MILITARY PERSONNEL LAW DESKBOOK

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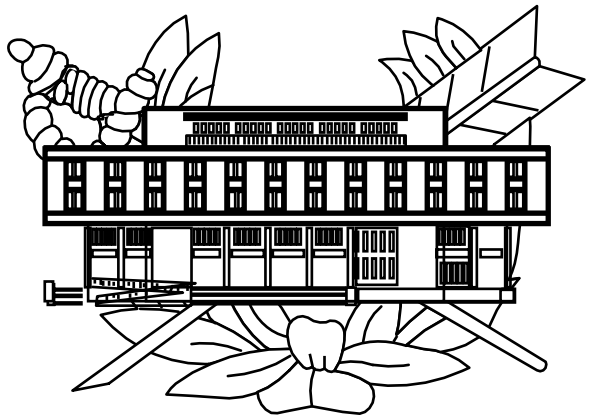

ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

The Judge Advocate General's Legal Center and School
United States Army
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CHAPTER A

COMMAND AUTHORITY: 55TH GRADUATE COURSE

I. SOURCES OF COMMAND AUTHORITY:

A. Constitution:

1. Article 1, 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 or imprisoned…"

C. Regulations:

1. DoD Directives, DoD Instructions (http://www.dtic.mil/whs/directives/) lay out DoD requirements. Services spell out specific service requirements in respective service regulation.

2. Service Regulations:

a. Army, Army Regulations (AR), e.g. AR 600-20, Army Command Policy (7 June 2006);

b. Navy, Navy Regulations, SECNAVINST, OPNAVINST;

c. Marines, 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 Often serve as gap fillers when higher directives, orders, or regulations are inadequate or have been rescinded.

b. Local regulations are heavy lifters in the area of installation protection. DoDI 5200.08, Security of DoD Installations and Resources, 10 December 2005, paragraph 1.1 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 an installation commander. The Constitution, statutes, and regulations defining the authority of a commander do not address every contingency faced by a commander in the lawful execution of their duties. To the extent that authority for a commander's actions cannot be found in statute or superior regulation, a concept of "inherent authority" has been inferred from caselaw. Commanders have inherent authority to act in order to avert dangers to morale, welfare, or discipline.

2. Inherent authority recognized in Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961)(power of a commander over an installation is "necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand"). See also Greer v. Spock, 424 U.S. 828 (1976)(holding that military installations are not public forums for civilian political activity. Commander has the "historically unquestioned power" summarily to exclude civilians from the area of his command, "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.").

3. Limitations. There must be some nexus between the authority sought and the effect on morale, welfare, or discipline. Political considerations, news media, and public relations may also serve as limiting factors.

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. USE OF COMMAND AUTHORITY TO REGULATE:

A. Speech.

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

c. 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. The Greer court reaffirmed the "historical usage" test, i.e. whether or not a public place was considered a public forum for free speech purposes was determined by the "historical usage" of the property. See Hague v. Committee for Industrial Organization, supra. Prior to Greer, the Supreme Court had drifted away from the historical usage test over the years, 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.

(2) Open House activities on military installations. Public access, such as at open house, is not sufficient to convert a military installation into a public forum in absence of abandonment of military special interest. Factors include mission-focus and political neutrality. Greer v. Spock, supra; Persons for Free Speech at SAC v. U.S., 675 F.2d 1010 (8th Cir. 1982) (open house on an Air Force base did not create a public forum. Base commander is afforded substantial discretion to control the use of the base and was not unreasonable in prohibiting nuclear weapons protesters from participating in the open house activities). Contra, U.S. v. Albertini, 710 F.2d 1410 (9th Cir. 1983)(Ninth Circuit held that 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). 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).

2. Standard applicable to each type of forum.

a. 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 (necessary to serve a compelling state interest and narrowly drawn to achieve that end) standard.

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

c. Nonpublic Forum: Reasonable for forum. Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119 (1977)(ban on inmate solicitation to join prison inmate "labor union" and group meetings rationally related to reasonable objectives of prison administration. "A prison may be no more easily converted into a public forum than a military base").

3. Unprotected Speech including Dangerous Speech:

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

b. Dangerous Speech:

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

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

4. Handling Dissident Activities Among Members of the Armed Forces. See DoDD 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces (1 Oct 96); AR 600-20, Army Command Policy, para. 5-9; AFI 51-903, Dissident & Protest Activities (1 Feb 98); MCO 5370.4B, Dissident & Protest Activities (26 Jun 97); OPNAVINST 1620.1B, Guidelines for Handling Dissent & Protest Activities Among Members of the Armed Forces (14 Sep 99).

a. Prior approval of 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 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 statute or regulation.

B. Solicitation.

1. Charitable. DoDD 5035.1, Combined Federal Campaign (CFC), Fund-Raising Within the Department of Defense (7 May 99); AR 600-29, Fund-Raising within the Department of the Army (1 Jun 01); SECNAVINST 5340.2D, Fundraising & Solicitation of Department of Navy Personnel, Military and Civilian, in the National Capitol Area (NCA) (23 Sep 99) (refers to DoDD 5035.1 as the authority for fundraising within the Navy). On-duty solicitation authorized only for Combined Federal Campaign and military relief & aid agencies. (See JER 3-210) Limited off-duty local fund raising may be authorized, e.g., for MWR activities, on-post private organizations, and other limited fund- raising to assist the unfortunate such as veteran organization poppy sales (flowers) and the placement of 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 (22 Apr 86); SECNAVINST 1740.2D, Solicitation & Conduct of Personal Commercial Affairs (27 Apr 87).

a. No right to solicit; must be authorized. Army permits in writing and valid for up to one year. (Navy/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/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/MC informal.

C. Political Activities: Ch. 6, DoDD 5500-7.R, Joint Ethics Regulation; DoDD 1344.10, Political Activities by Members of the Armed Forces on Active Duty (2 August 2004; AR 600-20 (Army Command Policy), para. 5-3 (7 Jun 06); MCO 5370.7B, Political Activities (8 Mar 93); AFI 51-902, Political Activities by Members of the USAF (1 Jan 96).

1. Soldiers, Sailors, Airmen, & Marines: Traditional concept is that military members do not engage in partisan political activity.

a. Examples of what an Active Duty Soldier can do (see above regulations for entire list): Vote and express personal opinion on candidates and issues authorized, 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): Participate in public demonstrations (partisan and nonpartisan) while on duty, in uniform (Locks v. Laird, 300 F. Supp. 915 (D. Colo. 1969)), or in a foreign country (Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir 1977)); no distribution of partisan political literature; no participation in partisan political management, campaigns, or convention.

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.

2. Reserve Component (RC) servicemembers: RC servicemembers on active duty must comply with the rules regarding active duty servicemembers. However, RC servicemembers may 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 there is no interference with the performance of military duties. See DoDD 13.44.10, para. 4.3.2.

3. Civilians: Hatch Act, 5 U.S.C. §§ 7324-27. 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 1-800-85-HATCH (854-2824) for advisory opinions.

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

a. Paragraph 3-4, AR 360-1 (The Army Public Affairs Program) (15 Sep 00), provides policies and procedures to be followed when considering military involvement in election year activities. Installation commanders should not permit the use of installation facilities by any candidate or representative of a candidate for political assemblies, meetings, fund-raising, events, press conferences, or any 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). Candidates who are not members of Congress may be given the same access to installations as that to which any other visitor is entitled. Prior to 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. See AR 600-20, appendix B, para. B-3o.

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

c. Lawn signs in government housing areas. Local policy usually controls. Appropriate limitations authorized.

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).

(2) Holiday displays. Lynch v. Donnelly, 465 U.S. 668 (1984)(secular holiday display which included nativity scene not unconstitutional).

(3) Invocations/Benedictions.

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

(b) Official prayer at nonreligious military ceremonies: See para. 4-4h, AR 165-1 (Chaplain Activities in the United States Army)(25 Mar 04)(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 and practices of their faith group"). See also the Air Force's *Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force* (9 Feb 06)(stating that non-denominational, inclusive prayer or a moment of silence may be appropriate for military ceremonies or events of special importance when its *primary* purpose is not the advancement of religious beliefs).

(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. Statutes.

a. Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (Government shall not substantially burden exercise of religion, even from a rule of general applicability, except in furtherance of a compelling governmental interest and through the least restrictive means) Compelling governmental interest test applies to the military, but intent is for courts to grant authorities significant deference in effectuating military interest in maintaining good order, discipline, and security. 1993 U.S. Code Cong. & Admin News 1892. **RFRA ruled unconstitutional in Boerne v. Flores, 521 U.S. 507 (1997).**

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

3. Accommodation of Religious Practices Within the Military: DoDD 1300.l7, Accommodation of Religious Practices Within the Military Services (3 Feb 88, w/ch.1: 17 Oct 88); AR 600-20, para. 5-6; SECNAVINST 1730.8A, Accommodation of Religious Practices (13 Dec 97).

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

b. Specific practices:

(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. 5-6g(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 shall interfere with the performance of the members 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 field environment.

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

E. Extremist Organizations.

1. See DoDD 1325.6; AR 600-20, para. 4-12; AFI 51-903; MCO 5370.4B (26 Jun 97); OPNAVINST 1620.1B (14 Sep 99) (prohibiting active participation in organizations which espouse supremacist causes, 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. Participation in extremist organizations or activities is incompatible with military service.

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

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

d. Expressly recognizes commander's inherent authority to prohibit activities which will adversely affect good order, discipline, or morale within the command.

F. Appearance.

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

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

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

2. Service Regulations: Army - AR 670-1 (3 Feb 2005); Air Force – AFI 36-2903 (29 Sep 2002); Navy – Navy Uniform Regs (Jan 2005); Marines – MC Order P1020.34G (31 Mar 2003).

3. Tattoos/Body Piercing/Mutilation/Tooth Ornamentation.

a. Army: No tattoos that are visible in Class A uniform EXCEPT neck/hands (this is new as of Jan 06!!!); no tattoos that are extremist, racist, sexist, indecent, etc. No body piercing jewelry on post (except female earrings), or while in uniform anywhere. Army has no specific guidance on mutilation (such as tongue splitting), but does prohibit appearance that is extreme or unmilitary. Same with tooth ornamentation.

b. Unique rules in other services: Navy/Marines prohibit tattoos on face/neck. Marines prohibit male earrings anywhere, whether on or off post. Air Force and Navy specifically prohibit tongue splitting (implied in Army/Marine rules).

IV. AUTHORITY OFF THE INSTALLATION:

THE ARMED FORCES DISCIPLINARY CONTROL BOARD (AFDCB). JOINT REG: AR 190-24/ OPNAVIST 1620.2A/ MCO 1620.2C/ AFI 31-213.

A. Takes action on reports of negative conditions; coordinates with civil authorities; makes recommendations to commander on eliminating conditions which affect health, safety, morals, welfare, morale, or discipline.

B. 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.

1. Due process provided in form of notice and opportunity to be heard.

2. 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."

3. Violation of off-limits is UCMJ offense.

CHAPTER B

55TH GRADUATE COURSE

MWR AND NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFIs)

I. REFERENCES.

A. DODD 1015.2, Subject: Military Morale, Welfare and Recreation (MWR) (14 June 1995- Certified current as of 21 November 2003).

B. DODI 1015.10, Subject: Programs for Military Morale, Welfare, and Recreation (3 November 1995, w/Change 1, 31 Oct 96).

C. Army: AR 215-1, Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities (15 August 2005).

D. Navy: SECNAV Instruction 1700.12A, Subject: Operation of Morale, Welfare and Recreation Activities (15 July 2005).

E. Air Force: AFI 34-262, Subject: Air Force Community Service Programs and use Eligibility (27 June 2002).

F. USMC: MCO P1700.27A, Marine Corps Community Services Policy Manual, (8 November 1999).

G. Coast Guard: COMDTINSTM 1710.13B: Coast Guard Morale Well Being and Recreation Manual (24 January 2005).

H. AR 60-10/AFR 147-7, Army and Air Force Exchange Service General Policies (17 June 1988); AR 60-20/AFR 147-14, Army and Air Force Exchange Service Operating Policies (15 December 1992).

II. INTRODUCTION.

A. Service MWR Headquarters:

1. U.S. Army Community and Family Support Center (USACFSC) (http://www.armymwr.com/).

2. Navy Morale, Welfare, and Recreation Division (http://www.mwr.navy.mil/).

3. Air Force Services Agency (http://www.afsv.af.mil/).

4. Marine Corps Community Services (MCCS) (http://www.usmc-mccs.org/).

5. Coast Guard (http://www.uscg.mil/mwr).

III. NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFIs)--OPERATIONS AND FUNDING.

A. Definition: A DoD organizational entity which performs an essential government function. It provides morale, welfare, and recreational programs for military personnel and civilians. As a fiscal entity, it maintains custody and control over nonappropriated funds. It is not incorporated under the laws of any state and enjoys the legal status of an instrumentality of the United States.

B. Objectives of the MWR Program. DODI 1015.10, para. 4.1; see also AR 215-1, paras. 1-7 through 1-9, and MCO 1700.27A, para 1101.

1. Maintain a high level of esprit de corps.

2. Maintain physical and mental well-being.

3. Encourage the constructive use of time.

4. Aid in recruitment and retention.

5. Assist in the adjustment to military life.

6. Provide a community support environment.

7. Create a self-sustaining military community.

8. Reinforce unit cohesion.

9. Increase combat readiness.

10. Not listed but ever-present objective, MAKE MONEY.

C. Congressional Interest in NAFIs.

1. Initially, reaction to business and private concerns over PX, BX, and MWR activities.

2. Two congressional committees—the primary committee is the MWR Panel of the Readiness Subcommittee of the House Armed Services Committee.

a. Broad interests—construction, financing, and services.

b. NAFIs should operate like a business.

D. Command Responsibilities for NAFI Operations. AR 215-1, ch. 2.

1. Secretary of the Army has overall responsibility. AR 215-1, para. 2-1.

2. Assistant Chief of Staff for Installation Management (ACSIM) is proponent and focal point for all MWRs and NAFIs. AR 215-1, para 2-1c. The Chief, Naval Operations (CNO) and Commandant of the Marine Corps perform coordination and information functions for MWR activities in the Navy and Marine Corps, respectively.

3. U.S. Army Community and Family Support Center (USACFSC). AR 215-1, para. 2-6.

   a. Develops program guidance, standards, and procedures to implement approved Army policies.

   b. Reviews the MWR program and establishes business strategies. Provides management and technical assistance.

   c. Reviews and approves request for establishment of all Army NAFIs.

   d. Develops financial management practices for the management of MWR and NAF resources.

   e. Administers Armed Forces Recreation Centers (AFRCs) and the Army Recreation Machine Program (ARMP), NAF Major Construction program, and NAF employee benefit programs.

   f. Provides administrative support to the MWR Board of Directors (BOD). The ASA (M&RA), and commanders from USAREUR, USFK, FORSCOM, TRADOC, AMC, USARPAC, and the Sergeant Major of the Army, make up the voting members of the BOD. The BOD is responsible to the Secretary of the Army for approving major management strategies, plans, and programs pertaining to Army MWR, and to provide oversight of APF and NAF. The USMC MCCS BOD, chartered by the Commandant, performs similar functions. MCO 1700.27A, para 1102.

4. Installation Management Agency (IMA). AR 215-1, para. 2-4.

   a. Provide oversight and ensure APF and NAF funds are properly used.

   b. Review and approve APF budgets and promote equitable distribution of resources.

   c. Conducts formerly MACOM-level responsible MWR events.

5. Garrison Commanders. Operate MWR programs, the IMWRF, and local NAFIs. AR 215-1, para. 2-5.

E. Funding of NAFIs.

1. APF support for MWR personnel, operations, supplies, and other expenses. See DODI 1015.10, encl. 6; AR 215-1, ch. 4 & App D; AFI 34-262, para 2.3; MCO 1700.27A, paras 1300, 1303, & 1304.

2. Nonappropriated funds--those generated by NAFI activities.

3. Construction funding. AR 215-1, ch. 10 (Sec. II) and App. E.

a. Army Morale, Welfare, and Recreation Fund (AMWRF) for NAF construction. AR 215-1, para. 10-8.

(1) Funded by AAFES revenues, monthly capital reinvestment assessment of all NAFI income, and interest. DODI 1015.10, para. 4.8; AR 215-1, para. 11-8.

(2) Pays most of major construction costs.

(3) Installation funds design cost (includes furniture, fixtures, and equipment), opening costs, all environmental costs, and project validation costs (market analysis). AR 215-1, para. 10-8.

b. The Marine Corps' "Central Construction Fund" is funded by an assessment of revenue generating activities. The rate of assessment is determined by the MCCS BOD. MCO 1700.27A, para 1312.

c. Market analysis required. AR 215-1, para. 10-2.

d. Public-Private Ventures. DODI 1015.13, Department of Defense Procedures for Implementing Public-Private Ventures (PPVs) for Morale, Welfare, and Recreation (MWR) Category C Revenue-Generating Activities (Mar 11, 2004); AR 215-1, para. 10-12; MCO 1700.27A, para 2005.

(1) In order to meet MWR requirements, installations may identify morale enhancing activities that are unavailable through normal funding sources and that may be met by the private sector. The Army leases the land for a facility, and the contractor builds the activity and operates it, with the IMWRF receiving a percentage of profits.

(2) CFSC is the sole Army agency authorized to negotiate PPV projects.

(3) Request requires approval/coordination with CFSC and an extensive local survey prior to approval by OASA (M&RA).

4. Organization of NAFIs. See DODI 1015.10, para. 4.3 and encl. 4; AR 215-1, para. 4-1; AFI 34-262, para 2.2.2; MCO 1700.27A, para 1302 & 1303.

a. Category A: Mission-Sustaining Activities. DODI 1015.10, Encl 7; AR 215-1, paras. 4-1a, 11-4a(1).

(1) Essential to sustaining readiness and have little or no capacity to generate NAF income.

(2) Supported with APF--up to 100%; DoD minimum is 85%.

(3) NAF funding only allowed for:

(a) Specific expenses for which APFs are not authorized, or

(b) When use is not otherwise prohibited and it is certified in writing that APF is not available.

(4) Category A activities are:

- Armed Forces Professional Entertainment Program Overseas.
- Gymnasium/Physical Fitness/Aquatic Training.
- Libraries.
- Parks and Picnic Areas.
- Recreation Centers/Rooms.
- Shipboard/Isolated/Deployed/Free Admission Motion Pictures.
- Sports/Athletics (Self-Directed, Unit Level, Intramural).
- Unit Level Programs and Activities.

b. Category B: Community Support Activities.

(1) Satisfies the basic needs of soldiers and their families. Makes installations temporary home towns. Different than Category A because of their ability to generate some income. AR 215-1, para. 4-1b.

(2) Requires substantial APF support. DoD standard is at least 65% APF. DODI 1015.10, Encl 7; AR 215-1, para 11-4a(2); MCO 1700.27A, para. 1303.4.

(3) Category B activities are:

- Arts and Crafts Skill Development.
- Bowling Centers (less than 13 lanes).
- Automotive Crafts Skill Development.
- Child Care and Youth Programs.
- Entertainment (Music and Theater).
- Information, Ticketing, and Registration Services.
- Outdoor Recreation.

- Recreational Swimming Pools.
- Sports Programs (above the intramural level).
- Stars and Stripes.

c. Category C: Revenue-Generating Activities. DODI 1015.10, Encl. 7; AR 215-1, para. 4-1c, 11-4a(3), appendix D.

(1) Has less impact on readiness and provides recreational opportunities.

(2) Has ability to generate income to cover most operating expenses. Only indirect APF support.

(3) At remote sites (see AR 215-1, table 4-1, for listings), Category C programs may receive APF on the same basis as Category B. AR 215-1, para. 4-4.

(4) Examples include:

- Aero Clubs (note: While the services all have authority for Aero Clubs (e.g., see AR 215-1, App. M), the Air Force currently operates the only truly active program. See AFI 34-217, Air Force Aero Club Program (1 February 1997).
- Amusement Machine Locations and Centers.
- Armed Services Exchange and Related Activities. (See AR 60-20 for AAFES policy)
- Armed Forces Recreation Centers.
- Audio/Photo and Retail Sales (Overseas).
- Bingo.
- Bowling Centers (over 12 lanes).
- Food, Beverage, and Entertainment Operations.
- Golf Courses.
- Military Clubs.
- Others.

d. Supplemental Missions. AR 215-1, para. 4-9. Not formally part of the Army MWR Program.

(1) Established to support a mission activity of the Army.

(2) Income and funding maintained at a level to "break even."

(3) Examples include:

- Army Community Services.
- Veterinary Services.
- Supplemental Field Ration Dining Facility Funds.
- NAF Billeting.
- Fisher House Funds.
- Military Historical Museums.
- Vehicle Registration Fund.
- Disciplinary Barracks Funds.

e. Army: New special category; Temporary Guest Facilities, Cabins, Cottages, Cabanas, Recreational Guest Houses. Receipts remain in a revolving account to be used for these facilities only.

5. Installation Morale, Welfare, and Recreation Fund (IMWRF), the "One Fund." AR 215-1, para. 4-8. Referred to in the Marine Corps as the "Single NAFI," the legal and NAF fiscal entity of MCCS activities. Operated similarly to the current Army "One Fund." MCO 1700.27A, para. 1306.

a. Goals.

(1) Designed to make NAFIs operate in a more businesslike fashion.

(2) Designed to help NAFIs better meet the needs of the military community.

b. Operation of IMWRF.

(1) Central control under the installation commander.

(2) Fund manager for IMWRF will be the Director for Community Activities (DCA). AR 215-1, para. 11-2b.

(a) Responsible for overall fiscal operation.

(b) Responsible for establishing sound management functions.

(3) NAFI councils are required (except for DA or MACOM administered NAFIs). Councils will be governing (directing and supervising the fund manager) or non-governing (advisory only). AR 215-1, paras. 5-8 to 5-10.

(a) Members will be full-time DoD civilians and active duty military. AR 215-1, para. 5-9.

(b) Made up of fund manager (nonvoting) and at least four other (voting) members. AR 215-1, para. 5-9.

c. Uniform Funding and Management (UFM). This process is authorized under the provisions of the Section 323 of the Bob Stump National Defense Authorization Act for FY 2003 and is implemented by DoDI 1015.15 (see also *Draft* Army Implementation Guidance on Uniform Funding Management, dtd. 8 December 2005). UFM is the merging of appropriated funds (APF) with nonappropriated funds (NAF) for the purpose of providing MWR services using NAF rules and procedures. The practice of UFM does not result in an increase or decrease to the MWR funding. UFM involves:

(1) Preparation of a MOA between the APF resource manager and MWR manager outlining APF authorized MWR services, the amount of APF funding, and the up-front payment schedule.

(2) The MOA serves as the basis for creating an APF obligation and forwarding funds to a NAFI. Applies only to MWR activities listed in AR 215-1, figure 4-1.

(3) MWR managers utilize NAF rules and procedures to execute MWR services authorized APF. APF utilized in this manner are considered NAF for all purposes and remain available until expended (no one year limit).

(4) MWR APF expenditures that are paid IAW UFM are recorded in a specially coded department on the NAF financial statements.

(5) With the exception of the United States Military Academy cadet activities, Army Supplemental mission NAFIs may not use UFM.

(6) Under UFM, all APF employment positions will be converted to NAF positions.

d. DoD MWR Utilization, Support, and Accountability (AR 215-1, para. 4-3). Implemented DoD policy found in Ass't Sec Def (Force Management Policy) Memo, 23 July 1997, DoD Morale, Welfare, and Recreation Utilization, Support, and Accountability (DoD MWR USA) Practice. It has been replaced by the Uniform Funding and Management Program. However, it may still exist in some locations as a method to capture costs at the end of a fiscal year.

(1) Designed to foster efficiency in the use of appropriated and nonappropriated funds.

(2) Applies only to MWR activities listed in AR 215-1, figure 4-1.

(3) Allows the use of NAF contracting and personnel procedures to meet an APF MWR need. APF must then reimburse the IMWRF for the expenses.

(4) Must have a Memorandum of Agreement in place.

e. Unit Funds. Each service has specific policies.

(1) Army. AR 215-1, para 5-11c, clarifies proper expenditures of unit funds.

(2) Funds must be used for the collective benefit of all unit members for off-duty recreational purposes authorized by AR 215-1.

(a) All members must have the opportunity to participate.

(b) Activities must relate to the morale, welfare, and recreation needs of the unit members. Family members and guests may attend at the discretion of unit members.

6. Solicited and unsolicited Commercial Sponsorship. DODI 1015.10, encl. 9; AR 215-1, para. 7-47. Allowed for MWR activities, Army Family Team Building, and Army Family Action Plan only.

a. Advertising, publicity, or other promotional consideration must be commensurate with the level of sponsorship offered.

b. Solicitation must be competitive and sponsorship award must be based upon the best value received and the appropriateness of the sponsor. No favored treatment allowed for sponsors and no penalties for nonsponsors.

c. All agreements must receive legal review (personnel involved in APF contracting may not be directly or indirectly involved in the solicitation).

d. All public recognition of sponsors must have disclaimers, i.e., "sponsorship does not imply endorsement."

e. Contents of all proposed public recognition must be reviewed to ensure compliance with DoD Directives.

f. May not solicit alcohol or tobacco manufacturers, but may accept unsolicited offers.

g. Sponsorship agreement must be in writing and for one year or less (extensions OK, but period covered by original agreement and renewals may not exceed five years). Also must include certification that no sponsorship costs will be charged to the Federal Government.

h. Open house programs are public affairs office events (not MWR). PAO must approve MWR events during open houses.

i. Professional development (SOC) training required for MWR employees authorized to work with the Commercial Sponsorship Program.

