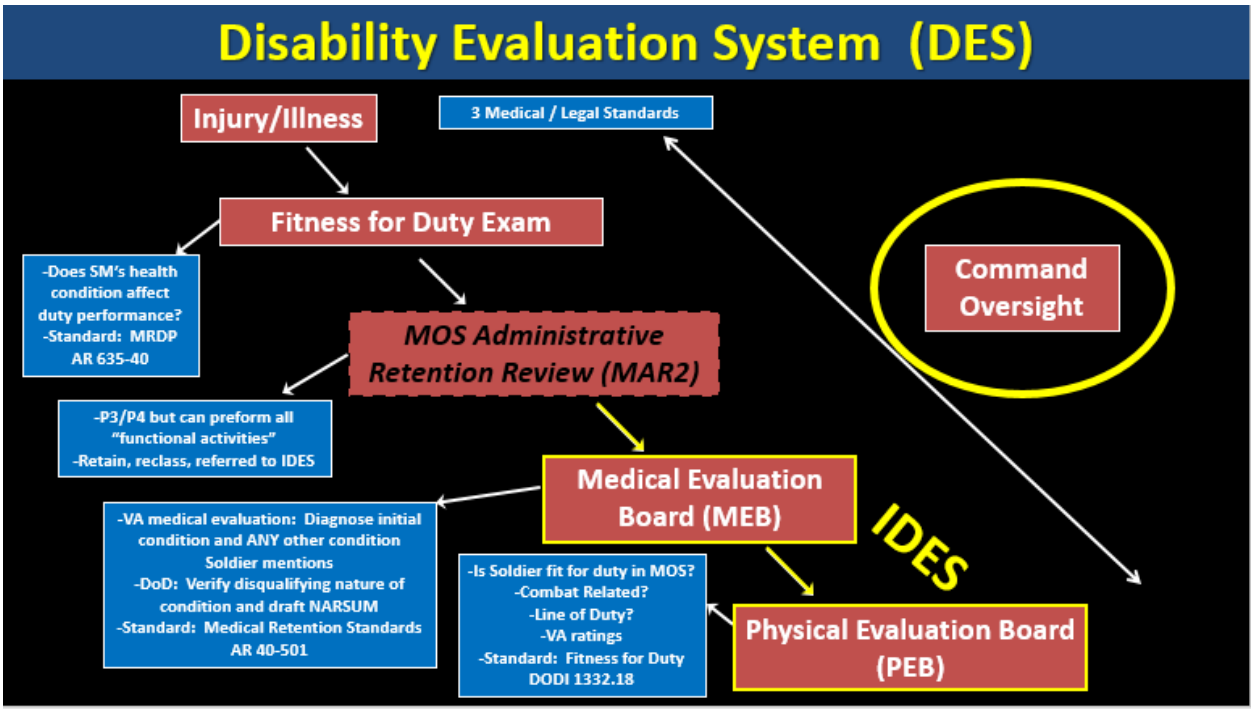
vii. Soldiers in the following circumstances will not be referred to MAR2:

1. A Soldier issued a profile for a condition that does not meet medical retention standards and/or prevents the Soldier from performing all required functional activities (see IV.d. above).
2. A Soldier with an approved retirement.
3. An officer within 12 months of their mandatory retirement date.
4. An enlisted Soldier within 12 months of their retention control point (RCP) and will be retirement eligible at RCP, or an RC enlisted Soldier within 12 months of their mandatory removal date and will be eligible for a 20-year letter on that date.
5. A Soldier within 90 days of their ETS.
6. A Soldier being processed for administrative separation.
7. A Soldier that failed to complete basic training, advanced individual training, or Basic Officer Leaders Course
    a. Except when a Soldier receives a P3 (not P4) and the condition meets medical retention standards, the Soldier will undergo MAR2 within six months of reporting to their new duty assignment. This includes conditions for which the Soldier was granted an accessions waiver.
8. Retiree recalls.
9. General officers.