7. Gifts. NAFIs can accept conditional or unconditional gifts from individuals or private organizations. AR 215-1, para. 7-39. For gifts to the government see AR 1-100. For Marine Corps see MCO 1700.27A, figure 2.3.

a. Acceptance of the gift must be in the Army's best interest.

b. Gifts may not be requested, and donors receive no preferential treatment.

c. NAFI fund managers may accept gifts of up to $5,000 when delegated authority by local commander.

d. Local commanders may accept gifts of up to $25,000.

e. IMA Region Directors may accept gifts up to $50,000 in value.

f. CFSC may accept gifts valued up to $200,000.

g. Secretary of the Army may accept gifts valued over $200,000.

F. Patronage. AR 215-1, Table 6-1,; AFI 43-262, Table A2.1; MCO 1700.27A, paras. 1200 & 1201.

1. MWR programs are established primarily for active duty personnel. Uniformed members of the Coast Guard, Public Health Service, and National Oceanic and Atmospheric Administration on active duty have equal access. DODI 1015.10, para E3.2.1.

2. Equal access for reservists for Category C activities. AR 215-1, para. 6-2a (implementing 10 U.S.C. § 1065).

a. Gives Ready and Selected Reserve members same priority as active duty members for Category C activities.

b. Gives Gray area retirees (retired reservists under 60) same priority as regular Army retirees for Category C activities.

c. Changes not applicable to Category A and B activities.

d. Family members have same priority as their sponsor.

3. State and local government use. AR 215-1, para. 6-2h(3).

a. May use Category A or B activities when the facilities have excess capacity; use is mutually beneficial to the installation and local activity; and when the use is at no additional cost to the Army unless the local/state agency subsidizes additional costs.

b. Must establish a Memorandum of Understanding.

4. Routine use of MWR activities by members of on-post private organizations is prohibited unless the member otherwise qualifies. AR 215-1, para. 6-2i.

5. Allows ASA (M&RA) to approve a waiver to allow the general public to patronize Category C activities when the facility is under-utilized and the local community agrees (except for bingo)(AR 215-1, Table 6-1).

6. DODI 1015.10 provides Coast Guard civilian employees access to military MWR facilities and programs commensurate with access provided to DOD civilian employees.

7. Suspension, termination or denial of patronage privileges is under the control of the garrison commander.

G. Prohibited Uses of NAFIs. AR 215-1, para. 4-13; AFI 34-262, para 2.4.2.

1. Use must withstand public scrutiny test.

2. Financial support to private organizations.

3. Charitable contributions or assistance in collection of charitable donations.

4. Non-MWR events, such as change of command, retirement ceremonies, funerals, or other personal-type events for selected individuals.

5. Items authorized to be funded with APFs.

a. Under some circumstances, NAFs may be used for MWR activities if APFs are not available.

b. Requires written authorization that authorized APFs cannot satisfy the requirements.

c. Consider fiscal limitations set out in Congressional appropriations and authorizations.

6. Food and beverages, except as specifically authorized in regulation.

7. Spending must be connected to command morale and welfare.

H. APF Contracting with NAF Activities (Overturning the Mattress Decision, 58 Comp. Gen. 94, Nov. 21, 1978). 10 U.S.C. § 2482a authorizes a NAFI to enter into an agreement with a Federal agency or instrumentality to provide or obtain goods and services beneficial to the efficient management and operation of the MWR system.

1. Authorizes APF activities to contract w/ a NAFI, noncompetitively, for purchases up to $2,500 using micropurchase procedures (rotating sources) with the IMPAC card.

2. Authorizes APF activities to contract w/ a NAFI for purchases exceeding $2,500 when justified as a sole-source contract using APF procedures.

3. Must be for goods or services "integral to the ongoing functions performed by the NAFI in support of the NAFI mission."

4. Overseas, APF activities may contract with the PX for purchases up to $50,000 (implements 10 U.S.C. § 2424).

IV. LIABILITY OF NAFIs.

A. NAFIs as Federal Instrumentalities (Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942)). AR 215-1, para. 3-1.

B. Tax Liability. AR 215-1, ch. 3, sec. III and para. 3-1b(2).

1. Federal. Alcohol wholesale & retail taxes. AR 215-1, paras. 3-10 and 3-12.

2. State and local. AR 215-1, paras. 3-13 and 3-14.

a. Waiver of immunity. 4 U.S.C. § 104.

b. Legal versus economic incidence of tax. AR 215-1, para. 3-13a.

C. Tort Liability. AR 215-1, para. 3-1, and para. 14-14.

1. Suits by NAFI employees. Exclusive remedy is under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901.

2. Suits by third parties. Federal Torts Claims Act. AR 215-1, Ch. 14.

D. Contract Liability. AR 215-4.

1. NAFIs have sovereign immunity from suit, but administrative remedies exist. Borden v. United States, 116 F. Supp. 873 (Ct. Cl. 1953).

2. Waiver of sovereign immunity for suit against the Exchange Service. Tucker Act, 28 U.S.C. § 1346.

E. Concessionaires status. They are private businesses and not instrumentalities of the United States. They are not entitled to any of the privileges and immunities of the Federal Government. AR 215-1, para. 3-2.

V. NAFI EMPLOYEES.

A. References.

1. DoD 1401.1-M, Personnel Policy Manual for Nonappropriated Fund Instrumentalities (Dec. 1988); DoD 1401.1-M-1, Job Grading System Manual for Nonappropriated Fund Instrumentalities (Oct. 1981).

2. DODI 1015.10, para. 4.12.

3. AR 215-3, (29 August 2003).

4. AFI 34-262, para 2.3.4. and AFI 65-106, Chapter 4.

B. Generally, NAFI employees are civilians. AR 215-3, para. 1-5.

C. Military.

1. Commander approval required.

2. Enlisted soldiers may be employed if off duty and if no interference with duty. AR 215-3, para. 2-20a.

3. Officers may provide off-duty service pursuant to a personal services contract. AR 215-3, para. 2-20b.

D. NAFI employment must comply with the applicable federal labor laws, but NAFI employees do not fall under OPM or the Federal Employment Compensation Act. 5 USC § 2105.

VI. CLUBS. AR 215-1, para. 8-18b.

A. Financial Status. Clubs must operate without a loss, or MACOM Commander must explain to MWR BOD why club should not close.

B. Army Theme Restaurants.

C. Membership.

1. Voluntary membership. AR 215-1, para. 8-18b(3); AR 600-20, para. 4-11.

a. Can't require reasons for ending or declining club membership.

b. Can't engage in any practice that involves or implies coercion, influence, or reprisal in the conduct of membership campaigns.

(1) No repeated orientations, meetings, or similar counseling of persons who have chosen not to join.

(2) No use of membership statistics in support of supervisory influence.

c. Encouraging membership.

(1) Sponsoring membership drives.

(2) Giving information to potential members, i.e., when they in-process.

(3) Structuring and running club activities based on the desires and support of patrons.

(4) Letter from commander encouraging club membership—must not use improper pressure.

2. Nonmember use of the club. AR 215-1, para. 8-18b(7).

a. Personnel in a transient or TDY status for less than 30 days. AR 215-1, para. 8-18b(7)(a)2.

b. To attend special functions. AR 215-1, para. 8-18b(7).

c. Bona fide guest of a member. AR 215-1, para. 8-18b(7)(a)1.

d. Others.

e. Nonmembers may be charged a different price than members.

VII. UNAUTHORIZED/RESTRICTED ACTIVITIES. DODI 1015.10, para. 4.10; AR 215-1, para. 8-36; AFI 34-262, para 1.8; MCO 1700.27A, paras. 1402, 1405.

A. Lotteries or sale of lottery tickets.

B. Pull-tab bingo.

C. Sale of chit books related to the sale of alcohol.

D. Topless or nude dancing. AR 215-1, para. 8-13.

E. Awarding alcohol as a prize. AR 215-1, para. 7-14(e).

F. Pornography Sales.

1. Military Honor and Decency Act of 1996 (10 U.S.C. § 2489a), implemented by DoDI 4105.70, Sale or Rental of Sexually Explicit Material on DoD Property (June 29, 1998). Prohibits sale or rental of sexually explicit material on "property under the jurisdiction of DoD" (DoD resale activities).

    a. Includes DeCA, AAFES, NEX, MCX, and U.S. Navy Ships Stores.

    b. Does not include entities that are not instrumentalities of the U.S.

    c. Other MWR activities covered? Not by the letter of the law.

    d. Covers audio and video recordings and periodicals with visual depictions produced in any medium.

e. Multiple lawsuits were brought challenging the constitutionality of the Act. The Act, and DoD's application, were found constitutional (See e.g., General Media Communications, Inc. v. Cohen, 131 F.3d 273 (21 November 1997, U.S. Court of Appeals, 2d Circuit). Court held that the Act was constitutional and within Congress' authority. The U.S. Supreme Court denied certiorari (See GMC v. Cohen, 118 S. Ct. 2367 (June 26, 1998)).

2. DoD Resale Activities Board of Review. Since the implementation of the Military Honor and Decency Act of 1996 the Board has reviewed hundreds of periodicals -- most were found violative.

G. Gambling is generally prohibited. See DoD Directive 5500.7-R, Joint Ethics Regulation § 2-302.

1. Monte Carlo or Las Vegas Events. DODI 1015.10, para. 4.11; AR 215-1, para. 8-10.

a. Must comply with state and local law unless on an exclusive jurisdiction installation. Overseas, international agreements apply.

b. Must use chits or play money. Can use winnings to buy resale items, food, beverages. Can't pay club dues, nor exchange for cash.

c. MWR--four per year (overseas may be more); PO--one per year.

d. CONUS use of slot machines or roulette wheels is prohibited.

e. Can't advertise via U.S. Postal Service.

2. "Gray Area Gambling Devices." Defined at AR 215-1, para 8-36g. Implements 15 U.S.C. § 1171.

a. Gambling Device vs. Amusement Machine.

b. Game of Chance vs. Game of Skill.

3. Bingo. DODI 1015.10, para. 4.11.1.2; AR 215-1, para. 8-8.

a. Must comply with state and local law unless on an exclusive jurisdiction installation. Overseas, international agreements apply.

b. On exclusive jurisdiction areas, the NAFI need not pay state or local fees or taxes, or obtain a bingo permit. Concurrent jurisdiction: state may regulate and charge for permits. AR 215-1, para. 3-13d.

c. Can't advertise via U.S. Postal Service.

d. Participation limited to authorized patrons and bona fide guests. Effective 4 January 1999 may not open bingo to general civilian populace, and contractor-operated bingo is prohibited. (Memo from ASA (M&RA) to Cdr, USACFSC, subject: Bingo Activities in Army Morale, Welfare, and Recreation (MWR) Programs--Action Memorandum, dated Nov. 5, 1998.)

4. Raffles. DODI 1015.10, para. 4.11.1.3; AR 215-1, para. 8-20.

a. Lotteries are prohibited.

b. Raffles may be conducted to raise funds for MWR activities.

(1) Raffle proposal must receive a legal review;

(2) The Installation Commander must give his written approval of the raffle in advance;

(3) The raffle tickets must specify the maximum number of tickets that may be sold; and

(4) The IMWRF's total annual prizes may not exceed a retail value of $20,000. $15,000 is maximum retail value for any one prize. (IMA region may grant exception.)

(5) Raffles must comply with state and local law unless on an exclusive jurisdiction installation. Overseas, international agreements apply.

(6) Can't advertise raffles via U.S. Postal Service.

VIII. MWR ACTIVITIES AND ALCOHOL. DODI 1015.10, Encl. 12; AR 215-1, Ch. 7, Sec. II.

A. Age Restrictions on Sale of Alcohol. AR 215-1, para. 7-7.

1. At locations outside U.S., 18 years is minimum age for the purchase of alcohol products in the overseas Military Retail System. Look at treaties and local situation for higher minimum age. AR 215-1, para. 7-7b.

2. In U.S., no one under 21 will be employed to dispense, sell, or handle alcohol unless permitted by the state. AR 215-1, para. 7-7a.

B. In U.S., drinking age will be the same as the state where the installation is located. The following exceptions to drinking age restrictions are obtainable through the IMA region to the DCofS, G-1, HQDA:

1. At remote installations where POVs are not available, all alcoholic beverages may be sold. AR 215-1, para. 7-7c(1).

2. If installation is located within 50 miles or 1-hour driving time from a state or international border with a lower drinking age. Sole consideration is the motor vehicle safety of the community. AR 215-1, para. 7-7c(2).

3. Special occasions under controlled conditions in order to foster camaraderie and friendship in a military environment. This exception may be approved by the garrison officer. AR 215-1, para. 7-7c(3).

4. Exceptions only apply to soldiers. AR 215-1, para. 7-7e.

5. State law does not affect "nonalcoholic" drinks (containing less than one-half of one percent alcohol), even if the state classifies them as alcoholic. AR 215-1, para. 7-7d.

C. Off Post. No activity may provide alcohol for off-post catered functions. Outside U.S., IMA regions will determine. AR 215-1, para. 7-10c.

D. Purchase of Alcohol. AR 215-1, para. 7-12.

1. In U.S., distilled spirits may be purchased from any source. Malt beverage and wine must be purchased in state. Exception: In Alaska and Hawaii, all alcohol purchases must be made within the state. AR 215-1, para. 7-12b.

2. Outside U.S., IMA regions decide policy consistent with treaties and agreements. AR 215-1, para. 7-12a.

3. As instrumentalities of the United States, NAFs are exempt from state and local taxes. AR 215-1, paras. 3-1b(2) and 3-13. But they must pay federal wholesaler or retailer taxes. AR 215-1, para. 3-10.

IX. CONCLUSION.

CHAPTER C

55TH GRADUATE COURSE

MILITARY PERSONNEL LAW

ARMY ADVERSE ADMINISTRATIVE ACTIONS

I. INTRODUCTION.

Commanders have a spectrum of administrative military personnel actions which they can use to 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 the twelve administrative actions short of administrative separation which you can expect to see most often. Appendix A is a chart which lists these actions in a tabular form. Each section also lists the appropriate references (a consolidated list of references is provided below).

This outline should be supplemented by reference to the applicable regulation and to appropriate local regulations and policies.

II. CONSOLIDATED LIST OF REFERENCES.

A. AR 190-5, Motor Vehicle Traffic Supervision.

B. AR 380-67, Personnel Security Program.

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

D. AR 600-8-10, Leaves and Passes.

E. AR 600-8-19, Enlisted Promotions and Reductions.

F. AR 600-9, The Army Weight Control Program.

G. AR 600-20, Army Command Policy and Procedures.

H. AR 600-37, Unfavorable Information.

I. AR 601-280, Total Army Retention Program.

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

III. DUE PROCESS OF LAW - THE STARTING POINT.

A. The Constitution.

1. Bill of Rights (e.g., Fourth, Fifth, and Sixth Amendments) generally inapplicable to military administrative proceedings.

2. When challenged in court on alleged denial of constitutional due process (Fifth Amendment), military position is "there is no constitutional life, liberty, or property interest affected by our administrative actions."

B. Our Regulations.

1. Must follow procedures in regulations—they are more than "guidelines." Regulatory requirements ensure consistency and fairness in the processing of actions and the full development of necessary administrative records. Although federal district courts are very hesitant to second guess 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 due process, at a minimum. Soldiers should be afforded notice of the intended action and the reason therefore, as well as an opportunity to be heard.

IV. SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS).

A. Reference. AR 600-8-2.

B. Purpose.

1. A suspension of favorable personnel actions (or “flag”) is an administrative hold placed on a Soldier which prevents most favorable personnel actions (e.g., promotion, awards, school attendance, payment of reenlistment bonuses, etc.) while the Soldier’s chain of command completes an

investigation, determines whether or what adverse action to take against the Soldier, and completes the adverse action.

2. A flag itself is not an adverse action, because it can be removed as easily as it can be initiated. Because a flag prevents virtually all favorable action on a Soldier, it can have a very adverse effect on the Soldier's career.

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. Regular ("non-transferable") flags. 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 overseas when sponsor is overseas.

b. Transferable flags.

(1) APFT (Army Physical Fitness Test) failure ("transferable") flags. Promotion, reenlistment, and extension.

(2) Weight control ("transferable") flags. Attendance at schools, promotions, assumption of command, awards and decorations, and reenlistment or extension.

(3) Command referral to the Army Substance Abuse Program (ASAP) flags IAW AR 600-85.

D. Procedure.

1. Any commander may direct the imposition of a flag.

2. Battalion S1 prepares DA Form 268, Report to Suspend Favorable Personnel Action (FLAG), and submits Standard Installation/Division Personnel System (SIDPERS) transaction. Properly administered, the flag system has two components:

a. A SIDPERS transaction that codes a Soldier's records in the Army's automated personnel database and prevents favorable personnel transactions.

b. The battalion adjutant (S1 or equivalent) manages the flagging system at his unit, keeping unit leadership and unit personnel clerks aware of the flag, and permitting lifting the flag when appropriate. The battalion Personnel Action Center (PAC) produces a monthly report for each of its companies, listing all Soldiers with flags and their type. This report should be screened at both battalion (in the PAC) and at unit (company) levels to ensure that all Soldiers who should be flagged are, and those who should have had their flags removed no longer are on the roster.

3. Unit then notifies Soldier.

4. Commanders lift flags when appropriate, using the same form (DA Form 268).

E. Approval Authority. Any commander or general officer staff head.

F. Appeal. None.

G. Records. DA Form 268 maintained only so long as Soldier is flagged. No permanent record of flag itself, although there may well be a permanent record of the underlying adverse action which required the flag.

V. EXTRA TRAINING.

A. Reference. AR 600-20, para 4-6b.

B. Purpose. An effective, non-punitive corrective measure.

C. Procedure. No formal procedure.

1. Any leader may order a Soldier to train to overcome a deficiency.

a. Must be directly related to the deficiency.

b. Must be aimed at improving the Soldier's performance.

2. Not punishment; must stop when deficiency is overcome.

D. Approval Authority. Any commander. An "inherent power[] of command." May be delegated.

E. Appeal. No specific procedure.

F. Records. None; *however*. . .

1. "Deficiencies *satisfactorily corrected* by means of training and instruction will not be noted in the official records of the Soldier[] concerned." AR 600-20, para 4-6b(2) (emphasis added).

2. If the problem merits it, consider documenting with a counseling with a view towards separation. Destroy the counseling if, after a reasonable time, the problem truly is cured; otherwise, proceed to separation.

VI. REVOCATION OF PASS PRIVILEGES.

A. Reference. AR 600-8-10, Chapter 5, Section XIV.

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. Any commander.

E. Appeal. No special procedures.

F. Records. None required. Consider documenting with a counseling with a view towards separation.

VII. COUNSELING WITH A VIEW TOWARDS SEPARATION.

A. Reference. AR 635-200, para 1-16.

B. Purpose. An administrative prerequisite to many administrative separations; a counseling with a view towards separation serves as a "final 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, para 2-3) (basic leadership tool used to assist Soldiers in professional growth; not necessarily adverse).

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, para 5-8.

   b. Personality disorder, para 5-13.

   c. Other designated physical or mental condition, para 5-17.

   d. Entry level performance and conduct, chap 11.

   e. Unsatisfactory performance, chap 13.

   f. Minor disciplinary infractions or a pattern of misconduct, para 14-12a and 14-12b.

   g. Failure to meet body fat standards, chap 18.

2. The counseling formally notifies the Soldier of:

   a. The 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; and

   d. The effect of each type of discharge.

D. The command must give the Soldier a reasonable opportunity to overcome the deficiencies.

E. Approval Authority. None. Counseling may be conducted by "a responsible official." AR 635-200, para 1-16b.

F. Appeal. None.

G. Records.

1. To be used as a prerequisite for separation, each counseling session must be recorded in writing.

2. DA Form 4856 (General Counseling Form) normally should be used for this purpose. Often local overprint form with types of discharge and potential effects will be used.

3. Filed in unit personnel files. No permanent, long-term record, unless incorporated into separation action. Maintain until Soldier departs unit; disposition thereafter per the Army Record Information Management System, AR 25-400-2 (ARIMS).

4. Commander's Notebook. Generally may not be used in lieu of counseling given to Soldier. Beware of Freedom of Information Act access. Generally, no right to access under FOIA if:

a. Prepared voluntarily.

b. Used only as a memory aid by preparer.

5. Article 15 (DA Form 2627) does not satisfy requirement in and of itself. Rather, units should have the legal clerk/legal center prepare a DA Form 4856 to accompany each Article 15.

VIII. REHABILITATIVE TRANSFER.

A. Reference. AR 635-200, para 1-16c.

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, chap 11.

2. Unsatisfactory performance, chap 13.

3. Minor disciplinary infractions or a pattern of misconduct, para 14-12a and 14-12b.

C. Procedure.

1. Period required.

a. Trainees: recycle between training companies where feasible; if not, between training platoons.

b. Soldiers in regular units: reassign between battalion-sized or brigade-sized units at least once, with a minimum of three months in each unit, where possible.

2. Due process and appeal rights are very limited. The company-level commander requests the transfer, and the request is processed through command channels to the approval authority. No other formal due process rights for the Soldier.

3. PCS is normally not available. Exception for "meritorious cases where . . . a Soldier [has] potential to be a distinct asset to the Army [with] a change in commanders, associates, and living or working conditions." AR 635-200, para 1-16c(3). GCMCA may authorize PCS within the same command. Requests for transfer to another command may also be submitted to HQDA.

D. Approval Authority.

1. Not specified in AR 635-200, para 1-16. Logically, first commander with authority over the gaining and losing unit.

2. May waive requirement for rehabilitative transfer.

a. Routine, common practice in many units. ("The exception that swallows the rule.")

b. If the command wishes to waive the requirement, it must document the reasons. Make sure there is something in the file to *support* the commander's *conclusion* that transfer would:

(1) Create serious disciplinary problems or a hazard to the military mission or to the Soldier, or

(2) Be inappropriate because the Soldier is resisting rehabilitation attempts, or

(3) Rehabilitation would not be in the best interest of the Army as it would not produce a quality Soldier.

E. Appeal. No specific provisions.

F. Records. No specific provisions. In practice, losing unit should document reasons for rehabilitation in a counseling with a view towards separation. The command should maintain those records for one year after Soldier's departure in case it is necessary to transfer the records to a gaining unit (if needed to support a subsequent separation action).

IX. ADMINISTRATIVE REPRIMAND, CENSURE, OR ADMONITION.

A. References. AR 600-37. (See also AR 25-400-2, The Army Records Information Management System (ARIMS)).

B. Purpose.

1. Documents misconduct or poor performance in official files.

2. Leadership tool.

3. Be wary of information originating *solely* from intelligence and personnel security files. This information requires special handling (*See, e.g.*, AR 600-37, chap 4, AR 380-67, chap 8).

C. The terms defined.

1. "Reprimand. To reprove severely; to censure formally, especially with authority. . . . . A public and formal censure or severe reproof, administered to a person in fault by his superior officer or by a body or organization to which he belongs." Black's Law Dictionary 1170 (5th ed. 1979).

2. "Censure. . . . . An official reprimand or condemnation." Id. at 203.

3. "Admonish. To caution or advise. To counsel against wrong practices, or to warn against danger of an offense." Id. at 45.

4. What's the practical difference? Don't use *censure*; it's ambiguous. Use *reprimand* instead if you wish to reprove someone for something they have done. Use *admonish* if the person's wrongdoing is not clear, but you wish to make a record of warning the person to avoid or desist from certain behavior. The same procedures (AR 600-37) apply to the filing of all three actions.

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.

b. For officers. As above, plus **any rating official**, and less "supervisor."

2. Contents. (*See* Figure 1, *infra*)

a. Reason for reprimand.

b. The statement that the reprimand was imposed as an administrative measure and not as punishment under Article 15. AR 27-10, para 3-3.

c. If the reprimand is intended for filing in the OMPF, the reprimand and the document referring the reprimand should indicate where the drafter desires to file the reprimand.

d. Notice and rebuttal by the Soldier. AR 600-37, paras 3-2 and 3-6.

(1) Notice (a copy of the reprimand & subsequent information).

(2) Rebuttal.

(3) No right to counsel, but local legal assistance and Trial Defense Services will often try to see Soldiers, time permitting.

E. Appeal. AR 600-37, chap 7.

1. Local filing. No formal appeal process.

2. OMPF filing. Appealed to DA Suitability Evaluation Board (DASEB).

a. Removal: Document is untrue or unjust. Normally, consideration of these appeals is restricted to SSG and above. The burden rests with the Soldier to provide evidence of a clear and convincing nature.

b. Transfer from P-fiche to R-fiche: Document is untrue, unjust, or that the reprimand has served its intended purpose and its transfer would be in the best interests of the Army. Again, appeals normally restricted to SSG and above. If the basis is that reprimand has served its intended purpose, Soldier

(1) must provide substantial evidence that the reprimand has, in fact, served its intended purpose; and

(2) must wait at least **one year** since imposition of the reprimand and have received at least **one OER or NCOER**.

F. Records. Memorandum maintained in local unit files until 12 months after a Soldier's departure, or permanently on the OMPF.