c. **Integrated Disability Evaluation System (IDES) (Formerly, Army Physical Disability Evaluation System (APDES) Overview**

i. Directive-Type Memorandum (DTM) 11-015 – Integrated Disability Evaluation System (IDES) 19 December 2011)
   1. Directed Department of Veterans Affairs (VA) to integrate into the Army DES early in the process, versus forcing Soldiers to report to the VA after leaving the service, and repeat many steps in the process
   2. The resulting process is a single set of disability medical examinations and a single set of disability ratings that are used by both the Army and the VA in IDES.

ii. A (non-doctrinal) way to visualize IDES:



iii. Three Distinct Legal Standards in IDES
   1. Medial Retention Determination Point (MRDP)
      a. Entry into IDES
   2. Medical Retention Standards of AR 40-501 (Ch. 3)
      a. MEB Standard
   3. Fitness for Duty, Department of Defense Instruction 1332.18
      a. PEB Standard

iv. A useful analogy for judge advocates explaining IDES to commanders is to speak in terms of procedural due process rights for the Soldier

IV. IDES: Step-by-Step (Detailed Explanation of Chart Above)

a. **<u>Injury/Illness</u>**

i. Most Soldiers going through IDES (Wounded Warriors) are not combat-wounded

ii. Commanders should mitigate risks in garrison, just as they do in combat
iii. Illnesses account for entry into IDES as well; Periodic Health Assessments (PHA) are important in identifying health problems

b. **Fitness for Duty Exam**
   i. Commanders can order a Fitness for Duty Exam if they suspect health problems that affect duty performance
   ii. Depending on the medical condition, Soldiers will ordinarily be given an opportunity to recover before being enrolled in IDES.
      1. Medical personnel will attempt to return the Soldier to full duty conditions via physical therapy and surgery.
      2. Medical personnel might assign a temporary profile (T2) on DA form 3349 (profile form) which restricts the Soldier from performing certain physical activities for a short amount of time. This does not enroll the SM in IDES.
      3. Medical personnel might assign a permanent profile (P2) on DA form 3349 (profile form) which restricts the Soldier from performing certain physical activities. This does not enroll the SM in IDES.
   iii. Depending on the severity of the condition or the progress through recovery, the physician will determine if any potentially unfitting condition is at the MRDP. A condition is at the MRDP when:
      1. The condition is stabilized or cannot be stabilized within 12 months AND
      2. The condition impacts "successful performance of duty." A condition impacts the successful performance of duty when:
         a. The condition impacts performing basic soldiering skills (performing all functional activities and at least one aerobic APFT[2] event) AND
         b. Impacts performing MOS specific duties.
      3. The condition results in the issuance of a P3/P4 Profile.
         a. Once a second Physician (Profiling Authority, appointed by Hospital Commander) signs the P3/P4 profile, Soldier has legally entered the IDES process.
         b. EXCEPT when Soldier has P3/P4 but can still perform all "functional activities" on profile in which case, they will be referred to MAR2

[2] As of this publication, the regulatory language has yet to be updated to reflect the use of the ACFT. Most likely new language will be similar, requiring a Soldier to be able to perform one aerobic ACFT event; however, practitioners should verify when advising on this issue.

iv. If Soldier receives an approved P3/P4 Profile for one or more conditions that are at the MRDP, the Soldier is enrolled in the IDES. As the Soldier transitions into the IDES, the following actions occur:
    1. Soldiers receives VA Medical Claims Form (VA 21-0819)
    2. VA Military Service Coordinator (MSC) assists Soldier in identifying all medical conditions, and documenting them on the VA-21-0819
    3. The VA-21-0819 form serves as a template for a series of medical appointments for the Soldier to attend.