COMPANY A
16TH SIGNAL BATTALION, 29TH SIGNAL GROUP
FORT ARLINGTON, VIRGINIA 11111

ABCD-EFG 7 June 2006

MEMORANDUM FOR PV2 Kathleen B. Nash, Company A, 16th Signal Battalion, 29th Signal Group, Fort Arlington, Virginia 11111

SUBJECT: Written Reprimand UP AR 600-37

1. You are hereby reprimanded for your conduct on 22, 24, 26, and 31 May. On those dates, you were absent without authority from your appointed place of duty. Specifically, on 22, 24, 26, and 31 May, you failed to report to the unit supply room at Company A, 16th Signal Battalion, 29th Signal Group, at the appointed time, 0800, to begin your duties. Furthermore, you were formally counseled on a number of prior occasions and orally admonished for similar offenses.

2. You are expected to be at your appointed place of duty at the appointed time unless excused by proper authority. Your persistent tardiness will not be tolerated in this unit.

3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under UCMJ, Article 15.

4. I intend to file this written reprimand in your unit personnel file. You have 72 hours from the receipt of this reprimand to submit matters in rebuttal or on your behalf. I will withhold my decision on imposing and filing this reprimand until I receive and consider your response.

HARD CHARGER
Captain, SC
Commanding

Figure 1

X. LOCALLY IMPOSED (OR "FIELD") BAR TO REENLISTMENT.

A. Reference. AR 601-280, Chapter 8.

B. Purpose.

1. "Only [S]oldiers of high moral character, personal competence, and demonstrated adaptability to the requirements of the professional [S]oldier's moral code will be reenlisted in the Active Army. . . . Soldiers who cannot, or do not, measure up to such standards . . . will be barred from further service . . ." AR 601-280, para 8-2a..

2. A potentially rehabilitative tool: puts pressure on Soldier to shape up; sets up Soldiers who fail to do so for separation.

3. Discretionary grounds for bar to reenlistment. AR 601-280, para 8-4d, lists 27 reasons, including, but not limited to, tardiness, loss of clothing or equipment, substandard personal appearance or hygiene, indebtedness, nonjudicial punishment, traffic violations, inability to follow orders, apathy, cannot adapt to military life, failure to manage personal affairs, behavior which brings discredit upon the unit or Army, failure to pass APFT or weapons qualification, noncompetitive for promotion.

4. Mandatory grounds for bar to reenlistment. AR 601-280, para 8-4c.

a. Single Soldier and dual-service couples with dependent family members when Soldier has been counseled IAW AR 600-20, Chapter 5, and does not have an approved family member care plan on file within 2 months.

b. Single Soldiers and dual-service couples with dependent family members with instructions of overseas assignment, if unable to provide the name of a guardian who will care for their family members in CONUS in the event of evacuation from overseas.

5. Commander's option: Commander will initiate bar to reenlistment or proceed directly to separation action UP 635-200. AR 601-280, para 8-4e.

a. Soldiers who do not make satisfactory progress in the Army Weight Control Program (*See* AR 600-9).

b. Soldiers who fail two consecutive APFTs.

c. Soldiers who are removed for cause from a noncommissioned officer education system (NCOES) course.

C. Procedure. AR 601-280, para 8-5.

1. Initiating the bar.

a. Any commander in Soldier's chain of command may initiate.

b. Bars are usually not appropriate during a Soldier's first 90 days or last 30 days in a unit. If circumstances warrant, Soldier may be barred, but the certificate should explain the timing.

c. Use DA Form 4126-R.

2. Notice and rebuttal by the Soldier.

a. If Soldier requests, allow seven days for comment.

b. Rebuttal attached to DA Form, 4126-R.

c. No right to counsel. TDS or legal assistance will generally try to see Soldier.

3. Initiating commander attaches Soldier's rebuttal (if any) and forwards through chain of command to approval authority. Personal action by each commander or acting commander required. Any commander may disapprove.

4. Restrictions.

   a. May not approve bar after Soldier separates from active duty.

   b. May not enter bar in Soldier's records after Soldier separates from active duty.

   c. May not retain Soldier involuntarily past ETS in order to approve bar.

5. Company level commander informs/ "counsels" Soldier if bar approved using back side of DA Form 4126-R, Bar Certificate, if bar is approved.

6. Periodic review by the unit commander.

   a. At least once every three months after date of approval, and 30 days before the Soldier's PCS or ETS.

   b. Soldiers no longer have an option to request voluntary separation after the imposition of a bar to reenlistment.

   c. At the three month periodic review, if the command does not intend to lift the bar, it must advise Soldiers that separation action will ensue if the bar is not lifted at the completion of the second three month review.

   d. Must lift bar or initiate separation under AR 635-200 after second review (unless Soldier has more than 18 years, but less than 20 years, or active federal service). AR 601-280, para 8-6.

D. Approval Authority. Depends upon Soldier's active Federal service (AFS) on date of bar initiation. (Note: many commands may improperly rely upon previous practice, when AFS at ETS controlled.)

1. Less than 10 years AFS on date bar was initiated: LTC commander in chain of command or SPCMCA.

2. Ten years or more AFS on date bar was initiated: general officer in chain of command or GCMCA.

3. Commander who initiates bar cannot approve bar.

4. If bar initiated above company level, approval authority must be GCMCA, GO in command, or HQDA.

E. Appeal.

1. Soldier has seven days to submit appeal.

2. If otherwise qualified, Soldier will not be involuntarily separated while appeal is pending.

3. Appellate authority. Depends upon Soldier's active Federal service (AFS) on date of bar initiation and approval authority.

a. Less than 10 years AFS on date bar was initiated: general officer in command or GCMCA.

b. Soldiers with 10 years or more AFS on date of bar initiation, or bar approved by GCMCA/GO in command: HRC.

c. Bar approved by HRC: no appeal.

F. Records. DA Form 4126-R (still) filed permanently in (active duty) Soldier's Military Personnel File (MPF) (formerly Military Personnel Records Jacket (MPRJ)). Reserve component Soldiers still use the MPRJ. Approved bar annotated on Soldier's DA Form 2-1.

XI. THE QUALITATIVE MANAGEMENT PROGRAM (OR "QMP") BAR TO REENLISTMENT.

A. Reference. AR 635-200, Chapter 19. (Old Authority: AR 601-280, Chapter 10.)

B. Purpose. Eliminate Soldiers who are either unproductive or unlikely to be promoted. Not intended to be rehabilitative; in reality a fast track to separation.

C. Procedure.

1. DA promotion boards annually review the files of all Soldiers in the grades of Staff Sergeant (E-6) or higher. The boards select Soldiers who are candidates for QMP.

2. Notification packet mailed from DA to installation or overseas command, who forwards packet to first LTC (or higher) commander in Soldier's chain of command. Commander must serve packet on Soldier expeditiously. Packet contains:

a. Instruction letter to commander,

b. Instruction letter to Soldier,

c. Document(s) which triggered the decision, and

d. Soldier's statement of option.

3. Using DA Form 4941-R, a Soldier has seven days from date of receipt to elect one of five options:

a. Appeal;

b. Do nothing and face separation;

c. Request immediate voluntary discharge under AR 635-200 and forfeit any chance to receive separation pay;

d. Retire, if retirement eligible;

e. Extend to retirement eligibility, if memorandum date is between 17 years, 9 months AFS and 20 years AFS; or,

D. Approval Authority. DA. Action has already been approved when it is received in the field. Soldier's action is just a statement of option, and perhaps an appeal.

E. Appeal.

1. Grounds.

a. Material error in Soldier's record when reviewed by selection board.

b. Improved duty performance.

2. Must be submitted to chain of command w/in 60 days of completing DA Form 4941-R.

3. Must arrive at USAEREC w/in 30 days of receipt from Soldier.

4. Due to limitations on access to commanders and legal advisors, USAR AGR Soldiers have 90 days to submit DA Form 4941-R to chain of command. Command has within 30 days of receipt from Soldier to submit comments to USA, 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. [Remember, the board which selected the Soldier for DA QMP bar had the Soldier's subsequent NCOERs and AERs before them.]

F. Records. Maintained by DA as part of OMPF.

XII. THE ARMY WEIGHT CONTROL PROGRAM.

A. Reference.

1. AR 600-9, The Army Weight Control Program, 10 June 1987, Interim Change No. I01, 4 March 1994. New version of AR 600-9 pending.

2. 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. Commander may direct weight check if a Soldier presents an unmilitary appearance.

2. All Soldiers scheduled to attend professional military schooling will be screened before departure. If the Soldier exceeds the screening table weight, he will not be allowed to depart unless his commander determines that he meets body fat composition standards. Soldiers arriving overweight at any DA select school or those who PCS to a professional military school will be processed for disenrollment.

3. Soldiers exceeding the screening table weight will be tested for body fat using the "tape" test.

4. Commanders will flag overweight personnel IAW AR 600-8-2. Flagged personnel:

   a. Are nonpromotable;

   b. Will not be assigned to command positions;

   c. Will not be authorized to attend professional military schooling; and

   d. 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; 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.]

5. Flagged personnel will be enrolled in the Army Weight Control Program (AWCP).

a. The loss of 3-8 pounds per month is deemed to be satisfactory progress in the AWCP. Overweight Soldiers who fail to make satisfactory progress within 6 months will either be processed for a bar to reenlistment or will have separation proceedings initiated against them. Commander must notify the Soldier in writing that separation is being considered, and must consider the Soldier's response.

b. Overweight Soldiers who are reenrolled in the AWCP within 12 months of successfully completing an enrollment in the AWCP will be processed for separation.

c. The AWCP provides a "grace period" for second-time enrollees. Soldiers are afforded 90 days to achieve standard when reenrolled in the AWCP after 12 months, but within 36 months from the date of previous removal from the AWCP.

D. Approval Authority.

1. Authority to place a Soldier in the weight control program: company-level commander.

2. Separation authority for active-component enlisted Soldiers.

a. LTC-level commander if Soldier has less than six years active and reserve service (notification procedure used).

b. SPCMCA if Soldier has six or more years of service (administrative board procedure used).

E. Appeal. No specific procedure.

F. Records.

1. Upon removal from weight control program, records will be maintained in unit (Bn S1/PAC) files for 36 months or until the Soldier's PCS.

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 weight control program, and forward any records.

XIII. DRUNK OR DRUGGED DRIVING - ADMINISTRATIVE SANCTIONS.

A. Reference. AR 190-5 and AR 600-85.

B. Purpose. Drunk driving (including drugged driving) administrative sanctions operate in concert with the Army's Alcohol and Substance Abuse Program (ASAP) to prevent alcohol and drug abuse, identify abusers, rehabilitate those abusers who warrant retention, and separate those who do not.

C. Procedures.

1. Withdrawal of driving privileges. AR 190-5, para 2-4a.

a. **Suspension** is immediate pending resolution of drunk driving charges 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, para 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. Issues addressed:

(1) Did the law enforcement official have reasonable grounds to believe the person was DWI or in actual physical control of the motor vehicle while under the influence of alcohol or other drugs?

(2) Was the apprehension or citation lawful?

(3) Was the person lawfully requested to submit to a test for alcohol or other drug content of blood, breath, or urine and was he informed of the consequences of refusal to take or fail to complete such test?

(4) Did the person refuse to submit to the test for alcohol or other drug content of blood, breath, or urine? Did the person fail to complete the test? Do the results of a completed test indicate a BAC of .08% or higher? Do the results indicate the presence of other drugs?

(5) Was the testing method used valid and reliable? Were the results accurately evaluated?

c. **Revocation** for period of one year. AR 190-5, para 2-4b.

(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, para 2-10. Specifically tailored to permit the subject to drive under restricted conditions (e.g., for medical emergencies; to and from work site; duty driving).

(1) May be requested at any time.

(2) GCMCA acts on all DWI/DUI requests for restricted privileges.

2. Referral to ASAP. AR 190-5, para 2-8.

a. Mandatory (within 14 days).

b. Enrollment is discretionary.

3. General Officer Written Reprimand. AR190-5, para 2-7. (*See* Figure 2, *infra*).

a. Mandatory. Must be issued to **all** active duty Soldiers. (Old Rule: Issued to commissioned and warrant officers and NCOs, including corporals.).

b. General officer will sign.

c. Based on:

(1) Conviction of intoxicated driving or driving under the influence of alcohol or other drugs, on or off the installation;

(2) Refusal to take or failure to complete a lawfully requested test to measure alcohol or drug content of the blood, breath, or urine, either on or off the installation, when there is reasonable belief of driving under the influence of alcohol or drugs;

(3) Driving or being in physical control of a motor vehicle on post when the blood alcohol content is 0.08% or higher, irrespective of other charges, or off post when the blood alcohol content is in violation of state laws; or

(4) Driving or being in physical control of a motor vehicle, either on or off the installation, when lawfully conducted chemical tests reflect the presence of illegal drugs.

d. Filing is IAW AR 600-37. The General Officer may:

(1) Decide not to file the GOMOR,

(2) Decide to file the GOMOR in the Soldier's Unit Personnel File, or

(3) Decide to file the GOMOR in the Soldier's OMPF.

4. Consider other administrative actions. AR 190-5, para 2-7b.

a. Administrative reduction per AR 600-8-19.

b. Bar to reenlistment per AR 601-280.

c. Administrative separation per AR 635-200.

Department of the Army
52d Infantry Division (Mechanized) and Fort Arlington
Fort Arlington, Virginia 11111-1111

ABCD-EF-G 7 June 2006

MEMORANDUM FOR 1LT Gideon Pillow, Company A, 2d Battalion, 11th Infantry, Fort Arlington, Virginia 11111

SUBJECT: Written Reprimand UP AR 600-37

1. I herby reprimand you for your conduct on 1 May 2006. At approximately 2200 on 1 May 2006, you were apprehended while driving your privately owned vehicle on Fort Arlington. The arresting officer cited you for driving under the influence of intoxicating liquor. Subsequently, on 3 June 2006, you were convicted of that offense after a trial on the merits in the Federal Magistrate's Court.

2. Your conduct on 1 May 2006 demonstrates a serious disregard for your own safety and that of others. Such conduct raises grave doubts as to whether you can perform your duties. Your lack of judgment in this incident calls into question whether you deserve the special trust and confidence that the President of the United States has reposed in you as a commissioned officer. I charge you to conduct yourself in a manner that is worthy of an officer in the United States Army.

3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under UCMJ, Article 15.

4. I intend to file this written reprimand in your Official Military Personnel File. You have 72 hours from the receipt of this reprimand to submit matters in rebuttal or on your behalf. I will withhold my decision on imposing and filing this reprimand until I receive and consider any response you may make.

RICHARD J. HALFTRACK
Major General, USA
Commanding

Figure 2

XIV. REMOVAL FROM PROMOTION LIST.

A. Reference. AR 600-8-19, Chapter 3, Section XI (Removal from (Local) Promotion List) and Chapter 4, Section V (Removal from 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. (Soldiers may be selected for promotion some months before they are actually promoted. Such Soldiers are said to be "on the list." (The informal practice has evolved of writing such "promotable" Soldiers' ranks with "(P)" after the rank designation, such as "SGT(P) Chen" or "LTC(P) Vasquez." For the Army policy on use of "(P)", *see* AR 25-50, paras 2-3(4), 6-5(2))

C. Procedure.

1. 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, without referral to promotion board. Unit commander may also decide to withhold automatic promotion by submitting a DA Form 4187 in the month preceding the automatic promotion.

2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6). (Local board considers Soldiers for promotion to SGT and SSG. Field grade commander of unit authorized LTC commander or higher approves the list.).

a. The command will provide Soldiers with a written explanation for the proposed removal. However, immediate removal from the promotion list without further due process is required under certain circumstances listed in para 3-29b, including (among others):

(1) Failure to Qualify for MOS-required Security Clearance,

(2) Local or DA Bar to Reenlistment,

(3) Reduction in Grade,

(4) Enrolled in the Weight Control Program,

(5) Failure of Record APFT, and

(6) Dropped From Rolls as a Deserter.

b. A removal board UP AR 600-8-19, para 3-31, will be convened if immediate removal is not justified under para 3-29b.

(1) AR 15-6 procedures do not apply.

(2) Commander will give at least 15 days written notice to Soldier.

(3) Soldier may be present and recorder will arrange for presence of requested witnesses, if reasonably available.

(4) Recorder will provide statements of witnesses who cannot attend the board.

(5) Soldier may:

(a) Appear personally or decline to appear;

(b) Challenge members for cause;

(c) Question witnesses;

(d) Present written affidavits of witnesses unable to appear; and

(e) 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 action and notify the Soldier of his decision. The promotion authority may lesson but not increase severity of board's recommendation.

3. 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 Weight Control Program).

c. Removal without referral to the Soldier (AR 600-8-19, para 4-16a(2)). Commanders will notify CDR, HRC, by message for immediate removal of any Soldier who has been: (NOTE: list is not exclusive)

(1) Reduced,

(2) Discharged,

(3) Dropped from the rolls,

(4) Approved for retirement,

(5) Barred from reenlistment due to signing a declination of continued service statement, AWOL, local bar, or court-martial during current enlistment,

d. Other cases. If the reason for removal is not listed in para 4-16a(2), the recommendation for removal must be referred to the Soldier and the Soldier must be given 15 days to submit matters in rebuttal. A Soldier who declines to submit rebuttal must do so in writing.

(1) Upon initiation, must impose flag.

(2) Forward recommendation and Soldier's rebuttal through GCMCA. May be disapproved at any level.

(3) DA makes final decision.

D. Approval Authority.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4): unit commander.

2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6): field grade commander of unit authorized a LTC commander or higher.

3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9): CDR, HRC.

E. Appeal. No specific procedure.

F. Records.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4). No records required. If reasons warrant, consider documenting with a counseling with a view towards separation. Maintain copy of enlisted advancement report and all DA Forms 4187 in unit (battalion) functional promotion files.

2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6). DA Form 4187, removal board report, and DA Form 3355 filed in unit (battalion) functional files for two years and records holding area for three years.

3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9). Maintained at DA.

XV. ADMINISTRATIVE REDUCTION FOR CIVIL CONVICTION OR INEFFICIENCY.

A. Reference. AR 600-8-19, Chapter 7.

B. Purpose.

1. Civil conviction. 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, para 7-3.

2. Inefficiency. "Inefficiency is a demonstration of characteristics that shows that the person cannot perform duties and responsibilities of the grade and MOS. Inefficiency may also include an act or conduct that clearly shows that the Soldier lacks those abilities and qualities normally required and expected of an individual of that grade and experience. Commanders may consider misconduct, including conviction by a civil court, as bearing on inefficiency. A Soldier may be reduced under this authority for long-

standing unpaid personal debts that he or she has not made a reasonable effort to pay." AR 600-8-19, para 7-5.

C. Authority to Reduce.

1. PV2, PFC, and SPC/CPL - 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/1SG, and SGM/CSM - Commanders of organizations authorized a COL or higher grade commander.

D. Procedure.

1. Civil Court Conviction (domestic or foreign, or adjudication as a juvenile offender). AR 600-8-19, Table 7-2.

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.

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. 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.

2. Inefficiency. AR 600-8-19, para 7-5.

   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.

   d. May reduce only one grade.

3. Soldier gets notice and opportunity to respond.

   a. SPC/CPL and below - no board.

   b. SGT and above - reduction board is usually required. Board appearance may be declined in writing, which will be considered acceptance of the reduction board's action.

4. Reduction Boards. AR 600-8-19, para 7-7.

   a. Must have both officers and enlisted members.

   b. At least three voting members.

   c. Members impartial.

   d. Recorder without vote appointed.

   e. Board has officer or enlisted Soldier or both of same sex as Soldier being considered for reduction.

f. For inefficiency cases only, one board member will be familiar with Soldier's MOS or field of specialization.

g. If Soldier is a minority and requests (in writing) a minority member on board, generally must provide a minority member.

E. Appeal.

1. SSG and below - next higher authority.

2. SFC and above - next higher authority who is a general officer.

F. Records. Filed in OMPF.

APPENDIX A **ADVERSE ADMINISTRATIVE ACTIONS**

	SUSPENSION OF FAVORABLE PERSONNEL ACTION	EXTRA TRAINING	REVOCATION OF PASS PRIVILEGES	COUNSELING WITH A VIEW TOWARDS SEPARATION	REHABILITATIVE TRANSFER
Grounds for Action	Other adverse action contemplated or investigation pending	Soldier deficient in any aspect of duty or conduct	Soldier deficient in any aspect of duty or conduct	Cdr contemplates separation for parenthood (5-8), personality disorder (5-13), entry level perf (ch 11), unsat perf (ch 13), or misconduct (ch 14)	
Ultimate Result	Many favorable personnel actions barred temporarily	Soldier corrects the problem	Soldier not permitted to leave post or place of duty during normal off-duty hours	Soldier on notice that continued poor performance may lead to separation, and consequences	Soldier gets a fresh start in a new unit
Regulation	AR 600-8-2	AR 600-20, para 4-6b	AR 600-8-10, para 5-27	AR 635-200, para 1-16	
Who Initiates	Commander or GO staff head	Any leader	Any leader	"a responsible official"	Commander
Board hearing	No	No	No	No	No
Entitled to Counsel	No (but see AR 27-3, para 3-6g(4)(i))	No	No	No	No
SJA Review	No	No	No	No	No
Approval Authority	Cdr or GO staff head	"[I]nherent power[] of command."	Unit Commander	None	Commander w/ auth over losing and gaining unit
Appeal Authority	No formal appeal	No formal appeal	No formal appeal	No formal appeal	No formal appeal

APPENDIX A **ADVERSE ADMINISTRATIVE ACTIONS**

	ADMINISTRATIVE REPRIMAND	LOCAL (OR FIELD) BAR TO REENLISTMENT	DA OR QMP BAR TO REENLISTMENT	DRUNK DRIVING SANCTIONS
Grounds for Action	Misconduct or unsatisfactory performance	Untrainable, unsuitable, PT failure, NCOES RFC, weight control failure; [no family care plan or no guardian, if applic.]	Moral or ethical problems; declining performance; no potential for continued service	Refusal to test; BAC > .08% (or between .05% and .08% depending on local law); or any official report of DWI
Ultimate Result	Written reprimand may be filed in Soldier's permanent records	Soldier can't reenlist, and may face separation action in six months	Soldier will be separated in 90 days, unless appeal successful	Privilege to drive on post or in overseas command suspended or revoked
Regulation	AR 600-37, chap 3	AR 601-280, chap 8	AR 635-200, chap 19	AR 190-5, chap 2
Who Initiates	Cdr, supervisor (enl) or rater (off), school cmdt, GO or GCMCA	Any commander	SSG & +: all records reviewed automatically by HQDA promo boards	Installation commander or designee not assigned to law enf duties
Board hearing	No	No	Record review; see above	W/in 14 days, on request
Entitled to Counsel	No (but see AR 27-3, para 3-6g(4)(j))	No (but see AR 27-3, para 3-6g(4)(f))	No (but see AR 27-3, para 3-6g(4)(f))	No (but see AR 27-3, para 3-6g(4)(w))
SJA Review	No	No	No	No
Approval Authority	OMPF: GO or GCMCA	<10 yrs svc: LTC cdr; >10: GO or GCMCA	HQDA promotion selection board	Installation commander
Appeal Authority	OMPF: DASEB	<10 yrs svc: GO or GCMCA; >10 yrs: DA	Commander, US Army Enlisted Records Center	GCMCA may grant restricted privileges

	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)

APPENDIX A **ADVERSE ADMINISTRATIVE ACTIONS**

Grounds for Action	Poor duty perf, Art. 15 punishment; pending discharge; 19 other grounds	Substandard duty performance; 11 other grounds	Referred OER or AER, Art. 15, OMPF reprimand; weight control failure; other derogatory info	Unable to perform duties & responsibilities required of rank and MOS	Any civilian conviction. Mandatory if confined for 1 yr or more (unsuspended)
Ultimate Result	Soldier is removed from promotion standing list			Soldier is reduced one rank	Soldier is reduced one or more ranks
Regulation	AR 600-8-19, chap 3	AR 600-8-19, chap 4	10 U.S.C. § 629(a); AR 600-8-29	AR 600-8-19, chap 7	
Who Initiates	Any commander	Any commander	Any commander	Any commander	Any commander
Board hearing	Yes (not full AR 15-6 board)	No	DA Promotion Review Board considers paper case	Yes, if Soldier is SGT or above, unless reduction is for unsuspended sentence of confinement for one year or more	
Entitled to Counsel	No	No	No	Yes (provided by Trial Defense Service)	
SJA Review	No	No	No	No	No
Approval Authority	LTC-level commander	DA Standby Advisory Board	The Secretary of the Army	PV2-CPL: company level commander SGT-SSG: field grade commander SFC-CSM: COL or higher commander	
Appeal Authority	No formal appeal	No formal appeal	No formal appeal	Next higher cdr for SSG & below First GO for SFC & above	

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CHAPTER D

HEALTH CARE LAW

55TH GRADUATE COURSE

DOD HIV/AIDS POLICY AND THE LAW

&

THE PHYSICAL DISABILITY EVALUATION SYSTEM

Outline of Instruction

I. INTRODUCTION.

A. Department of Defense HIV/AIDS Policy

B. Medical Boards – MMRB and MEB/PEB

MAJOR JOHN S. FROST
ADMINISTRATIVE & CIVIL LAW DEPARTMENT

II. DOD AIDS POLICY REFERENCES.

A. DoD Directive 6485.1, *Human Immunodeficiency Virus-1 (HIV-1)* (19 March 1991).

B. Army Regulation 600-110, *Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV)* (15 July 2005).

C. Air Force Instruction 48-135, *Human Immunodeficiency Virus Program* (12 May 2004).

D. SECNAV Instruction 5300.30D, *Management of Human Immunodeficiency Virus-1 (HIV-1) Infection In The Navy And Marine Corps* (3 Jan 06); Navy Environmental Health Center Technical Manual 6100.99-9E, *HIV Policy Course, Sexual Health and Responsibility Program (SHARP,* (March 2006).