c. **Medical Evaluation Board (MEB)**
    i. The MEB consists of a comprehensive medical examination and a determination of whether any condition documented at the medical exam does not meet medical retention standards prescribed in AR 40-501.
        1. The medical exam is conducted by the Department of Veterans Affairs but the results are interpreted and used by DoD physicians (the MEB) to determine if a medical conditions meets or fails medical retention standards.
    ii. Two Purposes
        1. Document medical status and duty limitations
        2. Determine if Soldier meets retention standards of AR 40-501, Chapter 3.
    iii. Upon being referred to the MEB, a Physical Evaluation Board Liaison Officer (PEBLO) will be assigned to the Soldier
        1. The PEBLO will explain the DES process, notify the Soldier of their rights, notify the Soldier's Commander of the Soldier's enrollment in DES, assemble the Soldier's medical treatment records, and forward the case to a VA military service coordinator (MSC).
    iv. Structure: 2+ Physicians, appointed by local hospital commander.
    v. Informal operation, records review of comprehensive medical exam and a Narrative Summary (NARSUM)
        1. The NARSUM is an important document in the DES process. The NARSUM contains diagnosis of all conditions that do not meet medical retention standards as well as an MRDP statement.
        2. In completing the NARSUM, the provider will rely on the VA examination and medical records.
    vi. When the MEB determines one or more conditions do not meet medical retention standards, the MEB will forward the case to the PEB.
        1. MEB make this determination based on the Medical Retention Standards of AR 40-501(Ch. 3).
        2. When the MEB determines that all conditions meet retention standards, the MEB will recommend the Soldier returns to

duty with appropriate duty limitations annotated on the profile form.

vii. Medical- and records-based determination

viii. Soldier's Due Process in the MEB.

1. If the Soldier objects to the MEB Findings, the Soldier can request an impartial medical review (IMR) or submit a rebuttal of the MEB findings.
2. Soldiers should seek legal advice from a MEB counsel in weighing these options.
3. Within five days of receiving the MEB decision, the Soldier must:
    a. Concur with the MEB decision,
    b. Request an IMR, or
    c. Not concur with the MEB decision and plan to submit a rebuttal. The Soldier has seven days to submit this rebuttal.
4. If the Soldier requests an IMR, the Soldier may still submit a rebuttal to the MEB.
    a. The Soldier must submit the MEB rebuttal within seven days of receiving the IMR results.

ix. MEB impact on duty status:

1. Leave is permissible but discouraged during MEB.
2. Soldier is ineligible to PCS except to a WTU, to home on permanent change of station leave (AR 600-8-10), or when required by Soldiers stationed OCONUS IOT complete DES. If a Soldier received PCS order before referral to DES, the DES process must be completed before the Soldier proceeds with the PCS.
3. Soldier is ineligible to attend any TRADOC schools.
4. Is eligible for awards and promotion consideration and selection.
5. Is subject to the UCMJ and administrative actions or separations under AR 635-200.

d. **Physical Evaluation Board (PEB)**

i. If any condition is determined by an MEB to be medically disqualifying, it is forwarded to the PEB.

ii. For Active Duty Soldiers, PEBs have now been consolidated to one location at Joint Base San Antonio. Previously, there were 3 PEB locations at Joint Base Lewis McChord, WA; Joint Base San Antonio, TX; and Washington, D.C. The current regulatory default is for in-person hearings at the PEB, although practically as a legacy effect of the COVID-19 pandemic, "in-person" hearings occur virtually.

iii. PEB threshold Question: Is the Soldier "fit for duty?"