E. Centers for Disease Control and Prevention. HIV/AIDS Surveillance Report, 2004; Vol. 6 (Copies of the HIV/AIDS Surveillance Report are available free from the CDC National AIDS Clearinghouse, P.O. Box 6003, Rockville, MD 20849-6003; telephone 1-800-458-5231 or 1-301-519-0023).

III. THE AIDS DISEASE.

A. In General.

B. Disease Progression.

C. Detection.

D. Transmission.

E. Classifications. DODD 6485.1, E2.2; AR 600-110, para. 2-1b.

IV. DOD AND SERVICE POLICIES ON HIV AND AIDS.

A. Accession Testing. HIV positive personnel are not eligible for enlistment or appointment in the military, both Active and Reserve Component. DODD 6485.1, para. 4.1; AR 600-110, para. 1-15a.

1. HIV screening for enlisted applicants is conducted at Military Entrance Processing Stations (MEPS). DODD 6485.1, para. 6.2; AR 600-110, para. 3-3b.

2. Officer applicants are screened during pre-contracting, pre-scholarship, or pre-appointment physical examinations. DODD 6485.1, E5; AR 600-110, para. 3-3h.

a. Military academy cadets, midshipmen and persons attending the Uniformed Services University of Health Sciences are separated and discharged with an honorable discharge if HIV positivity is the sole basis for discharge. Superintendents may delay separation until the end of the current academic year or allow graduation in final year. DODD 6485.1, para. E5.1.3; AR 600-110, para. 3-3h(1).

b. ROTC cadets are disenrolled at the end of the academic term in which the HIV infection is confirmed. No recoupment action is initiated. DODD 6485.1, para. E5.1.2; AR 600-110, para. 3-3h(2).

c. OCS candidates who are in their initial entry training are immediately disenrolled from the program and discharged with an honorable or entry level separation, as appropriate. DODD 6485.1, para. E5.1.1; AR 600-110, para. 3-3h(3).

d. No waiver for HIV infection is authorized.

e. All personnel disenrolled from officer programs who are separated shall be given preventive medicine counseling and advised to seek civilian treatment. DODD 6485.1, para. E5.1.5.

3. Prior service personnel required to meet accession medical fitness standards must have a negative HIV test no more than 6 months before enlistment in the Selected Reserves. Active duty Soldiers transferring to or enlisting in the Selected Reserves without a break in service must have a negative HIV test within the preceding 24 months. DODD 6485.1, para. 6.4; AR 600-110, para. 3-3g.

B. Disease Surveillance and Health Education.

1. DOD Policy (DODD 6485.1, para. E6.2) requires periodic testing with the following priority for military personnel:

a. Deployed or deploying to high HIV risk area,

b. Permanent assignment overseas,

c. Temporary deployment overseas,

d. Specific categories (medical personnel, drug and alcohol rehab, prenatal patients) per service regulation, and,

e. All remaining personnel per service regulation.

2. Army. Active duty and Reserve Component Soldiers are periodically screened for evidence of HIV infection.

a. Active Component. All active duty Soldiers must be tested routinely at least biennially. AR 600-110, paras. 2-2h and 2-7. Testing is keyed to birth month screening. AR 600-110, para. 2-7b.

b. ARNG and USAR. ARNG and USAR Select Reserve screening must be conducted every five years. AR 600-110, para. 2-2i.

c. Overseas Assignments.

(1) Active Army and AGR Soldiers awaiting an overseas PCS or who are scheduled for overseas deployments or TDY (defined as outside the 50 states, Puerto Rico, and the District of Columbia) must have a negative HIV test within the 12 months prior to their port call (unless the host nation's policies require earlier testing). AR 600-110, para. 2-2k.

(2) RC personnel called to active duty for 30 days or less may be deployed or assigned TDY world-wide, with a negative HIV test performed within five years. If scheduled for overseas deployments or TDY for more than 30 days, RC personnel must have a negative HIV test within two years of the date they are called to Active Duty.

3. Navy. SECNAVINST 5300.30D

a. Active Duty – "no more or less frequently than approximately every two years." SECNAVINST 5300.30D, para. 3b.

b. Reserve Component – at activation, if called to active duty for more than 30 days, if no test in preceeding two years. SECNAVINST 5300.30D, para. 3b.

c. PCS Orders – within two years prior to transfer; overseas PCS – within 12 months. SECNAVINST 5300.30D, para. 6c.

d. Treated for STD, drug/alcohol abuse, or pregnancy. SECNAVINST 5300.30D, para. 6e.

4. Air Force. AFI 48-135, para. 3.2.

a. Every two years, preferably during Preventive Health Assessment.

b. Newly diagnosed active tuberculosis, during pregnancy, diagnosed with a STD, upon entry into drug or alcohol treatment program, prior to incarceration.

5. Family members and other health care beneficiaries are not required to have an HIV test. However, DA policy is to routinely inform patients that physicians will order any necessary clinically indicated tests, to include HIV, unless the patient specifically declines such tests. DODD 6485.1, para. E6.2.5. Generally, HIV testing is "clinically indicated" under the circumstances listed below:

a. All blood donors;

b. All patients with suspicious illnesses;

c. All persons admitted to Army hospitals unless tested during the proceeding twelve months;

d. All persons seen at sexually transmitted disease clinics;

e. Certain blood recipients;

f. Sexual partners of HIV-infected individuals;

g. All pregnant women at the time of their initial prenatal evaluation and at time of delivery, if the mother is identified as being at high risk;

h. All persons enrolled in inpatient alcohol and drug rehabilitation programs;

i. Adults undergoing physical examinations;

j. All persons presenting at emergency rooms with evidence of trauma, such as shootings, stabbings, IV drug use, and rape;

k. All persons with acute or chronic hepatitis B infection; and

l. All persons who are dead on arrival or who die in emergency rooms.

6. DoD Civilians.

a. Civilian employees and applicants for employment may not be mandatorily tested for HIV except to comply with valid host nation laws. Assignment or employment may be denied to employees who refuse to comply with the testing requirement. DODD 6485.1, para. 6.10, and E8; AR 600-110, para. 6-15a.

b. When a Host Country requires proof of a negative HIV test result, prior approval to test a civilian employee must be obtained from HQDA (DAPE-CPE). AR 600-110, para. 6-15a.

c. HIV-positive civilian employees are treated no differently than other employees. They are permitted to work as long as their performance is acceptable and they do not pose a significant safety or health threat to themselves or others. They are considered handicapped employees within the meaning of the Rehabilitation Act of 1973 and are entitled to a reasonable accommodation if otherwise qualified. AR 600-110, paras. 1-14k, l, and m.

C. Health Education. DODD 6485.1, para. E6.3, and E9, AR 600-100, Section V.

1. Upon identification, military health authorities will counsel the individual and others at risk regarding:

a. Significance of a positive antibody test;

b. Mode of transmission of the virus;

c. Appropriate precautions, personal hygiene, and measures required to minimize transmission;

d. Need to reveal the identities of – and to advise –past sexual partners of their infection;

e. That they are ineligible to donate blood, organs, tissue or semen;

f. To always use condoms (except with a spouse who is fully informed of the Soldier's condition).

g. All individuals with serologic evidence of HIV-1 infection shall be counseled by a physician. DODD 6485.1, para. E9.1.2. For Army members, counseling is recorded on DA Form 5669 (Preventive Medicine Counseling Record). Commanders will receive a copy of this form. AR 600-110, para. 2-14d.

h. HIV positive test results may not be used as a basis for separation against a service member. DODD 6485.1, para. E3.1. However, service members who violate the preventative medicine counseling are subject to administrative separation. DODD 6485.1, para. E3.2.; AR 600-110, paras. 4-12e & 4-13c.

2. The medical assessment of each exposure to or case of HIV infection includes an epidemiological assessment (EPI) of the potential transmission of HIV to other persons. DODD 6485.1, E9; AR 600-110, para. 7-3.

3. Commander's Counseling. The Army, Navy, Marine Corps, and Air Force all specifically provide for Commander Counseling. AR 600-110, para. 2-14; Navy Technical Manual 6100.99-9E, Appendix; & AFI 149-135, att. 14. *See* Appendices A - D of this Outline for Sample Counseling Forms.

   a. Commanders formally counsel Soldiers who test positive for the HIV antibody immediately after the post-diagnosis preventive medicine counseling. Commander counseling includes:

      (1) A direct order to verbally advise all sexual partners of their infection prior to engaging in intimate sexual behavior or other behavior involving a significant risk of HIV transmission (such as behavior that would result in the exchange of blood or seminal fluid between persons);

      (2) A direct order to use condoms when engaging in sexual relations (including, but not limited to, sexual intercourse, oral-genital, or anal-genital contact) with persons other than their spouse or with their spouse unless the spouse freely and knowingly consents to such relations after being informed of the Soldier's infection;

      (3) A direct order not to donate blood, sperm, tissues or other organs; and,

      (4) A direct order to inform all health care workers of the infection when seeking medical or dental treatment.

   b. Army Commanders record counseling on DA Form 4856 (General Counseling Form) (*see* Appendix A, this outline). Army Commanders maintain the counseling form in unit personnel files. Upon reassignment, commanders forward the form in a sealed envelope to the gaining commander. AR 600-110, paras. 2-14d.

D. Retention.

1. Repeal of 10 Feb 96 statute that mandated immediate discharge of HIV-positive service members. Repeal of amendments to 10 U.S.C. § 1177 effective 24 Apr 96.

2. Current Policy.

a. Active duty personnel with evidence of HIV infection are referred for medical evaluation board to evaluate and document their fitness for continued service regardless of clinical staging. DODD 6485.1, para. 4.3; E2.4.2; and E10.

b. HIV positive service members are managed in the same manner as personnel with other progressive illnesses.

c. Soldiers meeting medical retention standards may reenlist, if otherwise eligible. AR 600-110, para. 4-5a.

d. Except for those identified during the accession testing program, personnel who show no evidence of progressive clinical illness or other indications of immunologic or neurologic impairment related to HIV infection are not separated solely on the basis of HIV positivity. DODD 6485.1, para. 4.3, and E10.1.1; AR 600-110, para. 1-15d.

e. Reserve Component Soldiers with serologic evidence of HIV infection have 120 days from the date they are notified of their infection to complete a medical evaluation to prove their fitness for continued reserve service. Reservists found medically fit are permitted to serve in the Selected Reserves in a nondeployable billet, if available. AR 600-110, para. 5-17.

E. Army Assignment Limitations - Current Policy.

1. HIV-positive service members are not deployed overseas (defined as outside the 50 states, Puerto Rico, and the District of Columbia). DODD 6485.1, para. 6.16; AR 600-110, paras. 1-15e & 4-2a.

2. Soldiers confirmed HIV positive while stationed overseas are reassigned to the United States as soon as possible, regardless of PCS rules. AR 600-110, para. 4-7.

3. HIV-positive Soldiers may NOT be assigned to:

   a. Any TOE or MTOE unit. AR 600-110, para. 4-2b. Installation commanders may reassign any HIV-infected Soldier from such units to TDA units on their installation, provided the Soldier has completed a normal tour. AR 600-110, para. 4-2b.

   b. USAREC, Cadet Command, or ARNG Full Time Recruiting Force if the Soldier's medical condition requires frequent follow up and the unit is not near an Army MTF capable of providing such treatment. Commanders must report these Soldiers to HRC for assignment instructions. AR 600-110, para. 4-2b(3).

   c. Military education programs resulting in additional service obligation (*i.e.*, advanced civilian schooling, professional fellowships, and training with industry). AR 600-110, para. 4-2b(2). This limitation does not apply to military schools required for career progression in a Soldier's MOS, branch or functional area, such as an advanced course or CGSC. Moreover, HIV-infected Soldiers who are determined fit for duty are eligible for military training required to qualify them for reclassification, or to award a Skill Qualification Identifier or Functional Are, as long as the schooling does not exceed 20 weeks. AR 600-110, para. 4-4.

4. Assignment preclusion from units, programs, organizations, or schools other than those listed in the regulation require HQDA (DAPE-HR) approval. AR 600-110, para. 4-2c.

5. Commanders may not change the assignment of an HIV-infected Soldier unless required by the Army regulation or by the Soldier's medical condition. AR 600-110, para. 4-2d.

6. HIV-infected health providers may be restricted in the performance of their duties when their duties, as determined by a Medical Review Committee, presents a risk of transmitting the virus to a patient. AR 600-110, para. 4-2d.

7. Commanders may not group HIV-infected Soldiers into the same unit, duty area, or living area unless no other unrestricted units, positions, or accommodations are available. AR 600-110, para. 4-2d.

8. Soldiers in DOD sponsored professional education programs are disenrolled from the program at the end of the academic term in which the HIV infection is confirmed. Any additional service obligation incurred by participation in the program is waived. Financial assistance received is not subject to recoupment. AR 600-110, para. 4-2b(2).

9. Family members who are confirmed as HIV positive may accompany their sponsor overseas. The sponsor may request deletion from the overseas assignment based on compassionate reasons or may request an "all others" tour. If the initial diagnosis of a family member occurs while overseas, the sponsor may apply for a compassionate reassignment to the United States. Mandatory PCS of the sponsor will not occur based solely on the HIV positivity of the family member. AR 600-110, paras. 4-3 & 6-12.

F. Separation.

1. "Individuals with serological evidence of HIV-1 infection who are fit for duty shall not be retired or separated solely on the basis of . . . HIV-1 infection." DODD 6485.1, para.4.3

2. Regular and Reserve Component service members who are determined to be unfit for further duty due to progressive clinical illness or immunological deficiency due to HIV infection are processed for separation or retirement. DODD 6485.1, para. 4.5.

   a. Regular Army and Army Reserve Component commissioned and warrant probationary officers, who are confirmed HIV positive within 180 days of their original appointment or who report for initial entry training in an AD status (other than ADT) and are confirmed HIV positive within 180 days of reporting to AD, are processed for discharge under the provisions of AR 635-100, Chapter 5, section IX (Elimination of Probationary Officers). *See* AR 600-110, para. 4-12d.

   b. Enlisted Soldiers, confirmed HIV positive within 180 days of initial entry on AD, are separated for the convenience of the government for failure to meet procurement medical fitness standards under the provisions of AR 635-200, paragraph 5-11. *See* AR 600-110, para. 4-13b.

c. HIV-positive military personnel who fail to comply with lawfully ordered preventive medicine procedures, including the commander's "safer sex" order, are subject to appropriate administrative and disciplinary actions, including separation. AR 600-110, paras. 4-12e, 4-13c, and 2-14c.

d. HIV-positive officers may submit an unqualified resignation or request voluntary REFRAD. AR 600-110, para. 4-12a. HIV-positive enlisted members may submit a voluntary request for discharge under the provisions of AR 635-200, paragraph 5-3. AR 600-110, para. 4-13b.

G. Limited Use Policy.

1. DOD policy (DODD 6485.1, E3) prohibits the use of HIV testing information and information obtained during the EPI as an independent basis for adverse administrative or disciplinary action, except for:

a. Accession separations;

b. Voluntary separations;

c. Armed Service Blood Look Back activities;

d. Rebuttal or Impeachment purposes consistent with law or regulation;

e. For administrative or disciplinary actions resulting from disobeying preventative medicine order; and

f. As an element of proof or aggravation in administrative or criminal action.

2. **Adverse personnel actions** include: court-martial; nonjudicial punishment; line of duty determination; involuntary separation action (other than for medical reasons); administrative or punitive reduction in grade; denial of promotion; a bar to reenlistment; as the basis for an unfavorable entry in a personnel record; as a basis to characterize service or to assign a separation program designator; or in any other action considered an adverse personnel action (*e.g.*, OER or NCOER). DODD 6485.1, para. E3.2.1; AR 600-110, para. 7-3b.

3. The limited use policy does not apply to:

a. The introduction of evidence for **impeachment or rebuttal** purposes in any proceeding in which the evidence of drug abuse or relevant sexual activity (or lack thereof) is first introduced by the service member.

b. Disciplinary or other action based on independently derived evidence.

c. **Nonadverse personnel actions**, IAW AR 600-110, para. 7-4, to include:

(1) Reassignment;

(2) Disqualification (temporary or permanent) from a personnel reliability program;

(3) Denial, suspension, or revocation of a security clearance;

(4) Suspension or termination of access to classified information;

(5) Removal (temporary or permanent) from flight status or other duties requiring a high degree of stability or alertness such as explosive ordnance disposal (a medical evaluation board must determine whether removal from flight status or a similar position is necessary); and

(6) Restriction on the duties of HIV-infected health care providers. DODD 6485.1, para. E3.2.3; AR 600-110, para. 4-6.

(7)

H. Release of Information.

1. Release of HIV data on a service member is covered by the Health Insurance Portability and Accountability Act (HIPAA) and DoD 6025.18-R, *DoD Health Information Privacy Regulation*, January 2003.

2. Service regulations stress the need for extra precautions in protecting HIV information. *See, e.g.*, AR 600-110, paras. 1-12g & 1-13f.

   a. All Soldiers are individually and privately notified of all positive HIV test results in a face-to-face interview with a designated physician. AR 600-110, para. 2-12.

   b. Unit commanders will accompany HIV-positive Soldiers to the initial notification by medical personnel. Unit commanders will not remain for the EPI. AR 600-110, para. 1-13d.

3. Soldiers are advised by medical authorities to notify their spouses of their infection. They also are advised that medical authorities will follow up with the spouses to ensure that notification has taken place. Upon notification by medical authorities, the spouse may choose to be tested for HIV. AR 600-110, para. 6-9.

4. Soldiers identified as HIV-positive have their medical and dental record jacket marked by a DA Label 162 (Emergency Medical Identification Symbol). A further annotation in their records will reflect "Donor Ineligible."

5. Upon reassignment, the losing installation HIV Program POC (from within the Personnel Service Center) notifies the gaining installation's HIV Program POC. When the Soldier reports to his unit, the gaining installation's HIV Program POC will notify the Soldier's unit commander of the Soldier's HIV Status. Copies of the Soldier's medical records are forwarded to the gaining installation's HIV Program POC, marked as "Sensitive," and mailed using return receipt. The Soldier hand carries the original records, and must contact the gaining HIV Program POC upon arrival at the new installation. AR 600-110, para. 4-8.

6. IAW AR 600-110, para. 2-12f, information concerning an individual's HIV positivity is only released outside DOD in the following circumstances:

   a. Military health care beneficiaries who are determined "at risk" (*e.g.*, spouse of an HIV-positive Soldier; *see also* AR 600-110, para. 6-9) are contacted directly by medical authorities and advised to seek medical evaluation;

b. Individuals who are not military health care beneficiaries, who are determined "at risk" (*e.g.*, sexual partner of an unmarried HIV-positive Soldier), are contacted through the local public health authorities, unless disclosure to the civilian health authorities is itself prohibited by the local jurisdiction.

c. Release of information to local health authorities, concerning the identity of HIV-positive individuals, is done in accordance with the reporting requirements of the local jurisdiction.

V. THE PHYSICAL DISABILITY EVALUATION SYSTEM

A. References.

1. DoD Directive 1332.18, *Separation or Retirement for Physical Disability* (4 November 1996).

2. AR 40-501, *Standards of Medical Fitness* (27 June 2006).

3. AR 600-60, *Physical Performance Evaluation System* (25 June 2002).

4. AR 40-400, *Patient Administration* (12 March 2001).

5. AR 635-40, *Physical Evaluation for Retention, Retirement, or Separation* (8 February 2006).

B. Purpose of the Physical Disability Evaluation System (PDES).

1. Personnel Management.

a. Effective and Fit Military

b. Quality Retention.

2. Provide Full and Fair Hearings.

a. Determine Soldiers' physical fitness for continued service.

b. Determine the level and type of compensation the Soldier is due.

C. Proponent. The proponent for the U.S. Army Physical Disability Evaluation System is the U.S. Army Physical Disability Agency (USAPDA), FGS-WRAMC, Washington, DC.

1. Commanded by The Adjutant General of the Army, a Brigadier General billet.

2. The Deputy Commander, USAPDA, runs day-to-day operations. Normally a non-medical branch colonel.

3. Maintains a file copy of individual case processing for five years, and a computer database of disability processing back to FY 81.

D. The Physical Performance Evaluation System (PPES) and the PDES.

1. MOS Medical Retention Board (MMRB). Aligned with the Physical Performance Evaluation System (PPES), this is an administrative screening conducted by the Soldier's command to evaluate the ability of Soldiers with P3 or P4 profiles to physically perform their PMOS in a worldwide field environment. The PPES uses the MMRB as an administrative screening board to make this determination.

2. Medical Evaluation Board (MEB). Part of the Physical Disability Evaluation System (PDES), this is a board conducted by the medical treatment facility – after a Soldier has received maximum benefit of medical treatment for a condition that may render him unfit for further service – to determine whether the Soldier meets AR 40-501's medical treatment standards. Soldiers found not to meet these standards are referred to a Physical Evaluation Board (PEB) to determine fitness under the procedures of AR 635-40.

3. Physical Evaluation Board. Also part of the PDES, the PEBs are boards that determine fitness or unfitness for duty, and further determine whether Soldiers are eligible for disability benefits. A PEB normally is composed of at least two field grade officers and a physician. A Judge Advocate is assigned to represent Soldiers at PEBs.

E. MMRB. *See* AR 600-60, *Physical Performance Evaluation System*.

1. The Physical Performance Evaluation System evaluates Soldiers issued a "P3" or "P4" profile, to determine if they have the ability to perform in their PMOS. The MMRB is the administrative screening board, at the installation level, that makes this determination.

2. Required Referrals. Soldiers with a P3 or P4 profile must be referred to a MMRB, unless direct referral to a PEB is required, because the Soldier's underlying medical condition fails to meet medical retention standards. *See* AR 600-60, para. 2-2. Soldiers also must be referred to a MMRB, IAW para. 2-2, if, after being retained by a MMRB or found fit by the PDES (MEB or PEB), one of the following events occurs:

   a. Soldier receives another P3 or P4 in another profile factor.

   b. The conditions for which the Soldier previously was retained deteriorate, or the Soldier receives additional duty limitations.

   c. The commander thinks the Soldier is incapable of performing PMOS duties after an appropriate period (recommended to be 120 days) has passed from the last MMRB or PDES decision.

3. Soldiers will NOT be referred to a MMRB, IAW para. 2-3, if:

   a. Their underlying condition does not meet AR 40-501's medical retention standards (they go straight into the PDES or, if they are RC Soldiers, are processed for medical disqualification). **Note**: When issuing a P3 or P4 profile, medical officers should determine whether the Soldier meets medical retention standards, especially where the profile includes limitations on:

      (1) Taking the APFT

      (2) Wearing a protective mask

      (3) Wearing the ballistic helmet

      (4) Firing an individual weapon

(5) Wearing load carrying equipment

For Commanders: Question overly restrictive profiles. Request reconsideration of the profile, IAW AR 40-501, para. 7-8, or refer the Soldier for a fitness for duty medical examination, IAW AR 600-20, chapter 5.

b. When their profiles are Temporary.

c. When the permanent profile is "1" or "2."

d. When the PDES (MEB and/or PEB) determined them fit for duty (unless an "appropriate period of time", IAW AR 600-60, paragraph 2-2b(3) has passed, and the commander thinks the Soldier is incapable of performing PMOS, branch or specialty duties).

4. Referral Time Limits. Active Duty Soldiers will appear before an MMRB within **60 days** from the date that the permanent profile is signed. AR 600-60, para. 2-4. USAR TPU and ARNG drilling unit Soldiers will be referred within 120 days.

5. Processing Time Limits. The MMRB Convening Authority (a General Court-Martial Convening Authority) must make a determination on MMRB recommendations **NLT 30 days** from the date the MMRB adjourned, IAW para. 2-4. These General Officers may delegate in writing the approval of MMRB findings and recommendations to the Soldier's Special Court-Martial Convening Authority. *See* para 4-6.

6. Training, Deployability and Reassignment Issues.

a. Training: Soldiers pending a MMRB or final decision on the MMRB recommendation are subject to TDY and field duty, with consideration given to the duty limits recommended by the profile. AR 600-60, para. 3-4.

b. Deployability. Soldiers are nondeployable effective the date their P3 or P4 profile is approved, until the MMRBCA retains the Soldier, the Physical Disability Evaluation System finds the Soldier fit, or – in the case of RC Soldiers – PERSCOM approves an MMRBCA's recommendation for reclassification. AR 600-60, para. 3-2.

c. Reassignment. Soldiers receiving a P3 or P4 profile after receiving assignment orders must appear before the MMRB before proceeding on reassignment. Requests for deferment or deletion must be forwarded to PERSCOM when the MMRB recommends probation, reclassification or referral to the PDES. The only exception is for OCONUS Soldiers, whose normal reassignment back to CONUS is not affected. AR 600-60, para. 3-6.

7. Reenlistment/Career Status. AR 600-60, para. 3-7.

a. Enlisted Soldiers pending MMRB action and determinations may not reenlist, but – if otherwise qualified – may extend their current enlistments IAW AR 601-280 (Active Duty) or AR 140-111 (RC Soldiers).

b. If Soldiers are retained in their PMOS, reclassified, or fund fit by the PDES, they will not be denied reenlistment or extension on medical grounds.

c. Officers pending MMRB may apply for and be considered for CVI, VI, or RA status. However, until the MMRB action is complete, they may not execute the RA oath of office.