1. The PEB will decide if the Soldier is retained, separated with severance pay, or medically retired.

iv. Fitness for Duty
    1. DoD Instruction 1332.18
        a. Can the Soldier perform their PMOS in a variety of conditions?
        b. Danger to the unit or other Soldiers?
        c. Unreasonable burden on the unit?
v. Informal PEB (IPEB): (initial determination)
    1. IPEB is composed of 2 or 3 members O-4 and above or GS-13 and above. At least one member must not be a physician.
    2. IPEB conducts a documentary review of the case forwarded by the MEB without the Soldier present. If 2/3 agree the Soldier is unfit for duty, the file immediately is sent to the VA for a ratings determination (using the VA Schedule for Ratings Disabilities (VASRD)
        a. VA Ratings Decision
            i. VA Ratings are determined in increments of 10% by rounding up or down
            ii. Separate with severance payment (20% or below)
            iii. Medically Retire (30% or above)
    3. VA Makes Rating Decision at PEB phase for ALL compensable conditions so that Soldier exits the military with their disability rating.
    4. IPEB will determine**:**
        a. Whether the Soldier's conditions cause them to be unfit for continued service**.**
        b. Whether Soldier will be placed on temporary disability retired list (TDRL) or permanently retired**.**
        c. For purposes of Federal Civil Service Law, whether unfit conditions were**:**
            i. Incurred in combat
            ii. Result of armed conflict
            iii. Or caused by instrumentality of war
        d. Whether disability compensation is excluded from Federal gross income.
        e. If Soldier is separated with severance pay, whether unfitting disabilities were:
            i. Incurred in combat zone or
            ii. Incurred during performance of duty in combat-related operations
    5. PEBLO will provide the Soldier the results of IPEB including a benefits estimate letter.
    6. Soldier's Due Process in IPEB

a. Soldiers should seek legal advice from a MEB counsel, PEB counsel, or private counsel regarding their IPEB options.
b. After receiving IPEB findings, Soldiers have 7 days to make an election.
c. Soldiers may choose to:
    i. Accept IPEB decision (this waives the Soldier's rights to formal PEB)
    ii. Nonconcur with IPEB decision and request formal hearing with or without rebuttal matters
    iii. Nonconcur with IPEB decision, not request formal hearing and
        1. Submit rebuttal matters (case reviewed by IPEB)
        2. Not submit rebuttal matters (case forwarded to U.S. Army Physical Disability Agency [USAPDA])
    iv. Accept VA ratings or request reconsideration of VA ratings

vi. Formal PEB (FPEB):
1. FPEB is composed of at least 3 members
    a. President: Line Officer, O-5 or above, often with combat arms and deployment experience
    b. Medical Officer
    c. Personnel Management Officer (can be from any branch other than medical but must be familiar with duty assignments). Enlisted Soldiers in FPEB may have an E-9 serve in this role.
2. Soldiers found "fit" by IPEB may request (not demand) a FPEB. Request should be based on:
    a. New information or evidence not previously submitted to IPEB
    b. Sufficient justification that IPEB did not properly consider evidence
3. Soldier rights in FPEB
    a. Solders have right to be represented by Soldier's PEB Counsel (SPEBC).
    b. Soldiers have several due process rights at FPEB (*see* AR 635-40, Ch. 4-23.f.)
    c. Soldier can appear in person at the FPEB and receive travel funding
    d. Soldier can call witnesses to testify before FPEB.
4. FPEB conducts a *de novo* review of all IPEB determinations and can affirm or deny any IPEB determinations.
    a. Practitioners should counsel their clients on the risks this *de novo* review presents to their clients.

b. Potentially, a FPEB could find a condition "fit" when the IPEB had determined that condition "unfit".

5. Soldier's Due Process in FPEB
    a. After receive FPEB findings, the Soldier has 10 days to make their election
    b. Soldier may choose to:
        i. Accept FPEB decision (this waives the Soldier's rights to appeal to USAPDA)
        ii. Nonconcur with FPEB decision and submit rebuttal matters.
            1. FPEB will review then forward case to USAPDA.
        iii. Nonconcur with FPEB decision and <u>not</u> submit rebuttal matters
            1. FPEB will forward case to USAPDA.
        iv. Accept VA ratings or request reconsideration of VA ratings
            1. Typically, only allowed reconsideration of new conditions determine unfitting by FPEB.