8. MMRB Structure and Operations.

a. MMRBCA (*See* AR 600-60, paras. 4-4 – 4-6) – A General Court-Martial Convening Authority. **Note:** Soldiers may be evaluated by an MMRB convened by a GCMCA other than their own, IAW coordination between two GCMCAs. MMRBCAs may delegate in writing the approval of MMRB findings and recommendations to the Soldier's SPCMCA.

b. Board Structure (*See* paras. 4-8 – 4-9). Five voting members and nonvoting members. Voting Members include: 1) President – O6; 2) Medical Member – Field Grade MC officer; 3) Additional Voting Members (x3). Nonvoting Members include: 1) Personnel Advisor to advise the MMRB – Commissioned Officer, WO, or Senior Personnel NCO; 2) Recorder – Enlisted Soldier.

c. Commander's Statement (*See* para. 4-12). The Soldier's immediate commander must write an evaluation of the Soldier's physical capability, addressing the impact of the profile limitations on the Soldier's ability to perform the full range of PMOS duties. *See* AR 600-60, fig. 4-4, for an example.

d. Counseling Statement (*See* para. 4-12). Enlisted Soldiers must be counseled by the unit first sergeant on the impact of an MMRB decision of retention. *See* AR 600-60, fig. 4-3, for an example.

e. Conduct of the Board. A formal board, but does not require a written transcript. Soldiers MAY have a spokesperson on their behalf, but are not entitled to legal counsel. Soldiers may present facts and call witnesses, but are not required to provide a statement regarding the origin, occurrence or aggravation of their injury or disease.

f. Board Deliberations. Voting in a closed session. A minority report by dissenting board members may be submitted. The board president orally informs the Soldier of the results.

g. Soldier Rebuttal. Soldiers may submit a rebuttal in writing within 2 working days following the board's adjournment. **Note:** Soldiers should be encouraged to seek the help of a Legal Assistance Attorney in preparing their rebuttals.

h. Recommendation – Retention (*See* para. 4-17). When a Soldier is retained in PMOS, the summary and decision are filed permanently in the OMPF.

i. Recommendation – Probation (*See* para. 4-18). Appropriate when the MMRB finds that the Soldier's condition may be improved through treatment. Probationary period cannot exceed 6 months. The MMRB also may recommend interim evaluation during the probationary period. **Note**: Commanders may re-refer the Soldier to the MMRB before the probationary period expires, if they believe the Soldier's condition has improved or deteriorated to such extent that an earlier reevaluation is warranted.

j. Recommendation – Reclassification or Referral to the PDES (*See* paras. 4-19 – 4-20). A written summary must explain the board's rationale, document how the medical condition prevents performance in PMOS, and explain concurrence or nonconcurrence with the commander's evaluation of the Soldier's ability to perform. Referral to the PDES for conduct of an MEB and PEB is warranted when the Soldier's assignment limits or medical condition prevents performance in the Soldier's PMOS.

k. Review of MMRB Recommendations (*See* para. 4-21). The MMRBCA must ensure that a member of his or her staff, in the grade of major or higher, or a WO4, reviews the MMRB decision. **Note**: The MMRBCA also may delegate decision authority to the Soldier's SPCMCA.

F. The Physical Disability Evaluation System**.** The PDES is comprised of the MEB and PEB, and any required review by the HQ, US Army Physical Disability Agency. The MMRB is not a part of this process, but is a "feeder" into it.

G. Medical Evaluation Board. This is a board conducted by the medical treatment facility – after a Soldier has received maximum benefit of medical treatment for a condition that may render him unfit for further service – to determine whether the Soldier meets AR 40-501's medical retention standards. Soldiers found not to meet these standards are referred to a Physical Evaluation Board (PEB) to determine physical fitness under the procedures of AR 635-40. For this reason, it is essential that the MEB evaluate thoroughly and report all abnormalities and their impact on fitness for duty.

1. Referrals. Referral may be made by HQDA (when questions arise as to the Soldier's ability to perform duties because of physical disability); Commanders of MTFs who treat Soldiers; **or Commanders,** when they believe a Soldier is unable to perform duties. Command referrals must be in writing, and state the reason for believing the Soldier cannot perform duties. **Note:** The DD Form 689 (Individual Sick Slip) may be used for such referral. *See* AR 635-40, para. 4-8.

2. Appointing Authorities. MTF Commanders; Commander, USAMEDCOM; and Commander, 18th MEDCOM. (These authorities also are Approval Authorities for all MEBs). AR 40-400, para. 7-2.

3. MEB Purpose. MEBs document a Soldier's medical status and duty limitations. A decision is made to the Soldier's medical qualification for retention, based on the criteria in chapter 3 of AR 40-501, *Standards of Medical Fitness*. If the MEB determines the Soldier does not meet retention standards, it will recommend referral to a PEB.

4. Processing. If an approved MMRB refers a case to a MEB, the MEB should be initiated within 30 days. MEB processing normally will not exceed 30 days (beginning on the date of the medical officer's narrative summary, through the date forwarded to the PEB). *See* AR 40-400, para. 7-1.

5. Composition. MEBs are comprised of two or more physicians. One must be a senior medical officer with detailed knowledge of directives pertaining to standards of medical fitness. AR 40-400 recommends that the physician use the VA Physician's Guide for Disability Evaluation Examinations to describe the nature and degree of the Soldier's condition.

6. Proceedings. MEBs operate informally, and review clinical, health and other records. If appropriate, the patient may receive the opportunity to appear in person and present his or her views.

7. Recording MEB Proceedings. MEB proceedings are recorded on DA Form 3947. They will include a brief clinical history by the patient's attending physician. AR 40-400, para. 7-7.

8. MEB Approval Authority (*See* AR 40-400, para. 7-12). The Appointing Authority (*e.g.*, the MTF Commander) is also the Approval Authority. If the Approval Authority does not agree with the MEB findings, he or she will return the packet to the MEB for further consideration. If, upon further examination, the Approval Authority still does not agree with the Board, he will forward the case to the Regional Medical Command commander for final decision.

9. Counseling Soldiers (*See* AR 40-400, para. 7-17). Upon approval of the MEB, the Soldier will be counseled about the findings (The Physical Evaluation Board Liaison Officer – a member of the MTF – will provide the counseling). Soldiers have 3 working days to appeal in writing. **Note:** Soldiers should consult a Legal Assistance Attorney to review this documentation and formulate a response. **Note:** Soldiers may provide additional information – from the unit commander, supervisors, etc. – for forwarding to the Physical Evaluation Board.

10. Referrals to PEBs. MEBS will refer to a PEB those Soldiers who do not meet physical retention standards.

11. Expeditious Discharge (*See* AR 40-400, para. 7-11). Soldiers identified within the first 180 days as not meeting medical procurement standards may be separated without referral to a PEB. Soldiers found to have a preexisting condition that is not service aggravated may be separated without evaluation by a PEB, if the Soldier requests waiver of the PEB.

H. Physical Evaluation Boards. Soldiers who fail to meet retention standards as detailed in AR 40-501, chapter 3, will be referred to a PEB.

1. Board Composition (*See* AR 635-40, para. 4-17). Two field grade officers and a physician. The non-physician board members are normally combat arms, and the board's President is a Colonel.

2. Informal Phase (*See* AR 635-40, para. 4-20). During the informal phase, the PEB reviews documents, without input from the Soldier or his or her legal counsel. The PEB makes its decision based strictly on the Soldier's medical and personnel records. Voting does not need to be unanimous. If the results of the informal board satisfy the Soldier, the case ends. However, if the results of the informal board do not satisfy the Soldier, within 10 days of receiving the results, he may nonconcur and offer no rebuttal; nonconcur with a written rebuttal (and waive appearance before a formal board); or nonconcur and request a formal board.

3. Formal Phase (*See* AR 635-40, para. 4-21). The Soldier receives military legal counsel, or may retain civilian counsel at his or her own expense. "Appearance" may be in person or via videoteleconference. The Soldier may present witnesses, ask questions of the board, and scrutinize evidence. The board's decision does not need to be unanimous.

a. PEB Determinations (*See* AR 635-40, para. 4-19).

(1) Fit or Unfit to perform duties

(2) Whether disability is permanent

(3) Whether the disability meets legal criteria for compensation

(4) Whether the disability meets criteria for exemption of disability retired or severance pay from gross federal income.

(5) Whether the disability meets criteria for Civil Service preference eligible status, and exemption from the Dual Compensation Act.

b. Percentage of Disability (*See* AR 635-40, para. 4-19h).

(1) Percentage ratings reflect the severity of the Soldier's medical condition at the time of rating. The VA Schedule for Rating Disabilities and Appendix B to AR 635-40.

(2) Appendix B establishes Army policies and modifications to the VASRD when rules or ratings from the VASRD are improper for Army use or do not provide a rating basis.

4. Determination of Not Fit. If the PEB determines that a Soldier is no longer fit for duty, and further determines the Soldier is eligible for disability benefits, the PEB rates the severity and extent of the disability.

5. Soldier Rebuttal. Following the formal board, the Soldier has ten days to submit a written rebuttal. If the rebuttal is denied, the US Army Physical Disability Agency (USAPDA) automatically reviews the case.

6. Review by the USAPDA (*See* AR 635-40, para. 4-22). The USAPDA can revise the finding of a PEB by reducing or increasing a rating**.** The USAPDA confines its review to the following:

a. Whether the Soldier received a full and fair hearing.

b. Whether the proceedings were conducted IAW governing regulations.

c. Whether the findings and recommendations were just, equitable, consistent with the facts, and adhered with law and regulations.

d. Whether due consideration was given to the facts and requests in any rebuttal.

e. That case records are accurate and complete.

If the USAPDA modifies the PEB findings and recommendations, it will provide the Soldier an opportunity to rebut the revised findings and recommendations. If the Soldier nonconcurs with the revised findings and recommendations, submits a written rebuttal, and this does not result in a change to the revised findings, the USAPDA will forward the case to the **Army Physical Disability Appeal Board**.

7. Army Physical Disability Appeal Board (*See* AR 635-40, para. 4-25). The APDAB determines if the Soldier received a full and fair hearing, whether the proceedings conformed to law and regulation, and whether the findings and recommendations are supported by the evidence.

I. Disposition of Soldiers Undergoing a PEB. *See* AR 635-40, appendix E. MTF commanders who determine a Soldier will be processed for a PEB will either decide whether the Soldier should be assigned to the medical holding unit of the MTF, whether the Soldier will be attached to the medical holding company of the MTF, or process the Soldier on an outpatient basis from the parent organization (this occurs whenever possible).

1. Personal Records and Property. Commanders must retain personnel records of Soldiers attached to medical holding units, and upon request, furnish the MTF commander (on a "loan" basis) records need to study and evaluate the Soldier. Upon receipt of orders reassigning the Soldier to a medical holding unit, commanders will forward the Soldier's personnel and pay records to the MTF Commander, and forward the Soldier's individual clothing.

2. Discharge. *See* AR 635-40, appendix E. After final approval of a PEB case, discharge will be effected usually within 20 days from the date of approval. MTF commanders are responsible for final disposition of Soldiers for separation.

3. Rating the disability. Once the PEB has determined the Soldier to be unfit, it is required by law to determine the physical disability rating using the Veterans Schedule for Rating Disabilities.

J. Physical disability disposition. Retirement or separation with severance pay is based on the criteria in 10 U.S.C. chap. 61.

1. Per 10 U.S.C. chap. 61, three factors determine disability disposition:

a. The rating percentage.

b. The stability of the disabling condition.

c. Total active years of federal service.

2. For service-incurred or -aggravated conditions not involving misconduct, the dispositions are described below.

a. Permanent disability retirement occurs if the condition is permanent and stable and rated at a minimum of 30 percent, or if the Soldier has 20 years or more of active federal service.

b. Temporary disability retirement (*see* AR 635-40, chap. 7) occurs if the Soldier is entitled to permanent disability retirement except that the disability is not stable for rating purposes. However, stability does not include latent impairment – what happens in the future. If placed on the TDRL, the Soldier is required to undergo a periodic medical reexamination within 18 months followed by PEB evaluation. The Soldier may be retained on the TDRL or until final determination is made. While the law provides for a maximum tenure on the TDRL of five years, there is no entitlement be retained on the TDRL fall all five years if one's condition improves.

c. Continued on active duty (COAD) (*See* AR 635-40, chap. 6)**.** To be considered for COAD, a Soldier must be found unfit by a PEB because of a disability that was not the result of intentional misconduct or willful neglect, or incurred during a period of unauthorized absence; capable of maintaining himself or herself in a normal military environment without adversely affecting his or her health or the health of others, and without undue loss of time from duty due to medical treatment; and physically capable of performing useful duty in an MOS for which he or she is qualified or trainable. Additionally, the Soldier must have 15, but less than 20 years of total service; or be qualified in a critical skill or shortage MOS; or be disabled due to combat.

APPENDIX A

GENERAL COUNSELING FORM

For use of this form, see AR 635-200; the proponent agency is MILPERCEN

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: 5 USC 301, 10 USC 3012 (G).
PRINCIPAL PURPOSE: To record counseling data pertaining to service members.
ROUTINE USES: Prerequisite counseling under paragraphs 5-8, 5-13, chapters 11, 13 or section III, chapter 14, AR 635-200. May also be used to document failures of rehabilitation efforts in administrative discharge proceedings.
DISCLOSURE: Disclosure is voluntary, but failure to provide the information may result in recording of a negative counseling session indicative of the subordinate's lack of a desire to solve his or her problems.

PART I - BASIC DATA

1. NAME		3. GRADE	4. SEX
Doe, John Q.	123-45-6789	E4	Male

5. UNIT	*FOR TRAINING UNITS ONLY*	
	6. WEEK OF TRAINING	7. TRAINING SCORES
HHC, 1st Training Brigade		HIGH ____ MED ____ LOW ____

PART II - OBSERVATIONS

8. DATE AND CIRCUMSTANCES

The purpose of this command counseling is to inform you of DA and command policy regarding your responsibilities as a result of testing positive for the Human Immunodeficiency Virus (HIV) antibody. This counseling supplements and complements the preventive medicine counseling you received on 20 FEB 01.

9. DATE AND SUMMARY OF COUNSELING

I have been advised that you were counseled by Preventive Medicine personnel concerning your diagnosis of HIV positivity, the risk this condition poses to your health, as well as the risk you pose to others. You were advised by medical personnel as to necessary precautions you should take to minimize the health risk to others as a result of your condition. While I have great concern for your situation and needs, in my capacity as a commander, I must also be concerned with, and ensure the health, welfare, and morale of the other Soldiers in my command. Therefore, I am imposing the following restrictions:

a. You will verbally advise all prospective sexual partners of your diagnosed condition prior to engaging in any sexual intercourse. You are also ordered to use condoms should you engage in sexual intercourse with a partner.

b. You will not donate blood, sperm, tissues, or other organs since this virus can be transmitted via blood and body fluids.

c. You will notify all health care workers of your diagnosed condition if you seek medical or dental treatment, or accident requires treatment. If you do not understand any element of this order, you will address all questions to me. Failure on your part to adhere to your preventive medicine counseling or the counseling I have just given you will subject you to administrative separation and/or punishment under the UCMJ, as I see fit.

DISPOSITION INSTRUCTIONS
This form will be destroyed upon : reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement

APPENDIX B

AFI 148-135, Attachment 14

ORDER TO FOLLOW PREVENTIVE MEDICINE REQUIREMENTS

Because of the necessity to safeguard the overall health, welfare, safety, and reputation of this command and to ensure unit readiness and the ability of the unit to accomplish its mission, certain behavior and unsafe health procedures must be proscribed for members who are diagnosed as positive for HIV infection.

As a military member who has been diagnosed as positive for HIV infection, you are hereby ordered: (1) to verbally inform sexual partners that you are HIV positive prior to engaging in sexual relations. This order extends to sexual relations with other military members, military dependents, civilian employees of DoD components or any other persons; (2) to use proper methods to prevent the transfer of body fluids during sexual relations, including the use of condoms providing an adequate barrier for HIV (e.g. latex); (3) in the event that you require emergency care, to inform personnel responding to your emergency that you are HIV positive as soon as you are physically able to do so.

(4) when seeking medical care, you may wish to inform the provider that you have HIV so that the provider can use that information to optimize your evaluation and treatment; (5) not to donate blood, sperm, tissues, or other organs.

Violating the terms of this order may result in adverse administrative action or punishment under the Uniform Code of Military Justice for violation of a lawful order.

_____

Signature of Commander and Date

ACKNOWLEDGMENT

I have read and understand the terms of this order and acknowledge that I have a duty to obey this order. I understand that I must inform sexual partners, including other military members, military dependents, civilian employees of DoD components, or any other persons, that I am HIV positive prior to sexual relations; that I must use proper methods to prevent the transfer of body fluids while engaging in sexual relations, including the use of condoms providing an adequate barrier for HIV; that if I need emergency care I will inform personnel responding to my emergency that I am HIV positive as soon as I am physically able to do so; that when I seek medical or dental care I may wish to inform the provider that I have HIV in order to optimize my evaluation and treatment;

and that I must not donate blood, sperm, tissues, or other organs. I understand that violations of this order may result in adverse administrative actions or punishment under the Uniform Code of Military Justice for violation of a lawful order.

_____

Signature of Member and Date

APPENDIX C

PREVENTIVE MEDICINE ORDERS FOR HIV POSITIVE USN PERSONNEL

This command has been advised that you were counseled by Preventive Medicine personnel concerning your HIV positive diagnosis, the risk this condition poses to your health, as well as the risk you pose to others. During counseling, you were advised by medical personnel as to necessary precautions you should take to minimize the health risk to others as a result of your condition. This command has great concern for the health, welfare and morale of you and others in this command. For these reasons, I am imposing the following restrictions on your conduct described to you in your medical counseling:

1. Prior to engaging in sexual activity, or any activity in which your bodily fluids may be transmitted to another person, you must verbally advise any prospective sexual partner that you are HIV positive and the risk of possible infection.

2. If your partner consents to sexual relations, you shall not engage in sexual activities without the use of a condom.

3. You must advise your potential partner that the use of a condom **does not** guarantee that the virus will not be transmitted.

4. You shall not donate blood, sperm, body tissue, organs or other body fluids.

5. You shall refrain from any injection using an air gun.

6. In the event that you require emergency care, you are ordered to inform personnel responding to your emergency that you are HIV positive, conditions permitting (e.g., unconscious).

7. When you seek medical or dental care, you must inform health care providers that you are HIV positive before treatment is initiated.

IMPORTANT: Your failure to comply with these orders may subject you to disciplinary action under the UCMJ and/or administrative separation.

Enclosure (1)
Appendix (C)

APPENDIX C (cont.)
PREVENTIVE MEDICINE ORDERS FOR HIV POSITIVE USN PERSONNEL

I acknowledge understanding of the above orders.

_____ _____
Member's signature Date
HM1 John Smith, USN, 123-45-6789

Orders transmitted and member's signature witnessed by:

Signature:_____
_____
Printed Rank, Name, SSN and Date

Distribution:
Original to: COMNAVPERSCOM (Pers-4821), 5720 Integrity Drive, Millington, TN 38055-4821
Certified Copy to: Member and Commanding Officer's file

Enclosure (1)
Appendix (C)

APPENDIX D

USMC COMMAND ORDERS TRANSMITTAL (ACTIVE DUTY)

STATEMENT OF UNDERSTANDING OF A DIRECT ORDER

I am issuing the following direct order to you:

Initials
_____ 1. Prior to engaging in sexual activity, or any activity in which your body fluids may be transmitted to another person, you must verbally advise any prospective sexual partner of your HIV positivity and the risk of possible infection.

Initials
_____ 2. If your partner consents to sexual relations, you shall not engage in sexual activities without the use of a condom.

Initials
_____ 3. You must advise your potential sexual partner that the use of a condom does not guarantee that the virus will not be transmitted.

Initials
_____ 4. You shall not donate blood, sperm, body tissues, organs, or other body fluids (e.g., breast milk).

Initials
_____ 5. You shall not share personal implements, including but not limited to, toothbrushes and razors, with other individuals. This provision does not preclude visits to licensed barbers or beauticians.

Initials
_____ 6. You must provide advance notification of your HIV positivity to all health care workers (including emergency medical responders when possible) who will be providing medical care to you.

Initials
_____ IMPORTANT: Your failure to comply with these orders may subject you to disciplinary action under the UCMJ and/or administrative separation. Service members have been charged with attempted murder for failing to comply with the above orders.

Enclosure (1)
Appendix (E)

APPENDIX D (cont.)

USMC COMMAND ORDERS TRANSMITTAL (ACTIVE DUTY)

I acknowledge understanding of the above orders.

_____ _____
Marine's Signature Date

_____
Marine's Name, Grade, SSN/MOS (Typed)

Orders transmitted and Marine's signature witnessed by:

_____ _____
Witness Signature Date

_____
Witness Name, Grade, SSN/MOS (Typed)

Distribution:
Original to Commanding Officer
(1) Certified True Copy to Marine
(1) Certified True Copy in Medical Record
(1) Certified True Copy in Dental Record

Enclosure (1)
Appendix (E)

CHAPTER E

FEDERAL-STATE RELATIONS ON AND OFF MILITARY INSTALLATIONS AND FEDERAL AUTHORITY OVER LAND

55TH GRADUATE COURSE

I. INTRODUCTION

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

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

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

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

B. Result: Art. I, § 8, cl. 17

II. EXCERCISING FEDERAL AUTHORITY INCIDENT TO LEGISLATIVE JURISDICTION

A. Definition. 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**.

LTC Jeff Sexton
July 2006

B. 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 1988, the federal government controlled 31 million acres of land.

C. Types of Jurisdiction

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

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

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

2. Concurrent legislative jurisdiction. The state and federal governments both have full legislative jurisdiction.

3. 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; or a state can cede only criminal jurisdiction but reserve all other powers.

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. Va. Code Ann. § 1-400.

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

4. Proprietary 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.

D. Types of Acquisition

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

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

3. Federal Reservation. Common in states that were part of the Louisiana Purchase. 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.

E. 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. AR 405-20, para. 5. Further, the DA's policy is to retrocede excess jurisdiction.

F. 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 (2004) [Restated in 40 U.S.C. 3111 and 40 U.S.C. 3112 (2004)]:

a. [T]he head or other authorized officer of any department . . . may . . . accept or secure from the State . . . consent to or cession of such jurisdiction, exclusive or partial . . . and indicate acceptance . . . by filing a notice . . .With the Governor . . . or in such other manner as may be prescribed by the laws of the State.

b. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

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

3. Examples: (See next page)

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 May 10, 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 January 15, 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. 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. 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 February 1, 1940. Markham v. United States, 215 F.2d 56 (4th Cir. 1954).

G. Disposal of Legislative Jurisdiction

1. Reverter clause in original consent or cession may operate. 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. 10 U.S.C. § 2683 (LEXIS 2006).

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

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

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

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

5. Difficulties applying the *McGlinn* Doctrine.

a. Finding old law is 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. Board of Supervisors of Fairfax County v. United States, 408 F. Supp. 556 (E.D. Va. 1976).

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

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

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

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

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

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

6. State and local taxes.

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

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

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

(3) Label the state puts on the tax is not necessarily determinative. 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. 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).

IV. USING THE SUPREMACY CLAUSE TO PREEMPT STATE LAW

A. Definition. Art. VI, cl. 2.

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

B. Federal Statutes Preempt State Statutes.

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

2. Conflict preemption. Does state law present an obstacle to accomplishing and executing the purposes and objectives of Congress? 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. 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. United States v. Shimmer, 367 U.S. 374, 383 (1961).

D. Federal Policies Preempt State and Local Statutes. 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. 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. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180 (1988).

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

V. EXERCISING STATE AUTHORITY ON EXCLUSIVE JURISDICTION INSTALLATIONS.

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

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

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

B. Allowing the State In —Alternate View: Where There is No Interference With the Federal Interest, the Fiction of a State Within a State Will Be Ignored.

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

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

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

C. 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 govt. instrumentalities on federal enclaves); United States v. South Carolina, 578 F. Supp. 549 (D.S.C. 1983)(state law requiring military bases in South Carolina to purchase their alcoholic beverages from persons who held South Carolina wholesale alcoholic beverage licenses was in violation of the Supremacy Clause of the U.S. Constitution).

b. Malt beverages and wine must be purchased from in-state distributors; liquor <u>generally</u> must be purchased from most competitive source, wherever located. 10 U.S.C. § 2495(a)(2); *see also* AR 215-1, Nonappropriated Fund Instrumentalities and Morale, Welfare, and Recreation Activities, para 7-12 (15 Sep 05).

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)(State of Maryland's attempt to exclude residents on federal enclave from the right to vote in state elections held in violation of the Equal Protection Clause of the 14th Amendment. Enclave residents are just 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 Sept. 1973). GENERAL RULE: Do not oppose annexation unless it would not be in the federal government's best interest, or it is opposed by another local jurisdiction. United States v. McGee, 714 F.2d 607 (6th Cir. 1983)(City of Dayton's annexation of a portion of Wright-Patterson AFB was in violation of state statute; also, potential for friction between the Military Base and the City in the event of annexation was a sufficient independent justification for court to grant the permanent injunction against the city); United States v. City of Leavenworth, 443 F. Supp. 274 (D. Kan. 1977).