vii. Soldier's Due Process beyond the IPEB and FPEB
    1. In some circumstances, USAPDA will conduct a review of PEB cases (*see* AR 635-40, Ch. 4-25)
    2. If USAPDA makes revisions to PEB findings and recommendations, the Soldier has another appeal opportunity to the Army Physical Disability Appeal Board (APDAB). (*see* AR 635-40, Ch. 4-26)

viii. IPEB and FPEB's Burden of Proof
    1. Preponderance of the evidence
    2. Findings based upon objective evidence—not personal opinion, speculation, or conjecture.
    3. Overcoming Presumptions of Soundness upon Entry into Service & Service Aggravation
        a. Each party starts with the premise that, unless otherwise documented, the Soldier was physically and mentally sound upon entering service
        b. To deny compensation, PEB must show by "***Clear and unmistakable evidence***" that the disability both: (1) existed before the member's entrance on active duty; and (2) was not aggravated by active military service. (NDAA 09)
    4. The Soldier has a one-time right to appeal to the VA the rating determined by the VA for any condition found unfitting by the PEB.

e. **<u>Final Disposition</u>**

i. USAPDA typically serves as the approval authority for disability cases and issues disability orders.
ii. Disposition options include:
1. Permanent disability retirement
2. Temporary disability retired list
3. Separation with disability severance pay
4. Separation without disability severance pay
5. Revert to retired status with disability benefits
6. Fit

V. LDES – Brief Overview

a. Under the LDES system, the PEB determines fitness and the disability ratings percentages
i. The PEB uses the VASRD for rating percentages. Essentially, the PEB performs the role of the VA, using the same evaluation criteria, in the IDES.
ii. However, the PEB will only evaluate P3/P4 profile conditions and those found to not meet medical retention standards.
iii. Soldiers would need to enroll and be evaluated by the VA for all other service-connected conditions which do not fall below medical retention standards.
b. LDES process may be used when Soldiers are eligible for IDES but the IDES process may have detrimental impact on the disability process, the Soldier, or the Army.
i. The Soldier or the command may request the LDES process in lieu of IDES.
c. The LDES process will be used for Veterans referred to the DES by ABCMR.

VI. EDES – Brief Overview

a. EDES is for Soldiers with catastrophic injuries or illnesses from combat or combat-related operations.
b. EDES waives DES processing and requests immediate permanent retirement at 100 percent disability.
c. Soldiers may request EDES when the condition is:
i. Permanent
ii. Severely disabling injury, disorder, or disease
iii. Condition compromises ability to carry out activities of daily living
iv. Soldier requires mechanical assistance or constant supervision
d. At any time, Soldiers may request to process through IDES.

VII. Office of Soldiers Counsel (OSC)

a. Soldiers MEB Counsel (SMEBC)
i. Civilian Attorneys with dedicated paralegals
ii. Specially trained in the IDES
iii. SMEBCs are assigned to most major Army installations

iv. Assists clients with all legal issues

b. Soldiers PEB Counsel (SPEBC)
   i. Represents Soldiers at the Formal PEB

VIII. United States Army Reserve (USAR) Practice Points

a. In the Line of Duty, command funds Soldier appearance at formal PEB. Not in the Line of Duty, command will not fund Soldier appearance at formal PEB.
b. Reserve Component on Active Duty
   i. Full IDES process
c. Reserve Component, Not on Active Duty
   i. In the Line of Duty: IDES Process
   ii. Not in the Line of Duty: PEB for fitness for duty only
      1. No MEB
      2. No referral to VA for disability ratings
d. Do not rush through the medical evaluation process at a demobilization!

IX. Wounded Warriors and Misconduct

a. UCMJ actions – Soldiers under investigation or charged with offense that could result in dismissal, dishonorable discharge, or BCD
   i. May be referred to and complete the MEB phase
   ii. Cannot proceed in the PEB until:
      1. Investigation ends without charges
      2. Court-Martial charges are dismissed
      3. Officer submits resignation for good of the Service (AR 600-8-24) or resignation in lieu of Court-Martial
      4. The case is referred to a Summary Court-Martial
      5. The Court-Martial conviction does not include confinement and discharge or Soldier completes confinement without discharge
b. Chapter 10
   i. Soldiers are not eligible for referral to MEB or PEB.
   ii. If Soldier is already in DES, their MEB or PEB will be terminated.
   iii. Possible to preserve VA Benefits by including language in the Ch. 10 indicating that the GCMCA had no intention of referring the case to a General or Special Court-Martial.

c. Administrative Separations for Enlisted
   i. AR 635-200, Chapters 7 or 14 (fraudulent enlistment or misconduct)
      1. Both MEB and Administrative Separation Action continue until completion.

2. After MEB is complete, GCMCA makes decision to continue to PEB or Administrative Separation. GCMCA analysis IAW AR 635-200:
    a. Was medical condition a direct or substantial contributing cause of misconduct?
    b. Other circumstances warrant disability processing?
3. For Enlisted Soldiers: After MEB is complete, GCMCA decides what takes precedence

ii. For other separations under AR 635-200 (i.e. 5-17), the DES process takes precedence over the administrative separation.

iii. **Soldier continue to be eligible for administrative separations action up until the day of their separation or retirement for disability even if their PEB is complete.**

d. Administrative Separations for Officers
    i. Generally, officers approved to resign for the good of the Service in lieu of trial by Court-Martial are <u>ineligible</u> for referral to MEB and PEB
    ii. However, if officer was referred to MEB prior to <u>approval</u> of the resignation, the MEB and/or PEB must be completed and the case dual processed to the Deputy Assistant Secretary of the Army (Review Boards).

e. <u>AWOL</u>
    i. Soldiers AWOL are not eligible for referral or continuation in MEB, PEB, or final disposition
    ii. Once a Soldier is dropped from rolls (DFR), their case is terminated
        1. If the Soldier returns prior to DFR, their DES process may resume.

f. RC Soldiers and Unexcused Absences
    i. RC Soldiers with nine or more unexcused absences in one year cannot be referred to or continue in the DES process UNLESS:
        1. Soldier has a condition, which was a direct medical cause or significant contributing factor to the unexcused absences.

g. Civilian Confinement
    i. Soldiers confined by civilian authorities for misdemeanor or felony are ineligible for MEB or PEB UNLESS:
        1. Present for duty on bail or
        2. After conviction, command declines in writing to separate the Soldier

h. Suspended Sentences
    i. Soldiers may be referred to or proceed in DES if their military sentence of dismissal or punitive discharges is suspended.
    ii. The Soldier may not be discharged through DES until the period of suspension has ended and punitive discharge/dismissal has been disapproved.

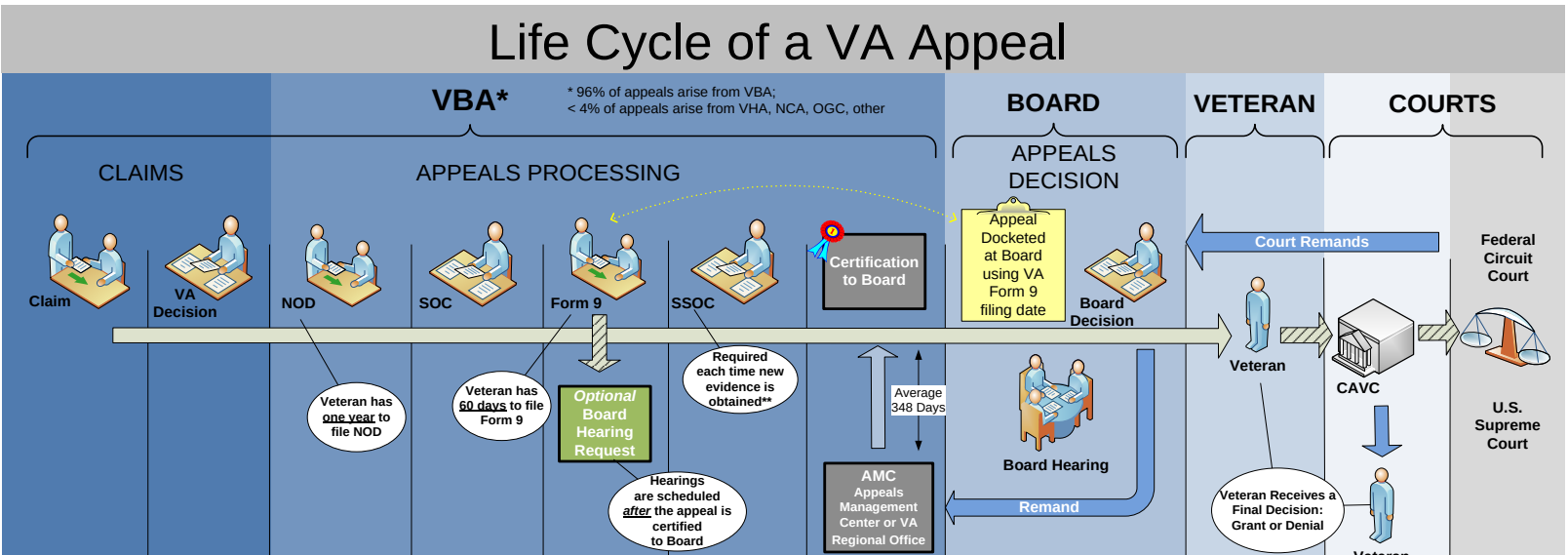
i. Recommended Guidance to Convening Authorities
    i. Wounded Warriors are still responsible for their actions
    ii. Prior to taking action on a case or making a recommendation, leaders should have a sufficient understanding of:
        1. The Soldier's underlying medical and behavioral health conditions
        2. The potential impact on veteran's benefits, to include continued care of mental health issues
            a. *See* Military Law Review Article, *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces* by MAJ John Brooker, MAJ Evan Seamone & Ms. Leslie Rogall, 214 MIL. L. REV. 1 (2012)