4. Education. Impact Aid. 20 U.S.C. §§ 7701-7714 (LEXIS 2006).

   a. Financial assistance to Local Educational Agencies.

      (1) Per capita aid. 20 U.S.C. § 7703.

      (2) School construction in areas affected by federal activities. 20 U.S.C. §§ 7708-09 (2004).

   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 nondomiciliary students enrolled in the county public schools be charged tuition).

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

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

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

5. Spouse and Child Welfare Services.

a. Current Policy. Invite state authorities onto the installation. DOD Dir. 6400.1, Family Advocacy Program (23 Aug 04); AR 608-18, paras 2-11 to 2-16, The Army Family Advocacy Program (30 May 06) (Note: App. D also defines legislative jurisdiction.); SECNAVINST 1752.2A - Family Advocacy Program (17 Jul 96); MCO 1752.3A, MC Family Advocacy Program; AFI 40-301 – Family Advocacy (19 Jan 05).

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

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

VI. 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 Sept. 1994).

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 service is declined, state law for service will be followed.

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

(2) Service includes levy on personal property.

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

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

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

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

1. Permitted where it does not interfere with their military duties. 10 U.S.C. § 982; DOD Dir. 5525.8; Army Reg. 27-40, Litigation, ch. 10 (19 Sept. 1994).

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 (DoDD 3025.1); see also Chapter 19, JA 422 (Operational Law Handbook)(2006).

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. Other Emergency Programs.

1. Military Assistance to Safety and Traffic (MAST) (AR 500-4).

2. Fire Protection Assistance (AR 420-90).

3. Search and Rescue Operations (SAR) (AR 500-2).

E. 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. Formerly known as the Army's Domestic Action Program under AR 28-19 (now rescinded).

2. 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.

3. 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.

VII. EXERCISING FEDERAL AUTHORITY THROUGH THE PROPERTY CLAUSE.

A. Definition. 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. Kleppe v. New Mexico, 426 U.S. 529 (1976).

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

2. The Property Clause power is "complete."

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

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

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

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

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

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

VIII. CONCLUSION.

CHAPTER F

55TH GRADUATE COURSE

OFFICER PERSONNEL LAW

THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL
ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

OUTLINE OF INSTRUCTION

I. REFERENCES.

A. Title 10, United States Code.

B. DOD Instruction 1332.29, Eligibility of Regular and Reserve Personnel for Separation Pay.

C. DOD Directive 1332.30, Separation of Regular and Reserve Commissioned Officers.

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

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

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

G. AR 600-8-29, Officer Promotions.

H. Air Force Instruction 36-3206, Administrative Discharge Procedures for Commissioned Officers.

I. Air Force Instruction 36-3207, Separating Commissioned Officers.

J. SECNAV Instruction 1920.6C, Administrative Separation of Officers.

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

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

II. OVERVIEW OF PURPOSE, KEY CONCEPTS, AND TERMS.

A. Purposes for Officer Transfers and Discharges.

1. Provide a way to terminate service prior to the terms of the original contract.

2. Provide authority to transfer officers from one component to another.

3. Provide authority to discharge officers from all military obligations.

4. Support the service's personnel life-cycle function of transition.

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

C. Separation. Broadly defined to include any actions designed to result in a commissioned officer's discharge, retirement, or resignation.

D. Regular Army (RA) v. Other Than Regular Army (OTRA).

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

2. OTRA Officer: An officer who holds a grade and office under a commission signed by the President, and who is appointed as an officer in a **Reserve Component of the Army**.

3. The laws for RA appointments and the transfer of officers between RA and OTRA were amended in the Fiscal Year 2005 National Defense Authorization Act. Specifically, Section 501 **rescinded 10 U.S.C. § 532(e)**, which stated that no person will receive an original appointment

as a commissioned officer in the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps until completing one year of active duty service as a commissioned officer of a reserve component.

a. The new Department of Defense (DOD) policy is to transition to an all-Regular Active Duty List (ADL).

(1) As of 1 May 2005, all new officers commissioned to the ADL receive regular appointments regardless of method or source of commission.

(2) NLT 1 May 2006, military departments must ensure the transition of all reserve commissioned officers on the ADL to regular officer status provided the officer meets the following requirements UP 10 U.S.C. § 532:

(a) is a citizen of the United States;

(b) is able to complete 20 years of active commissioned service before his 62d birthday;

(c) is of good moral character;

(d) is physically qualified for active service; and

(e) has such other special qualifications as the Secretary of the military department concerned may prescribe by regulation.

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

E. Active Duty List (ADL) v. Reserve Active Status List (RASL).

1. ADL: A single list for the Army, Air Force, Navy, or Marine Corps that contains the names of all officers who are serving on active duty (other than those outlined in 10 U.S.C. § 641; e.g., reserve officers on active duty for training or on full-time National Guard duty, warrant officers, and retired officers on active duty).

2. RASL: A single list which contains the names of all officers (including commissioned warrant officers) who are in an active status in a Reserve Component and are not on the ADL.

F. Probationary v. Nonprobationary Status.

1. Probationary Officer:

a. A commissioned officer (RA or OTRA) with less than five years of active commissioned or commissioned service.

b. All newly commissioned officers are probationary for five years.

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

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

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

2. Commanders exercising general court-martial authority and all general or flag officers in command who have a judge advocate or legal advisor available.

III. OFFICER TRANSFERS AND DISCHARGES.

A. Controlling Regulation: AR 600-8-24.

B. AR 600-8-24 divides officer transfers and discharges into six areas:

1. Voluntary Release From Active Duty (REFRAD) - Chapter 2, paras 2-5 through 2-20. Applies to OTRA officers only. A REFRAD is the transfer of an OTRA officer from Active Duty status rather than discharge.

2. Involuntary REFRAD - Chapter 2, paras 2-21 through 2-38. Applies to OTRA officers only.

3. Resignations - Chapter 3.

4. Eliminations - Chapter 4.

5. Miscellaneous Types of Separations - Chapter 5.

6. Retirements - Chapter 6.

IV. RELEASE FROM ACTIVE DUTY (REFRAD).

Applies to OTRA officers only. A REFRAD is the transfer of an OTRA officer from active duty status rather than discharge. Can be voluntary or involuntary; see AR 600-8-24, Chapter 2.

A. **Voluntary REFRAD**. (*See* AR 600-8-24, paras 2-5 to 2-20.) Examples of Voluntary REFRAD include: Expiration of obligated service; hardship; pregnancy; separation to attend college; and separation to accept public office.

1. Personal Reasons. OTRA officers may submit applications no earlier than 12 months and no later than 6 months prior to the desired release date. UP AR 600-8-24, paras 2-5 and 2-6, the officer must:

a. Complete at least one year of current active duty commitment;

b. Complete current prescribed tour if stationed OCONUS;

c. Complete Active Duty Service Obligation (ADSO) unless granted an exception to policy.

2. Hardship. Exists when in circumstances not involving death or disability of a member of the soldier's (or spouse's) immediate family, separation will materially affect the care or support of the family by alleviating undue and genuine hardship. UP AR 600-8-24, paras 2-9 and 2-10, the officer must clearly establish:

a. The hardship is permanent and did not exist prior to entry on active duty; or

b. If the hardship existed prior to entry on active duty, the condition has since intensified and can only be alleviated by separating from active duty; and

c. Upon REFRAD, the officer will be able to eliminate or materially alleviate the condition.

3. Pregnancy. A commander with Separation Approval Authority (SAA) may release a RC officer who requests REFRAD because of pregnancy. UP AR 600-8-24, paras 2-13 and 2-14:

a. The officer's immediate commander will counsel the officer to provide information concerning the officer's rights, entitlements, and responsibilities with respect to continued active duty or separation.

b. Officers commissioned through funded programs will not be released until completion of their ADSO. When extenuating circumstances exist, officers may request a hardship separation.

c. If before the REFRAD is accomplished a medical officer determines that the pregnancy has terminated for any reason, the authority for separation no longer exists.

4. School. An officer who is serving the initial tour of active duty and who is not mission essential may request REFRAD to attend a recognized institution of higher learning. UP AR 600-8-24, paras 2-15 and 2-16:

a. Officers commissioned through funded programs will not be released until completion of their service obligations.

b. Officer's school reporting date must be in the last three months of the officer's remaining active service.

B. **Involuntary REFRAD**. (*See* AR 600-8-24, paras 2-21 to 2-38.)

1. Involuntary REFRADs may be divided into two groups: actions based upon the soldier's status and actions based upon the soldier's conduct.

a. **Status based** involuntary REFRADs include: REFRAD for reaching maximum age; REFRAD due to maximum service; and REFRAD based upon nonselection for AGR continuation.

(1) Maximum Age or Service. (*See* AR 600-8-24, paras 2-21 to 2-24.)

(a) Age. An officer will be released from active duty (unless he or she requests voluntary retirement) on the last day of the month in which he or she attains the following maximum age:

(i) For major general or brigadier general promotable – 62.

(ii) For any other commissioned officer – 60. (If the officer is within 2 years of active federal service retirement eligibility, he or she may be retained on active duty until eligible for retirement.)

(iii) For warrant officers who cannot qualify for (non-regular service) retired pay UP 10 U.S.C. §§ 12731-12740 – 62.

(iv) For warrant officers who qualify for (non-regular service) retired pay UP 10 U.S.C. §§ 12731-12740 – 60.

(v) For certain medical officers – 67. However, the service may not retain the officer to this age without the officer's consent.

(b) Service. Generally, Reserve commissioned officers will be released from active duty after completing 20 years of active service. There are several exceptions:

(i) Staff College Level School or Senior Service College members will be retained on active duty until completing 2 years of active duty following graduation.

(ii) Officers named by command selection boards will be retained on active duty up to 90 calendar days after completing assignment to the designated command position.

(iii) Lieutenant Colonels may be retained until 28 years service.

(iv) Colonels may be retained until they reach 30 years service, whichever is later.

(v) Brigadier Generals may be retained until they have 5 years in grade or reach 30 years service, whichever is later.

(vi) Major Generals may be retained until they have 5 years in grade or reach 35 years service, whichever is later.

(2) Nonselect for Active Guard Reserve (AGR) Continuation. (*See* AR 600-8-24, paras 2-25 and 2-26.)

(a) AGR officer on initial period of duty will be separated from active duty 90 days after notification of nonselection.

(b) AGR officers on active duty and within two years of retirement eligibility will ordinarily not face involuntary REFRAD until eligible for retirement.

b. **Conduct based** involuntary REFRADs include: board directed actions for poor performance or misconduct; REFRAD for civil conviction; and REFRAD for OBC failure.

(1) REFRAD by the Department of the Army Active Duty Board (DAADB). (*See* AR 600-8-24, paras 2-27 and 2-28.)

(a) IAW 10 U.S.C. § 14902, Service Secretaries shall prescribe, by regulation, procedures for the review at any time of the record of any Reserve officer to determine whether that officer should be required, because of substandard performance, misconduct, moral or professional dereliction, or national security concerns, to show cause for retention in an active status.

(b) The DAADB is the Army's tool for ensuring that only RC officers who consistently maintain high standards of efficiency, morality, performance, and professionalism are permitted to serve on active duty.

(i) Referral of a case to the DAADB may be initiated locally or at department headquarters level.

(ii) Bases for REFRAD are similar to bases for administrative elimination: substandard performance, misconduct, moral or professional dereliction, and national security reasons.

(iii) These cases involve minimal due process. The officer is notified and given an opportunity to respond/rebut. The board reviews the record and officer's response/rebuttal and then recommends either retention or release.

(iv) The initiating commander can close the case and stop the REFRAD action upon considering the officer's response/rebuttal.

(2) Civil Conviction. An officer found 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 active duty.

(a) UP AR 600-8-24, paras 2-29 and 2-30, the Secretary of the Army, or designee, or the GCMCA may immediately REFRAD an officer when the offense:

(i) Results in conviction and sentence for more than one year; or

(ii) 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.

(b) These cases involve minimal due process. The officer's case is not referred to a board; the officer is only notified and allowed an opportunity to respond.

(3) Officer Basic Course (OBC) Failure. RC officers with less than five years commissioned service will be released from active duty and discharged from his or her Reserve commission when the officer fails to meet service school standards.

(a) UP AR 600-8-24, paras 2-33 and 2-34, the failure and resulting release and discharge must be based upon:

(i) Misconduct;

(ii) Moral or professional dereliction;

(iii) Academic or leadership deficiencies; or,

(iv) Resignation from the course.

(b) Enhanced due process is warranted since action may involve more than a loss of active duty status. Officers are entitled to a faculty board because they can also lose their commission. However, officers may waive the board and accept the decision of the approval authority with respect to their release/discharge.

C. Separation Approval Authority (SAA). (*See* AR 600-8-24, para 2-2.)

1. Approval Authority varies with type of REFRAD.

2. There is limited approval authority at the installation level. The following officers may exercise SAA and grant voluntary REFRADs:

a. Commanders of units and installations having general court-martial authority;

b. General officers in command of Army Medical Centers; and

c. Commanders of:

(1) Personnel centers;

(2) Training centers;

(3) OCONUS replacement depots; or,

(4) All active Army installations authorized 4,000 or more active duty military personnel.

3. There is no denial authority at the installation level. GOSCA may generally approve voluntary REFRADs but has no authority to disapprove a voluntary request. Recommendations for disapproval must be forwarded to DA.

4. The SAA for involuntary REFRAD actions is generally reserved to the Cdr, HRC or HQDA level. In any involuntary REFRAD case, reviewing JAs must consult AR 600-8-24.

V. RESIGNATIONS.

A. Unqualified Resignations. (*See* AR 600-8-24, paras 3-5 and 3-6.)

1. Any officer on AD for more than 90 calendar days may tender an unqualified resignation, unless:

    a. Action is pending that could result in Resignation for the Good of the Service;

    b. The officer is under a suspension of favorable action;

    c. The officer is pending investigation;

    d. The officer is under charges; or

    e. Any other unfavorable or derogatory action is pending.

2. Normally, resignations will not be accepted unless, on the requested date of separation, the officer has completed his or her applicable ADSO.

3. Once submitted, a resignation may be withdrawn with HQDA approval. (*See* AR 600-8-24, para 3-2.)

B. Failure to Meet Medical Standards at Appointment. A probationary officer who did not meet medical fitness standards when accepted for appointment may submit a resignation UP AR 600-8-24, paras 3-9 and 3-10.

C. Pregnancy. (*See* AR 600-8-24, paras 3-11 and 3-12.)

1. Counseling required. Purpose is to provide information concerning rights, entitlements, and responsibilities with respect to continued AD or separation.

2. Normally, the Army will not grant a tendered resignation for pregnancy until the officer has completed her initial ADSO or any service obligation incurred from the funded program, if any, under which she was commissioned. However, when extenuating circumstances exist, the Army may grant an exception to policy if the officer accepts an indefinite appointment in the Reserves 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 characterization of service. Regardless of the characterization of service received, an officer who resigns for the good of the service in lieu of general court-martial is barred (with minor exceptions) from receiving Veteran's Affairs benefits.

2. In Lieu of General Court-Martial. (*See* AR 600-8-24, paras 3-13 and 3-14.)

a. An officer may submit a resignation for the good of the service in lieu of general court-martial when:

(1) Court-martial charges have been preferred against the officer with a view toward trial by general court-martial, or

(2) The officer is under a suspended sentence of dismissal.

3. Tender of the resignation does not preclude or suspend court-martial proceedings. However, the convening authority may not take action on findings and sentence until DA acts on the resignation request.

VI. INVOLUNTARY DISCHARGES / ELIMINATIONS.

A. Bases for Elimination or Discharge (*See* AR 600-8-24, para 4-2.):

1. Substandard Performance (*see* 10 U.S.C. § 1181(a)). Examples:

a. Lack of response to training, in that performance of duties in officer's assigned specialty is precluded or impaired to the degree of being unsatisfactory.

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. PT or weight failure.

g. Testing HIV Positive within 180 days of entering active duty.

h. Failure to establish an adequate Family Care Plan.

2. Misconduct, Moral or Professional Dereliction, or in the Interests of National Security (*see* 10 U.S.C. § 1181(b)). 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.

h. Drug dependence or misconduct involving drugs. (Note: In cases involving drugs, the command must initiate elimination action.).

3. Derogatory Information (*see* AR 600-8-24, para 4-2c). The Army's receipt of, or filing of, unfavorable information relating to an officer may result in the initiation of an elimination action.

a. Required record review is triggered by:

(1) Punishment under Article 15, UCMJ;

(2) Conviction by court-martial;

(3) Relief for cause OER;

(4) OMPF-filed administrative reprimand; or,

(5) 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.

4. Homosexual Conduct (*see* AR 600-8-24, paras 4-2b(6), 4-22, and 4-23; 10 U.S.C. § 654) is grounds for separation from the military services. Homosexual conduct includes:

a. Homosexual acts;

b. Homosexual statements; or

c. Homosexual marriage.

B. Rights and Procedural Issues. (*See* DOD Instruction 1332.40, E3.1; s*ee also* 10 U.S.C. § 1185). "The Secretary of each Military Department shall prescribe procedures for the initiation of separation recommendations." However, the Department of Defense Instruction's procedures for separation actions form the basis for each service's regulations. The General Officer Show Cause Authority (GOSCA) [a.k.a. Show Cause Authority (SCA)] generally initiates the separation action.

1. After reviewing "all information presented about the case," the GOSCA or SCA shall either close the case in which an officer should not be required to show cause for retention or "report the matter for referral to a Board of Inquiry." (*See* DOD Instruction 1332.40, E3.2.).

a. Officers may be considered for separation for one or more reasons; however, separate findings are required for each.

b. There are several limits on show cause actions (*See* AR 600-8-24, para 4-4; 10 U.S.C. § 1161).

(1) 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.

(2) Likewise, officers will not be required to show cause for conduct that has been the subject of judicial proceedings that resulted in acquittal.

(3) Subsequent conduct:

(a) In substandard performance cases, if an officer showing cause for poor duty performance is retained, she cannot again be required to show cause for the same reasons within a one year period; and

(b) The officer is entitled to honorable discharge if the **sole** reason for elimination is substandard performance.

(c) In cases of misconduct, moral or professional dereliction, or in the interest of national security 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 of the previous board unless the findings and recommendation of the Board are determined to have been the result of fraud or collusion.

2. Notification by SCA.

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 IAW 10 U.S.C. § 1186;

(3) Submit a request for Retirement in Lieu of Elimination, if eligible, IAW 10 U.S.C. § 1186.

(4) Appear before a Board of Inquiry (BOI), if eligible, IAW 10 U.S.C. §§ 1182 and 14903.

c. Without regard to the officer's probationary or nonprobationary status, he or she is entitled to submit a written response or rebuttal to the headquarters that initiated the show cause action. At any point of the process, the decision to retain the officer stops the show cause action.

3. Officer is provided an opportunity to provide a rebuttal to SCA initiating the action.

4. The characterization of service for officers facing show cause actions may be Honorable, General, or Under Other Than Honorable Conditions.

    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.

5. Decision to retain at any point stops action.

6. Probationary officers are generally afforded less due process.

    a. Probationary officer not entitled to board unless OTH discharge is recommended. *See also* Air Force Instruction 36-3206, Administrative Discharge Procedures for Commissioned Officers (*Deleting previous requirement for* Probationary Officer Discharge Board).

    b. If officer loses probationary status during processing, must process as nonprobationary.

7. Nonprobationary officers must be afforded an opportunity to show cause for retention. (10 U.S.C. § 14904.)

    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 stops the show cause action.

    b. The officer is referred to a Board of Inquiry (BOI). If the BOI recommends the officer's retention, the action is terminated. In all other cases, the case is referred to HQDA.

c. HQDA next appoints a Board of Review (BOR) to review the BOI proceedings. If the BOR recommends the officer's retention, the action is terminated. In all other cases, the case is referred to the Secretary of the Army.

d. The Secretary of the Army takes action in the officer's case.

8. Referral to Board of Inquiry (BOI) – full due process. (10 U.S.C. §§ 1182 and 14906; DODD 1332.40, paras E4.1 and E4.2.)

a. Composition of the BOI.

(1) Locally appointed by the respondent officer's GOSCA.

(2) Comprised of at least three voting officers. The members must be:

(a) On Active Duty List or Reserve Active Status List;

(b) From the same military service as respondent; and

(c) Senior in grade and rank to the respondent. Membership was previously limited to officers in the grade of Colonel (O-6). Statutory changes permit the military departments to use officers in the grade of O-5 for two of the three membership positions. (*See*, NDAA for FY 2002.). President shall be a Colonel or higher.

(d) Additionally, if the respondent is an OTRA officer, a reserve component member must serve on the board.

(e) When the officer is a female, minority, or member of a special branch, the board membership will, upon the officer's written request, include a female, minority, or special branch member. Such request must be made within seven days or the notification.

(3) Other Participants. The board will also include a legal advisor, a recorder, and respondent's counsel, all of whom are nonvoting members.

b. Function. The BOI "shall give a fair and impartial hearing to a respondent. . . . The hearing shall provide a forum for why the officer concerned thinks the contemplated action should not be taken." (DODD 1332.40, para E3.3.3.)

c. Respondents afforded substantial due process. At the Board of Inquiry, the officer:

(1) Will be provided with a military counsel and may hire civilian representation;

(2) Will have a reasonable time to prepare his case, but in no case will he or she have less than 30 days;

(3) Will be permitted to be present at all stages of the proceedings, and have full access to all of the records, except when the Secretary determines that national security requires the protection of classified documents;

(4) May challenge any member of the Board for cause;

(5) May present documents from his service record, letters, depositions, sworn or unsworn statements, affidavits, evidence, and may require the production of witnesses deemed to be reasonably available;

(6) May cross examine any witness brought before the board; and

(7) May elect to testify or may remain silent. If the officer testifies, he or she may be required to submit to examination by the board as to any matter concerning the testimony, but not in contravention of the UCMJ, Article 31. (*See* AR 600-8-24, para 4-11.)

d. 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, case is forwarded to the GOSCA who will "report" the case to a Board of Review.

9. Board of Review (BOR) – Limited due process. (10 U.S.C. § 1183).

a. Convened at DA level.

b. Composition. Same composition as a BOI. Members must be senior in rank to the respondent. The BOR shall review the entire record of the BOI.

c. Recommends either retention or elimination.

(1) If the respondent "shows cause" or establishes that retention is warranted, the case is closed.

d. If the documentation establishes that retention is not warranted, the BOR recommends separation and the appropriate characterization for the respondent's discharge certificate, and then forwards the case to Secretary for final action.

10. Action by Service Secretary (10 U.S.C. §1184). The Secretary has two choices: retention or separation. The Secretary's decision is final.

11. Processing an Option Elected by Officer.

a. Resignation in Lieu of Elimination (Regulatory).

b. Request for Discharge (RA) (10 U.S.C. § 1186).

c. Retirement in Lieu of Elimination (10 U.S.C. § 1186).

VII. MISCELLANEOUS SEPARATIONS.

A. AR 600-8-24, Chapter 5, prescribes disposition and procedures for miscellaneous types of separations whereby an officer may be dismissed, released, separated and discharged from AD. The different service regulations do not all include the same miscellaneous bases for separation.

B. Examples of Miscellaneous Separations include:

1. Lack of jurisdiction – or cases in which the officer obtains a court writ ordering release from Active Duty.

2. Chaplain's loss of professional qualifications - if the command did not initiate elimination action under Chapter 4, para 4-2b. (*See* AR 600-8-24, para 5-5; *see also* 10 U.S.C. §§ 643 and 14901; DODD 1332.31; AFI36-3207, Section 3.7; SECNAVINST 1920.6C, Encl (3)).

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. (AR 600-8-24, para 5-9; AFI 36-3207, Section 3.4; SECNAVINST 1920.6C, Encl (3)).

4. Second Lieutenant and Warrant Officer (WO1) nonselected for promotion. (*See* 10 U.S.C. § 630; AR 600-8-24, para 5-11; AFI 36-3207, Section 3.5; SECNAVINST 1920.6C, Encl (3)).

5. Conviction by foreign tribunal – in cases when sentence includes confinement of greater than 6 months. (AR 600-8-24, para 5-13).

6. Dropped From the Rolls (DFR) – AD or retired when confined, absent without leave (AWOL), or loses retired pay. (AR 600-8-24, para 5-15; AFI 36-3207, Section 4; SECNAVINST 1920.6C, Encl (4)).

7. Dismissed by General Court-Martial – after appellate review is complete. (AR 600-8-24, para 5-17.)

C. Procedures. Procedures and due process requirements vary for each of the assorted separations.

VIII. RETIREMENT.

1. Voluntary Retirements.

a. Voluntary Retirement (VR) – General Court-Martial Convening Authority (GCMCA) approval. The Army is the only service to include voluntary retirements in its officer separation regulation. This area, however, is primarily governed by statute. *See* 10 U.S.C. § 1186.

b. VR 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 Review Board. (*See* AR 600-8-24, para 4-24c; AFI 36-3207, Section 2.4; SECNAVINST 1920.6C, Encl (6)).

d. Retirement in Lieu of PCS - at least 19 years, 6 months time in service; must submit within 30 days of notice of PCS.

2. Involuntary Retirements.

a. Mandatory Retirement - maximum age or service.

b. Selective Early Retirement - based on selection by SERB.

(1) 10 U.S.C. § 638 provides authority for the Secretary of the Army to convene boards to select officers for retirement before their mandatory retirement date. (*See also* AR 600-8-24, para 6-29.) Board may select no more than 30% of the officers in the following categories:

(a) Colonel or Navy Captain (06) with four (4) years time in grade (TIG);

(b) Lieutenant Colonel or Commander (05) twice nonselected for promotion to Colonel or Captain; and

(c) Officers, below Major or Lieutenant Commander (04), who are not promotable and retirement eligible or within two (2) years of eligibility.

(2) 10 U.S.C. § 638a modifies SERB eligibility rules during an authorized drawdown (1 October 1990 to 31 December 2001). In a drawdown, the categories include:

(a) 06 with two (2) years TIG;

(b) 05 **once** nonselected for promotion to 06; and

(c) Drawdown officers below 06 who are not promotable and retirement eligible or within two (2) years of eligibility.

B. Retired Grade (10 U.S.C. § 1370).

1. Minimum TIG Requirements (Voluntary Retirements).

a. Six months for 04 and below.

b. Three years for 05 through Major General or Rear Admiral (08). The President may waive this requirement in individual cases involving extreme hardship or exceptional or unusual circumstances.

c. Under previous drawdown authority, the Secretary of the Army could reduce the TIG requirement to 2 years for 05 and 06.

2. Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA (M&RA)) or Deputy Assistant Secretary of the Army (Review Boards) (DASA-RB) makes satisfactory grade determination, as appropriate. (*See* AR 600-8-24, para 4-24c; SECNAVINST 1920.6C, Encl (6)).

3. Special Appointment to Grades O-9 and O-10.

C. Retired Pay (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 three years.)

3. Determining the retired pay "multiplier." (10 U.S.C. § 1409)

a. Member before 1 August 1986 – "multiplier" equals 2 ½ percent per year.

b. Member after 31 July 1986 – "multiplier" equals 2½ percent per year minus 1 percent for each year of service less than 30. For a twenty-year retirement, officer will receive 40%. **NOTE**: As a result of the FY 2000 Defense Authorization Act, 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).

IX. FINANCIAL CONSIDERATIONS.

A. Separation Pay for Involuntary Separations (DOD Instruction 1332.29, part 3).

1. Basic eligibility requirements:

a. Six years active duty;

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 reduction in force (RIF).

b. Computation.

(1) $30,000 ceiling eliminated.

(2) Formula: 10% of annual base pay times the number of years in service.

(3) Example. CPT with 8 years service. (.10 x (12 x $3,703.00 (monthly base pay))) x 8 (years in service) = $35,548.80

3. Half Separation Pay. Officers who are involuntarily separated for cause **may** receive half separation pay.

a. Homosexuality.

b. Drug or alcohol abuse rehabilitation failure.

c. For the convenience of the government.

d. Security.

4. Officers involuntarily separated due to substandard performance or misconduct **do not** receive separation pay.

B. Special Separation Benefit (SSB) (10 U.S.C. § 1174a) and Voluntary Separation Incentive (VSI) (10 U.S.C. § 1175).

1. Special Separation Benefit (SSB) and Voluntary Separation Incentive (VSI). [**NOTE:** The DOD's temporary drawdown program was not renewed by the National Defense Appropriations Act for FY 2002 and therefore terminated on 31 December 2002. These programs may be resurrected, subject to the availability of future appropriations and the need to reduce Army size.]

a. Special Separation Benefit (SSB). (*See* 10 U.S.C. § 1174a.)

(1) Provided for a one-time lump sum payment.

(2) Formula: 15% of annual base pay times the number of years in service.

(3) Example: CPT X has eight (8) years of service. CPT X's pre-tax payment would be (.15 x (12 x $4,273.50 (last month base pay)) x 8 (years in service) or $61,538.40.

b. Voluntary Separation Incentive (VSI). (*See* 10 U.S.C. § 1175.)

(1) Provided for annual payments for twice the number of years of active duty.

(2) Formula: 2.5% of annual base pay times the number of years in service paid annually for twice the number of years in service.

(3) Example: CPT Y has eight (8) years of service. During the next 16 years, he will receive $164,102.40 paid at an annual pre-tax rate of $10,256.40. Each of the 16 installments would be (.025 x (12 x $4,273.50 (last month's base pay))) x 8 (years in service) or $10,256.40.

c. Eligibility Rules for SSB and VSI. To collect benefits, an officer must:

(1) Be a RA or RC officer on the ADL;

(2) Have between six (6) and 20 years of service;

(3) Have five years of continuous AD or full time Guard duty immediately preceding the date of separation;

(4) Not be eligible for retired pay;

(5) Execute an agreement to serve in the Reserves; and,

(6) Meet other requirements established by the Secretary.

d. Other Limitations on SSB and VSI.

(1) Acceptance of DOD civilian position within 180 days results in loss of SSB or VSI.

(2) Disability/retired pay set-off. SSB/VSI recipients were permitted to later convert to the early retirement program. Retirement pay would then have been set-off by amounts received under SSB/VSI. (*See* 10 U.S.C. § 1174 (h).)

(3) Subject to the availability of appropriations.

C. Recoupment (10 U.S.C. § 2005).

1. Policy. Individuals who participate in certain advanced education programs and fail to complete their educational requirements or military service obligations are subject to recoupment.

a. Air Force policy is to not recoup benefits in homosexual conduct cases unless the conduct results in the issuance of an Other Than Honorable Discharge or the member engages in such conduct for the purpose of seeking separation. (AFI 36-3207, Sections 1.16-1.18.)

b. Army policy is to attempt recoupment in all cases. The Secretary directs recoupment in most cases.

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.

X. OTHER CONSIDERATIONS.

A. Selective Continuation on Active Duty (SELCON). (*See* 10 U.S.C. § 637.)

1. Applies to RA **and** OTRA officers.

2. Service Secretary may (based on the needs of the service for specific skills) convene selective continuation boards to retain twice nonselected officers who wish to remain on active duty. Captain or Navy Lieutenant may be retained until 20 years time in service (TIS); Major or Lieutenant Commander until 24 years TIS, unless thereafter promoted AZ.

3. NDAA for FY 2002, section 505(d), extended SELCON to OTRA officers.

a. Major or Lieutenant Commander with less than 14 years TIS are not required to be SELCON'd until 20 years. SELCON increments of three years.

b. Major or Lieutenant Commander with more than 14 years TIS will normally be SELCON'd until 20 years. Officers who refuse to accept SELCON through retirement eligibility are not authorized to receive Separation Pay.

c. Non-SELCON'd officers will be separated within seven months.

B. Involuntary Separation of Officers with Access to Sensitive Programs. (AR 600-8-24, para 1-19.)

1. Coordination with supporting security officials required. Separation will not occur unless the security official concurs with the action.

2. Applies to officers in the following categories:

a. Knowledge of sensitive compartmented information (SCI).

b. Nuclear Weapon Personnel Reliability Program assignment.

c. Knowledge of Single Integrated Operational Plan—Extremely Sensitive Information (SIOP-ESI).

d. Special Access Program (SAP) knowledge.

e. Presidential Support assignment.

C. Separation in a Foreign Country. (AR 600-8-24, para 1-29.)

1. Normally, officers are not separated in OCONUS (Outside the Continental United States) commands. They are returned to the United States and processed for final separation at CONUS-based separation/transfer points.

2. Exceptions.

a. Officer requests separation in a foreign country and the 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 command (MACOM) may disapprove the request for overseas separation.

b. Officers confined in a foreign penal institution pursuant to the sentence of a foreign court.

(1) DA must approve separation during confinement.

(2) Foreign authorities must take final action on the case before separation.

(3) The foreign government concerned must consent to the officer's separation in its territory.

D. Referral for Physical Disability Evaluation. (AR 600-8-24, para 1-24.)

1. Triggered when it is determined that an officer being processed for REFRAD, separation, retirement, or elimination has a medical impairment that does not meet medical retention standards.

2. Officers under investigation for an offense chargeable under the Uniform Code of Military Justice (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.

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 REFRADs or involuntary elimination under chapter 4, AR 600-8-24, or who request resignation for the good of the service or separation, resignation or retirement in lieu of elimination, will be processed under both AR 600-8-24 and the medical/physical evaluation board system.

a. If the physical disability evaluation results in a finding of physical fitness, the Army Physical Disability Agency will approve the findings for the Secretary of the Army and forward them for processing with the AR 600-8-24 action.

b. If the physical disability evaluation results in a finding of physical unfitness, both actions will be forwarded to the Secretary of the Army for determination of appropriate disposition.

4. When an officer is processed for separation or retirement for reasons other than those indicated above, physical disability processing takes precedence.

XI. COMMANDER'S RESPONSIBILITIES.

A. Ensuring proper documentation.

B. Ensure completion of counseling requirements. For instance, AFI 36-3207, Section 2.1, requires an officer's commander or supervisor to counsel the officer regarding the interests of both the officer and the Air Force. UP AR 600-8-24, para 1-13, the Army requirements are more specific.

1. Required for commissioned officers with less than 10 years active federal commissioned service.

2. Triggered when such officers submit a request for voluntary REFRAD or an unqualified resignation.

3. Counseling is by the first colonel in the officer's chain of command or supervision. Chaplains, judge advocates, 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.

4. Counseling must include the following:

a. Advice concerning the opportunities available in the military.

b. A 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 U.S. Army Reserve. RC officers will be encouraged to retain their commissioned status in the U.S. Army Reserve.

g. The addresses of agencies that can provide the officer with information about U.S. Army Reserve career opportunities. See Table 1-1.

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 active duty?

2. Should the officer be eligible for reappointment or recall to active duty at some later time?

3. Should the officer lose his or her commission?

XII. CONCLUSION.

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CHAPTER G

55TH GRADUATE COURSE

MILITARY PERSONNEL LAW

ENLISTED ADMINISTRATIVE SEPARATIONS

Outline of Instruction

I. REFERENCES.

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

B. AR 600-9, The Army Weight Control Program.

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

D. AR 601-280, Army Retention Program.

E. **AR 635-200, Active Duty Enlisted Administrative Separations**.

F. AR 15-6, Procedure for Investigating Officers and Boards of Officers.

II. INTRODUCTION.

A. The topic of enlisted administrative separations covers both *favorable* and *unfavorable* separations. Examples of favorable separations include retirement actions and honorable discharge separations at the expiration of a Soldier's service obligation. Examples of unfavorable separations include separation based on misconduct. Enlisted administrative separations are also either *involuntary* (initiated by the chain-of-command) or *voluntary* (initiated by the Soldier).

B. Our class discussion will focus on the separations you are most likely to deal with as a first-tour judge advocate. When analyzing enlisted administrative separations, think of the following four questions:

1. *What kind of discharge* can the Soldier receive? There are different types of administrative discharges, and often the type of discharge an enlisted Soldier can receive is contingent upon the reason for the enlisted Soldier's separation.

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

3. *What is the reason* for the separation action (e.g., overweight, misconduct, homosexual conduct)? Is the separation voluntary or involuntary? The various bases for enlisted administrative separations are generally found in Army Regulation (AR) 635-200 under different chapter headings (e.g., chapter 14 deals with misconduct, and chapter 15 deals with homosexual conduct). Hence separation actions are often called "chapters."

4. *What procedural steps* are required to separate the enlisted Soldier? Various factors (e.g., the reason for the separation, the number of years the enlisted Soldier has in the Army) determine what sort of procedural requirements must be followed for the separation action.

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

A. **Secretary of the Army**. Virtually unlimited authority.

B. **GCMCA** (General Court-Martial Convening Authority). All chapters, except Secretary of the Army plenary authority cases (para 5-3), reduction in force, strength limitations, or budgetary constraints (para 16-7); QMP (chap 19); voluntary separations of Soldiers serving indefinite enlistments (para 4-4); conviction by a foreign court (paras 1-41a and d, para 14-9a); and early release from AD of RC personnel serving AGR tours under Title 10 (para 5-15).

C. **General officer** (GO) **in command with a legal advisor**. The same as GCMCA *except* secretarial authority cases (para 5-3), lack of jurisdiction (para 5-9), and discharge in lieu of court-martial (Chap 10).

D. **SPCMCA** (Special Court-Martial Convening Authority).

1. Chap 5, Convenience of the Government (less 5-9, Lack of Jurisdiction).

2. Chap 6, Dependency or Hardship.

3. Chap 7, Defective Enlistments, Reenlistments, and Extensions (except OTH).

4. Chap 8, Pregnancy.

5. Chap 9, Alcohol or Other Drug Abuse Rehabilitation Failure.

6. Chap 10, Discharge in Lieu of Court-Martial (if delegated, at a post with a PCF, for AWOLs; may only approve before trial, but may never disapprove)

7. Chap 11, Entry Level Performance and Conduct.

8. Chap 12, Retirement.

9. Chap 13, Unsatisfactory Performance.

10. Chap 14, Misconduct (only with a General Discharge; Honorable or OTH goes to GCMCA or GO in command).

11. Chap 15, Homosexual Conduct (unless OTH Discharge warranted).

12. Chap 16, Selected Changes in Service Obligations.

13. Chap 18, Failure to Meet Body Fat Standards (notification cases only).

E. **LTC-level commander with a legal advisor** (includes MAJ(P) assigned to LTC position; does not include MAJ or MAJ(P) Acting Commander). Only the following:

1. Chap 8, Pregnancy (voluntary discharge).

2. Chap 9, Alcohol or Other Drug Abuse Rehabilitation Failure (notification cases only).

3. Chap 11, Entry Level Performance and Conduct.

4. Chap 13, Unsatisfactory Performance (notification cases only).

5. Chap 16, Selected Changes in Service Obligations (voluntary).

6. Chap 18, Failure to Meet Body Fat Standards (notification cases only).

F. Only HQDA may involuntarily discharge a Soldier with 18 or more years of active Federal service,

G. The separation authority's three questions.

1. Sufficient evidence?

a. Burden on the government, not the Soldier (or "respondent").

b. **Preponderance** (50% +), *not* higher criminal standard of proof beyond a reasonable doubt.

2. Retain or separate?

3. Characterization of service?

IV. CHARACTERIZATION OF SERVICE OR TYPE OF DISCHARGE.

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

AR 635-200, para 3-5a.

A. Overview.

1. Honorable.

2. General (under honorable conditions).

3. Under Other Than Honorable Conditions.

4. Entry Level status (uncharacterized).

5. Order of release from the custody and control of the Army by reason of void enlistment or induction.

6. [Punitive discharge (Dishonorable or Bad Conduct discharges). Only as a result of approved court-martial sentence.]

B. **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 to the pattern of behavior, not isolated incidents.

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

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

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C. **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 it. Never permitted for ETS.

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

4. Impact on benefits.

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

b. No education benefits. Money paid in to Montgomery GI Bill is forfeited.

c. Many states will not pay unemployment compensation.

d. "I understand that I may expect to encounter substantial prejudice in civilian life."

5. No automatic upgrading of discharges. Upgrading requires application to the Army Board for Correction of Military Records (ABCMR) or the Army Discharge Review Board (ADRB), and the ultimate success rate is very low.

D. **Under Other Than Honorable (OTH) Conditions**.

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

2. Board hearing required, unless waived by the Soldier or the separation is voluntary (i.e., Chap 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 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. Chances of success are very low.

E. **Entry Level** status (uncharacterized).

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). *See* 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.

F. Release from custody and control of the Army (para 3-9).

1. Usually no characterization of service, because the person never acquired military status. Exception for constructive enlistment.

2. Very rare; used only for void enlistments.

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

V. PROCEDURAL CATEGORIES AND ADMINISTRATIVE CONSIDERATIONS.

A. Overview.

1. Soldier initiated (i.e., voluntary).

2. Notification cases.

3. Board hearing cases.

4. Administrative double jeopardy.

5. Separation pay.

B. Soldier initiated (i.e., voluntary).

1. Procedure.

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

b. Forwarded through command channels to approval authority.

c. Limited procedural rights for the Soldier.

2. Applicable separation chapters.

a. Chap 6, Dependency or Hardship.

b. Chap 8, Enlisted Women – Pregnancy.

c. Chap 10, In Lieu of Trial by Court-Martial.

d. Most of Chap 16, Selected Changes in Service Obligations (includes Voluntary Separation Incentive (VSI) and Special Separation Benefit (SSB)).

C. **Notification** cases.

1. Procedure. Paras 2-2 and 2-3.

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

(1) Counseling always ***required*** under (para 1-16):

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

(b) Personality disorder, para 5-13.

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

(d) Entry Level Performance and Conduct, Chap 11.

(e) Unsatisfactory Performance, Chap 13.

(f) Minor disciplinary infractions or a pattern of misconduct, para 14-12a or 12b.

(g) Overweight, Chap 18.

(2) Rehabilitative transfer generally ***required*** for separations under (1)(d) (e) & (f) above.

(a) Trainees recycled between companies or platoons at least once.

(b) Others recycled between battalion-sized units or larger at least once, with at least three months at each unit.

(c) PCS only for “meritorious cases” where Soldier is a “distinct asset” to the Army.

(d) Waiver authorized if transfer would serve no useful purpose or would not produce a quality Soldier. Examples:

(i) Two consecutive APFT failures.

(ii) Pregnancy while in entry-level status.

(iii) Highly disruptive or suicidal.

(iv) Resistance to rehabilitative efforts.

(v) Small installation or remote location.

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

b. Commander notifies Soldier in writing that Soldier's separation is recommended. Soldier must sign acknowledgment of receipt.

(1) Cite specific allegations and provisions of regulation that authorize separation.

(2) Least favorable characterization of service Soldier could receive.

(3) Right to consult with counsel.

(4) Right to submit statements.

(5) Right to obtain copies of all matters going to separation authority.

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

c. Soldier may consult with counsel; submit matters within seven duty days (or request extension).

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

e. Legal review.

(1) No *requirement* for legal review unless ADAPCP limited use evidence (typically, Chap 9 will include some Chap 13 or 14 separations) involved.

(2) As a practical matter, most SJA offices try to do a legal review twice: first, before packet is presented to Soldier; second, before final action goes to the separation authority.

2. Notification procedure alone may be used when:

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

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

c. Regulation permits for:

(1) Some provisions of Chap 5, Convenience of the Government.

(2) Chap 7, Defective Enlistments/Reenlistments and Extensions.

(3) Chap 9, Alcohol or Other Drug Abuse Rehabilitation Failure.

(4) Chap 11, Entry Level Performance and Conduct.

(5) Chap 13, Unsatisfactory Performance.

(6) Chap 14, Misconduct, but only when service should be characterized as General.

(7) Chap 18, Failure to Meet Body Fat Standards.

D. **Board hearing cases**.

1. Procedure. Paras 2-4 through 2-12.

a. Soldier entitled to all rights listed under Notification Procedure, *supra*. Added rights:

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

(2) Right to a board hearing.

(3) Right to submit a conditional waiver.

(4) **Fifteen-day notice** before the hearing.

(5) Challenge board members for cause.

(6) Request witnesses.

(7) Submit matters to the board.

(8) Question witnesses.

(9) Choose whether or not to submit to examination by the board.

(10) Argue to the board.

b. Board hearing.

(1) Composition. Para 2-7. Three or more voting members, SFC or above, all senior to the respondent. Majority commissioned or warrant officers. One must be 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.

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

(a) See AR 15-6.

(b) Standard for admission of evidence: relevant and competent.

(c) Limited privileges preserved.

(d) Coerced statements excluded.

(e) Bad faith unlawful searches by military members excluded.

(f) Polygraph evidence admitted only by agreement of the parties.

(3) Government represented by a "Recorder."

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

(5) 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.

(6) Voting members meet in closed session and return findings and recommendations. Be sure board answers the required questions; use a findings worksheet as you would in a court-martial.

c. Final action. Para 2-6.

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

(a) No *requirement* for reviewing officer to be a JA unless:

(i) OTH recommended.

(ii) Soldier identified specific legal issues for consideration by separation authority.

(iii) Limited use evidence was introduced.

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

(2) Separation authority's action may be no less favorable than the board's recommendations, para 2-6d, unless separation authority submits a request for separation under para 5-3 to HQDA for action by the Secretary of the Army. Para 2-6e.

(3) Separation authority may suspend execution of an approved separation (except for fraudulent entry or homosexual conduct) for up to 12 months. Para 1-18. Upon satisfactory completion of the probation period (or earlier) separation authority will cancel execution of the approved separation. If there is further misconduct, may be basis for new separation action, disciplinary action, or vacation of the suspension.

2. Required.

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

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

c. Any separation under Chap 15, Homosexual Conduct.

E. **Administrative double jeopardy** (para 1-17). Soldiers will not be processed for administrative discharge under Chaps 11, 13, 14, 15, 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.

F. **Separation pay**. DoD Instruction 1332.29.

1. General prerequisites.

a. More than six but less than twenty years service immediately before discharge.

b. Agrees to enter Ready Reserve for three 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 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, homosexual conduct, alcohol or drug abuse rehabilitation failure, or security.

c. One half of the formula in para F.2.c. above.

4. No separation pay.

a. Any Soldier who *requests* discharge (i.e., Chap 6 (Dependency or Hardship), Chap 8 (Pregnancy), Chap 10 (In Lieu of Trial by Court-Martial)).

b. Any separation during first term of enlistment.

c. Any separation under Chap 13 (Unsatisfactory Performance), Chap 14 (Misconduct), dropped from the roles, or court-martial sentence.

d. Any OTH discharge.

VI. COMMAND-INITIATED (INVOLUNTARY) SEPARATIONS.

A. **Convenience of the Government**, Chap 5.

1. Secretarial Plenary Authority (Chap 5, Section I).

a. Requires DA approval.

b. Honorable, general, or entry level (uncharacterized) discharge.

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

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

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

2. Involuntary Separation Due to Parenthood, para 5-8.

a. Basis. "Parental obligations interfere with fulfillment of military responsibilities [such as] repeated absenteeism, late for work, inability to participate in field training exercises or perform special duties such as CQ and Staff Duty NCO, and nonavailability for worldwide assignment or deployment according to the needs of the Army." Para 5-8a.

b. Counseling with a view towards separation required.

c. Honorable, general, or entry level (uncharacterized) discharge.

d. Separation authority: SPCMCA.

e. 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.

3. Personality Disorder, para 5-13.

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

b. Psychiatrist or doctoral-level clinical psychologist must make diagnosis.

c. Counseling and opportunity to overcome deficiency required.

d. Honorable or entry-level discharge required under most circumstances. General discharge available only for Soldier who has GCM conviction, or more than one SPCM conviction, in current enlistment.

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

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

b. Psychiatrist or doctoral-level clinical psychologist must make diagnosis.

c. Counseling and opportunity to overcome deficiency required.

d. Honorable discharge or entry-level appropriate under most circumstances. General discharge available with notice procedures, but normally not appropriate.

5. Other bases within Chap 5: surviving sons and daughters, 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 separation to further education.

B. **Defective Enlistments, Reenlistments, and Extensions**, Chap 7.

1. Fraudulent entry.

a. Procurement of 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 three tests.

(1) Is information disqualifying?

(2) Is the apparently 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, pre-service homosexual conduct, or other disqualification, or misrepresentation of intent with regard to legal custody of children.

d. Honorable, general, under other than honorable conditions, or entry level separation.

2. Minority.

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

b. Discharge for minority is upon application of parents if Soldier is under 18 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 Service and the disqualification may be waived.

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

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 which cannot be fulfilled by the Army, and Soldier did not knowingly take part in creation of the unfulfilled commitment.

c. Honorable discharge or entry level separation.

C. **Alcohol or Other Drug Abuse Rehabilitation Failure**, Chap 9.

1. Basis. Soldier is enrolled in ASAP (formerly ADAPCP) and the commander, after consultation with the rehabilitation team, determines:

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

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

2. Mandatory initiation when a Soldier is declared an alcohol or other drug abuse rehabilitation failure. AR 635-200, para 9-2c, and AR 600-85, para 5-5c.

3. Notification procedure.

4. Separation authority. LTC-level commander (but SPCMCA for board cases).

5. Honorable, general, or entry level separation. But honorable discharge required in any case in which the government initially introduces limited use evidence as defined by AR 600-85.

D. **Entry Level Performance and Conduct**, Chap 11.

1. Basis. Unsatisfactory performance or minor disciplinary infractions evidenced by inability, lack of reasonable effort, failure to adapt to military environment, or pregnancy which precludes full participation in training required to earn MOS (Military Occupational Specialty).

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 essential.

4. Rehabilitative transfer required. May be waived by separation authority (*should only be waived in limited circumstances*). Para 1-16d.

5. Notification procedure.

6. Description of separation.

   a. Soldiers who have completed Initial Entry Training or have been awarded a Military Occupation Specialty will be transferred to the Individual Ready Reserve unless the Soldier has no potential for useful service under full mobilization.

   b. All other Soldiers separated under Chap 11 will receive an entry level separation with no characterization of service.

7. Separation authority. LTC-level commander for non-board cases. SPCMCA for board cases.

E. **Unsatisfactory Performance**, Chap 13.

1. For Soldiers beyond entry level status.

2. Prior counseling with a view toward separation required.

3. Rehabilitative transfer required. May be waived by separation authority (*should only be waived in limited circumstances*). Para 1-16d.

4. Mandatory grounds. Para 13-2. Unless the commander chooses to impose a bar, separation must be initiated for Soldiers who:

a. Without medical reason fails two successive APFTs (*see also* AR 350-1).

b. Are eliminated for cause from an NCOES course.

5. Notification procedure.

6. Description of separation.

a. Characterization: Honorable or General.

b. Soldiers who have completed IET or have been awarded a MOS will not necessarily be separated.

(1) If the characterization is Honorable, the Soldier is transferred to the IRR.

(2) 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).