X. Warrior Transition Units (WTUs)

a. AR 40-58, Warrior Care and Transition Program governs and judge advocates advising WTU commanders should review the regulation in its entirety.
b. For assignment/attachment to a WTU, the Soldier must need:
    i. Six months of rehabilitative care
    ii. Complex medical management
    iii. Decision made by MTF Commander, WTU Commander, and Unit Commander
c. Most Soldiers going through IDES are not assigned or attached to a WTU.

XI. The Veterans Claims Process

a. VA must receive a claim for VA benefits as a prerequisite to making a benefits award. 38 U.S.C. § 5110(a)
    i. There is no time limit on filing a VA benefit claim
    ii. The failure to file a claim for benefits until years, and sometime decades, after service often complicates VA's adjudicative process
    iii. An IDES claim (claim submitted by a Service member prior to separation) satisfies VA requirements for submission of a claim.
b. VA Claim Timeline:



XII. Key Points for Advising on Veterans Law

a. Practice Points
    i. Maintain medical records, orders, and copies of investigations
    ii. Claims filed sooner, rather than later, can be adjudicated more quickly with favorable benefits to the Veteran versus claims filed years after the event precipitating the claim.
    iii. With an OTH (Other than Honorable Discharge), medical care (but likely not disability compensation) is still available for service connected injuries/conditions.
    iv. Typically, the only significant VA benefit one loses with a General, Under Honorable Conditions Discharge is Education Benefits (GI Bill, etc.)
    v. Any previous period of service completed Honorably, may vest certain VA Benefits even if the Soldier's last term of service ended adversely.

b. The Best Approach for analyzing the probability of receiving VA Benefits
    i. Analyze "Veterans Status" as explained in Title 38.
    ii. Veteran Status is the threshold issue the VA will look at before considering any filed VA claim (it's what gets you in the door).
    iii. Three main factors for Veterans Status (Reference i at Part III)
        a. Written Proof of Service (DD214 or equivalent).
        b. Minimum active service requirements. (24 months or the entire period that the Soldier was called to Active Duty).
        c. Discharged under conditions other than dishonorable (a term of art for the VA, does not mean "anything but a Dishonorable Discharge").
        d. Veterans Status Flow Chart. This chart, produced by the VA Office of General Counsel, can be used as a tool by Judge Advocates to determine likelihood (not definitive answers) of a Soldier receiving VA benefits after discharge.