7. Separation authority. LTC-level commander for non-board cases. SPCMCA for board cases.

F. **Misconduct**, Chap 14.

1. Overview. Chap 14 includes four separate grounds for separation:

a. Conviction by a civil court.

b. Pattern of minor military disciplinary infractions.

c. Pattern of misconduct (military or civilian).

d. Commission of a serious offense.

2. Separation authority.

a. GCMCA or general officer 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) An administrative separation board recommends an entry level separation or general discharge.

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

3. Conviction by a civil court. Para 14-5.

a. May be considered for discharge when initially convicted by civil authorities, 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. If separation action is initiated by the immediate commander, the case will be processed through the chain of command to the separation authority.

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

d. Retention should be considered only in exceptionally meritorious cases when clearly in the best interest 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 required.

c. Rehabilitative transfer or waiver required.

5. Pattern of Misconduct. Para 14-12b.

a. Discreditable involvement with civil or military authorities.

b. Conduct prejudicial to good order and discipline.

c. Prior counseling with a view toward separation required.

d. Rehabilitative transfer or waiver required.

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 MCM.

b. AWOL or desertion.

c. 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 UP AR 635-200, Chap 9, Alcohol or Other Drug Abuse Rehabilitation Failure.

(2) Criteria. AR 635-200, para 14-12c.

(a) All Soldiers identified as illegal drug abusers, with the exception of self-referrals to ASAP, will be processed for separation.

(b) Note that AR 600-85 requires initiation of separation proceedings, but does not mandate discharge. The separation action will be initiated and processed through the chain of command to the separation authority, who will exercise discretion, on a case-by-case basis, in directing retention or discharge of the Soldier.

(c) All medically-diagnosed drug dependent Soldiers ***will*** be processed for separation after detox.

(d) 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. AR 600-85, para 1-35b.

7. Procedure.

a. Administrative board procedure - if OTH warranted.

b. Notification procedure - if OTH is not warranted.

8. Description of separation. Honorable, general, OTH, or entry level separation.

G. **Discharge for Homosexual Conduct**, Chap 15.

1. Grounds for Separation. National Defense Authorization Act FY 94 (10 U.S.C. § 654) (Effective 30 Nov 93). Codifies homosexual exclusion policy. Requires separation of a Soldier who:

   a. "... has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts,"

   b. "... has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding ... that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts," or

   c. "... has married or attempted to marry a person known to be of the same biological sex."

2. Definitions. Several definitions are key to understanding the legislation and its implementation. Some of the definitions are found in the statute; others are provided in the implementing DoD guidance.

   a. Homosexual means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms “gay” and “lesbian.”

   b. Homosexual conduct means a homosexual act, a statement by the Soldier that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

   c. Homosexual act means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purposes of satisfying sexual desires; and any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in such bodily contact.

   d. Homosexual statement means language or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. Includes statement “I have a homosexual orientation.”

e. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

3. Accessions.

a. Don't ask. Applicants will not be asked to reveal their sexual orientation or whether they have engaged in homosexual conduct.

b. All applicants will be informed of the separation policy for homosexual conduct.

c. If applicant volunteers homosexual orientation, or if recruiter comes across independent evidence of homosexual acts, applicant will be rejected.

4. Investigations.

a. Only a commander in the chain of command of a suspected homosexual can authorize an investigation or inquiry.

b. Investigations may be initiated only when there is "credible information that there is a basis for discharge."

c. Credible Information.

(1) Exists "when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion." AR 600-20, para 4-19d(2)(a).

(2) Does not exist, for example, when "the only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct." AR 600-20, para 4-19d(3)(d).

d. Informal fact-finding inquiries and administrative separation procedures are the preferred way of addressing homosexual conduct.

e. Neither CID nor MPI will conduct investigations solely to determine the sexual orientation of an individual.

f. If the misconduct is purely private, consensual, adult misconduct, the CID may investigate only if the information is either referred to them by the unit commander, or the local CID unit receives approval to investigate from the commander or deputy commander, USACIDC.

g. If case involves only statements (e.g., "I am gay"), or only private, consensual, adult sexual misconduct, scope of investigation should be limited to "the factual circumstances directly relevant to the specific allegations."

h. When interviewing Soldiers suspected of homosexual conduct:

(1) The military policy on homosexual conduct should be explained to the Soldier before questioning. The interviewer will not ask questions if the Soldier indicates a reluctance to talk.

(2) Soldiers will be advised of Art 31 rights if suspected of UCMJ violation.

(3) "Statement" case. May inquire into whether Soldier has engaged in, attempted to engage in, or intends to engage in homosexual acts or marriages. May ask Soldier why he or she made statement; what he or she means by it.

(4) "Acts" case. Discuss only the alleged conduct. May seek specific details to test credibility, to corroborate statement, to assess criminality of acts, to determine whether aggravating circumstances are present, to obtain information to counter a possible rebuttal by Soldier, and to determine possible basis for recoupment by government.

(5) Soldiers shall not be asked to reveal sexual orientation.

5. Separations.

a. Administrative board procedure used in all enlisted cases.

b. Soldiers will be separated if there is an approved finding of homosexual conduct. Exceptions:

(1) **Rebuttable presumption for cases based solely on admissions**. Admission of being a homosexual or having a homosexual orientation creates a rebuttable presumption of propensity or intent to engage in homosexual acts. Burden of proof shifts to Soldier. In determining whether a Soldier

has successfully rebutted the presumption, some or all of the following may be considered (this is not an exclusive list):

(a) Whether the member has engaged in homosexual acts.

(b) The member's credibility.

(c) Testimony from others about the members past conduct, character, and credibility.

(d) The nature and circumstances of the member's statements.

(e) Any other evidence relevant to whether the member is likely to engage in homosexual acts.

(2) **Rebuttable presumption for homosexual act cases**. A Soldier may be retained after commission of a homosexual act if and only if the following findings are made. The Soldier bears the burden of proving *all* the following items to the board's satisfaction:

(a) Such conduct is a departure from the Soldier's usual and customary behavior.

(b) Such conduct is unlikely to recur.

(c) Such conduct was not accomplished by use of force, coercion, or intimidation.

(d) Under the particular circumstances of the case, Soldier's continued presence is consistent with the interests of the Service in proper discipline, good order, and morale.

(e) The Soldier does not have a propensity or intent to engage in homosexual acts.

(3) Homosexual conduct for purposes of avoiding or terminating military service. If the commander or board believes that the individual is not a homosexual but is merely trying to avoid military service, the Soldier does not have to be discharged.

c. Characterization of service.

(1) Honorable, general, or entry level separation.

(2) Under Other Than Honorable (OTH) conditions. Authorized if, during a current term of service, the Soldier attempted, solicited, or committed a homosexual act:

(a) By use of force, coercion, or intimidation.

(b) With a person under 16 years of age.

(c) With a subordinate in circumstances that violate customary military superior-subordinate relationships.

(d) Openly in public view.

(e) For compensation.

(f) Aboard a military vessel or aircraft.

(g) In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

d. Separation Authorities. Enlisted separation authorities are:

(1) GCMCA (when command seeks OTH).

(2) SPCMCA (when command does not seek OTH).

6. Reporting Requirement.

a. All Army legal offices (including reserve component) are required to *report* pending homosexual discharge cases to OTJAG Administrative Law Division.

b. Initial report made on initiation of separation action; subsequent report made following ultimate disposition.

c. Reports may be transmitted by fax (COM 703-588-0155 or DSN 425-0155).

d. Separation authority remains with local commanders.

7. Recoupment.

a. 10 U.S.C. § 2005 & 37 U.S.C. § 303a, as amended by NDAA FY 06.

b. Soldiers who receive a bonus or similar benefit and whose receipt of the bonus or similar benefit is subject to the condition that the member continue to satisfy certain eligibility requirements must repay to the United States an amount equal to the unearned portion of the bonus or similar benefit if the member fails to satisfy the requirements. Soldiers (and cadets) receiving "advanced education assistance" must enter into written agreements providing for pro rata reimbursement of such educational assistance if the Soldier, "voluntarily or because of misconduct," fails to complete the agreed upon period of service. The same standard applies to pro rata recoupment of enlisted bonuses when the enlisted Soldier is separated prior to the end of the agreed service obligation.

(1) On 8 April 2005, the Deputy Secretary of Defense issued a new policy regarding repayment of unearned bonuses, special pay, and educational benefits or stipends. The policy expressly supersedes the former DoD recoupment policy which provided that recoupment in homosexual admission cases required an additional finding that the service member made the admission to seek separation. The new DoD recoupment policy provides the Army flexibility to determine, on a case-by-case basis, whether a Soldier's homosexual conduct constitutes a breach of his or her service agreement. The new DoD policy does not apply to agreements that existed under the former policy, to the extent the new policy would adversely affect the Soldier.

(2) In some cases, a fact-finding inquiry may be sufficient to determine whether the Soldier breached his service agreement. In other cases, a substantial investigation may be required. IAW AR 600-20, para 4-19e, the ASA (M&RA) must approve requests to initiate substantial investigations.

c. In cases where recoupment might be appropriate, separation boards should make specific findings on the issue of recoupment. If the board is waived, the separation authority must make specific findings.

d. Coordinate all potential recoupment cases with HQDA (ASA, (M&RA).

H. **Failure to Meet Body Fat Standards**, Chap 18. *See also* AR 600-9.

1. Soldier must first be given a reasonable opportunity to comply with and meet weight reduction goals.

2. Soldier must not have a medical condition that precludes them from participating in the Army body fat reduction program.

3. Initiation of separation or bar to reenlistment mandatory for Soldiers who do not make satisfactory progress and still exceed the body fat standards for any two consecutive months, or after a period of 6 months in the Army body fat reduction program.

4. Initiation of separation required for Soldiers who fail to maintain body fat composition standards during the 12-month period following removal from the program. After the 12th month, but within 36 months from the date of removal from the program, initiation of separation is required for Soldiers who reenter the weight control program and fail to meet the standard within 90 days.

5. Sole basis for separation is failure to meet weight control 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.

7. Honorable discharge or entry level separation.

8. Separation authority is LTC level commander; SPCMCA, if there is a board.

I. **Qualitative Management Program (QMP)**, Chapter 19.

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

2. HQDA boards screen RA NCOs (SSG-CSM/SGM) and USAR AGR NCOs (SGT-CSM/SGM).

3. Soldier notified and given opportunity to appeal.

4. Approval authority is DCS, G-1.

5. Honorable discharge.

VII. SOLDIER-INITIATED (VOLUNTARY) SEPARATIONS.

A. Expiration of Service Obligation, Chap 4.

1. Rarely any JAG involvement.

2. Honorable or entry level discharge.

3. Beware of inadvertent ETS discharge of Soldier for whom the command is contemplating adverse action. See paras 1-21 through 1-28.

B. **Dependency or Hardship**, Chap 6.

1. Bases.

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

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

2. Voluntary request by Soldier.

3. Separation authority: SPCMCA.

4. Honorable, General, or Entry Level (uncharacterized) discharge possible. General requires notification procedure.

C. **Separation of Enlisted Women -- Pregnancy**, Chap 8.

1. Bases.

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

b. 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.

2. Voluntary; Soldier must request separation.

3. Request must generally be approved.

4. Soldier may request a specific separation date, but 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.

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

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

7. If Soldier is under investigation, charges, or serving court-martial sentence, Chap 8 request may be approved with consent of GCMCA.

8. Separation authority: LTC-level commander.

9. Honorable or Entry Level (uncharacterized). General, if notification procedures listing specific factors warranting characterization used.

D. **Discharge in Lieu of Trial by Court-Martial**, Chap 10.

1. Chap 10 previously titled "Discharge for the Good of the Service."

2. Two independent bases.

   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 RCM 1003(d), MCM, are relied upon.

3. Voluntary request by Soldier.

4. 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 VA benefits, and prejudice in civilian life because of discharge.

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

6. 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 Rule of Evidence 410.

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

8. Separation authority.

   a. GCMCA.

b. SPCMCA where authority has been delegated to act in certain cases (para 10-7) (*rare*: commander of Personnel Control Facility, only charge is AWOL, prior to trial, specific delegation of authority). Cannot disapprove.

9. Most requests approved with Other Than Honorable discharge. Although the regulation provides for Honorable, General, or entry level (uncharacterized) separations.

E. **Retirement for Length of Service**, Chap 12. Usually not considered an "administrative discharge" at all.

F. **Selected Changes in Service Obligation**, Chap 16. Chap 16 contains ten grounds for discharge.

1. Order to active duty as a commissioned or warrant officer.

2. Discharge for acceptance into a program leading to a commission or warrant officer appointment.

3. Discharge for the purpose of immediate enlistment or re-enlistment.

4. Non-retention on AD. (only USAR AGR Soldiers who have a local bar to reenlistment may request voluntary separation, not RA Soldiers)

5. Overseas returnees.

6. Early separation due to disqualification for duty in MOS.

7. Early separation due to reduction in force, strength limitations, or budgetary constraints.

8. Separation of Soldiers of medical holding detachments/companies.

9. Separation of personnel assigned to installations or units scheduled for inactivation or permanent change of station.

10. Holiday early transition program.

VIII. CONCLUSION.

SEPARATION ACTIONS

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

	RELEASE FOR MINORITY (16 OR YOUNGER)	RELEASE FOR MINORITY (17 YEARS OLD)	ERRONEOUS ENLISTMENT	DEFECTIVE OR UNFULFILLED ENLISTMENT	FRAUDULENT ENTRY
Grounds for action.	Enlisted when under age 17 and still under age 17.	Enlisted under age 18 w/o parental consent, and still under 18, not facing court-martial (CM) charges, serving CM sentence, or in military confinement.	Enlistment would not have occurred had government known the relevant facts or had appropriate directives been followed.	Eligible for enlistment but not option for which enlisted; or received promise that Army can't fulfill. Soldier must identify w/in 30 days of discovery.	Material misrepresen-tation, omission, or concealment of information that if known by Army might have resulted in rejection.
Counseling and rehab required?	No.	No.	No.	No.	No.
Who initiates?	Immediate or higher commander.	Parents w/in 90 days of enlistment.	Immediate or higher commander.	Immediate or higher commander.	Immediate or higher commander.
Board hearing?	No.	No.	Use notification procedure. Entitled to board if Soldier has six 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 six years service.
Regulation.	AR 635-200, chap 7, section II.	AR 635-200, chap 7, section II.	AR 635-200, chap 7, section III.	AR 635-200, chap 7, section III.	AR 635-200, chap 7, section IV.
Entitled to counsel?	Counsel for consultation.	Counsel for consultation.	Counsel for consultation. Counsel for representation if board.	N/A	Counsel for consultation. Counsel for representation if board.
SJA Review?	No.	No.	Maybe. See AR 635-200, para 2-6a & e(4)(c).	No.	Maybe. See AR 635-200, para 2-6a & e(4)(c).
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 punitive-discharge CM 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 six years active and reserve service.	No.	Use notification procedure.	Use notification procedure. Entitled to board if Soldier has more than six years active and reserve service.
Regulation	AR 635-200, chap 9.	AR 635-200, chap 10.	AR 635-200, chap 11.	AR 635-200, chap 13.
Entitled to counsel?	Counsel for consultation. Counsel for representation if board used.	Counsel for consultation (performed by trial defense counsel).	Counsel for consultation.	Counsel for consultation. Counsel for representation if board used.
SJA Review?	Maybe. See AR 635-200, para 2-6a & e(4)(c).	Yes.	Maybe. See AR 635-200, para 2-6a & e(4)(c).	
Separation Authority	No board: LTC Cdr or MAJ(P) in LTC cmd. Board: SPCMCA.	GCMCA in most cases	No board: LTC Cdr or MAJ(P) in LTC cmd.	No board: LTC Cdr or MAJ(P) in LTC cmd. Board: SPCMCA.
Characterization of service	Hon, Gen, or ELS. Hon required in Limited Use Evidence used.	Normally OTH. Hon, Gen possible.	ELS.	Hon, Gen.

	CONVICTION BY CIVILIAN COURT	MINOR (MILITARY) DISCIPLINARY INFRACTIONS	PATTERN OF MISCONDUCT	COMMISSION OF A SERIOUS OFFENSE	HOMOSEXUAL CONDUCT
Grounds for action.	Civilian conviction for offense that authorizes punitive discharge under UCMJ, or any civilian sentence to confinement for more than six 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.	Homosexual statement, act, or marriage. Homosexual statement may be rebutted by showing of no propensity or intent to commit acts.
Counseling and rehab required?	No.	Yes.	Yes.	No.	No.
Who initiates?	Immediate or any higher commander.	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 six years service.	Yes. May be waived. No board if OTH not warranted and Soldier has less than six years active and reserve service.	Yes. May be waived. No board if OTH not warranted and Soldier has less than six years active and reserve service.	Yes. May be waived. No board if OTH not warranted and Soldier has less than six years active and reserve service.	Yes. May be waived.
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.	AR 635-200, chap 15.
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.	Counsel for consultation. Counsel for representation if board used.
SJA Review?	Maybe. See AR 635-200, para 2-6a & e(4)(c).				
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.	OTH: GCMCA. If OTH not warranted: SPCMCA.
Characterization of service.	Hon, Gen, OTH, or ELS.	Hon, Gen, OTH, or ELS.	Hon, Gen, OTH, or ELS.	Hon, Gen, OTH, or ELS.	Hon, Gen, OTH, or ELS.

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CHAPTER H

MILITARY EQUAL OPPORTUNITY (EO)

55TH GRADUATE COURSE

CHAPTER H

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Outline of Instruction

I. REFERENCES.

A. Agency Regulations:

1. DOD Dir. 1350.2 (Equal Opportunity).

2. Army: AR 600-20 (Army Command Policy, 7 Jun 06), Chapter 6 and Appendix D.

3. Navy:

a. SECNAVINST 5350.16 (Equal Opportunity Within the Dep't. of the Navy)

b. SECNAVINST 5354.1 (DON Policy on Military EO Complaint Processing)

c. OPNAVINST 5354.1E (Navy EO Policy)

4. Air Force: AFI 36-2706 (Military Equal Opportunity (MEO) Program)

5. Marines:

a. MCO P5354.1D (EO Manual)

b. MCO 5354.3B (EO Advisor)

B. Websites:

1. Army: http://www.armyg1.army.mil/hr/EO/default.asp

2. Navy: http://www.npc.navy.mil/CommandSupport/Diversity/EqualOpportunity/

3. Air Force: http://ask.afpc.randolph.af.mil/default.asp

4. Marines: https://www.manpower.usmc.mil/portal/page?_pageid=278,1938372&_dad=portal&_schema=PORTAL

5. Defense Equal Opportunity Management Institute (DEOMI): https://www.patrick.af.mil/deomi/deomi.htm

C. See also Appendix A.

II. INTRODUCTION.

A. Equal Opportunity (EO) ensures "fair treatment for all persons based solely on merit, fitness, and capability in support of readiness." ARMY REG. (AR) 600-20, ARMY COMMAND POLICY, para. 6-1.

B. Policy.

> *"The U.S. Army will provide equal opportunity and fair treatment for military personnel and family members without regard to race, color, gender, religion, national origin and provide an environment free of unlawful discrimination and offensive behavior. This policy:*
>
> *"Applies both on and off post, during duty and nonduty hours.*
>
> *"Applies to working, living, and recreational environments (including both on-post and off-post housing)."*
>
> AR 600-20, para 6-2a.

C. EO approached from a soldier readiness point of view:

"To accomplish any mission, leaders must ensure that their units are properly trained and that their soldiers, their equipment, and they, themselves, are in the proper state of readiness at all times. Soldiers must be committed to

accomplishing the mission through unit cohesion developed as a result of a healthy leadership climate. Leaders at all levels promote individual readiness by developing competence and confidence in their subordinates. ***A leadership climate in which all soldiers perceive that they are treated with fairness, justice, and equity is crucial to the development of this confidence.****"*
DA PAM 600-26, DA AFFIRMATIVE ACTION PLAN, para 1-4b (23 May 1990).

III. THE ARMY'S EQUAL OPPORTUNITY PROGRAM.

A. Who. Applies to soldiers, Department of the Army civilians, and family members.

B. What. "Soldiers are not accessed, classified, trained, assigned, promoted, or otherwise managed on the basis of race, color, religion, gender, or national origin." AR 600-20, para 6-3b. Two exceptions:

1. Assignment and use of women soldiers. AR 600-13.

2. Support for established equal opportunity goals. AR 600-20, para. 6-14 and DA Pam 600-26 (Affirmative Action Plans/Equal Opportunity Action Plans).

C. When. Applies both on and off duty.

D. Where. Applies both on and off post.

E. How. Designed to work through the chain of command, as a command function. "Alternative agencies" serve as a safety valve for the chain of command, or when the chain of command is the problem; *see infra*.

F. Why. Maximize human potential and ensure fair treatment to all persons based solely on merit, fitness, and capability, in support of readiness. AR 600-20, para 6-1.

IV. RELATION TO OTHER POLICIES, PROGRAMS, AND UNITS OF INSTRUCTION.

A. Although the Army's EO policy applies to soldiers, civilian employees, and family members, recognize that civilian employees enjoy additional protections.

1. Equal Employment Opportunity (EEO) is a separate program for Army civilian employees. Title VII of the Civil Rights Act of 1964, as amended (codified at 42 U.S.C. § 2000e *et seq.*), implemented in the Army's EEO Program. *See* AR 690-600, Equal Employment Opportunity Discrimination Complaints (9 Feb 04). *See also*, 29 C.F.R. Part 1614, Federal Sector EEO Complaints Processing.

2. Army civilian employees who are covered by a collective bargaining agreement (CBA) may enjoy additional protections under the CBA (e.g., right to use negotiated grievance procedure).

B. A service member's failure to comply with the Army's EO policy may amount to criminal misconduct under the UCMJ.

C. Other programs and agencies directly or indirectly support the EO program.

1. Armed Forces Disciplinary Control Board. AR 190-24, Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations (30 Jun 93); OPNAVINST 1620.2A; AFI 31-213; MCO 1620.2C.

2. Housing referral program. AR 210-50, Housing Management (3 Oct 05), Chapter 6, Section III; SECNAVINST 5350.14 (Equal Opportunity in Off-Base Housing); AFH 32-6009.

3. Other "alternative agencies;" *see infra*.

4. Defense Equal Opportunity Management Institute, Patrick AFB, FL. Mission: To enhance leadership and readiness by fostering EO and EEO programs and positive human relations through education, training, and research. https://www.patrick.af.mil/DEOMI/DEOMI.HTM

D. Assignment policy for women.

1. The Army's EO program is independent of the Army's assignment policy for women soldiers. The Army's policy on assignment of women soldiers implements the DoD Direct Ground Combat (DGC) rule.

   a. "Qualified women are eligible for all assignments except to units below brigade level whose primary mission is engaging the enemy on the ground with individual or crew served weapons while being exposed to hostile fire and a high probability of direct physical contact with the hostile force's personnel." AR 600-13, para 1-12.

   b. Permits exclusion of women from special operations units, long range reconnaissance units, and units that physically collocate and remain with closed units.

   c. *See* Secretary of Defense memo, 13 Jan 94, subject: Direct Ground Combat Definition and Assignment Rule. *See also* AR 600-13, Army Policy for the Assignment of Female Soldiers.

V. STAFFING. AR 600-20, Chapter 5.

A. Equal Opportunity Advisor (EOA).

1. Role. Understanding and articulating EO policy; recognizing and assessing indicators of discrimination; recommending remedies; collecting, organizing, and interpreting demographic data; EO training; and EO complaint processing. Senior Enlisted EOAs may conduct inquiries and make recommendations as required.

2. Assigned to the special staff of commanders at installations, organizations, and agencies that are brigade-level (or equivalent) and higher. Primary, full-time duty. Has direct access to commander. Commander must be EO Advisor's rater or senior rater.

3. Trained at Defense Equal Opportunity Management Institute (DEOMI) in 15-week course.

4. Where assigned.

a. Brigade-level and higher units; installations to 10,000 soldiers; base support battalions: SFC (E-7) or higher.

b. Installations over 10,000 soldiers, and area support groups: MSG (E8) and SFC (E7).

c. Division: LTC (O5), MSG, SFC x 2.

d. Corps: LTC, SGM (E9), MSG/SFC.

e. MACOM: LTC, SGM (E9), & MSG (E8).

5. EOA's provide assistance to investigating officers conducting EO complaint investigations. AR 600-20, Appendix D-6(d).

B. Equal Opportunity Representative (EOR).

1. Role. Assist commanders at the battalion level and below in carrying out the EO program in their units. *May not* conduct investigations.

2. Assigned to battalion and company size organizations. Not a full time duty. Regulation suggests assigning EOR in rank of SGT(P) (E5 promotable) through 1LT (O1).

VI. EO COMPLAINT PROCESSING.

A. Other services:

1. Navy: SECNAVINST 5354.1.

a. Informal Resolution System is model for handling informal complaints. NAVPERS 15620, Resolving Conflict.

b. Timelines. Make complaint within 60 days of incident. Investigate and resolve within 60 days (Reserve complaints within 120 days of filing).

c. Formal complaints. Written complaint preferred, but other avenues available, i.e. Article 138, NAVREGS 1150 (against superior), IG, Congressional.

d. First appeal on formal complaint is to GCMCA. Final resolution is with Secretary of the Navy.

2. Air Force: AFI 36-2706 (Equal Opportunity & Treatment (EOT) Process).

a. Refer EOT complaints involving senior officials, colonels, and colonels select to SAF/IGS.

b. Informal and formal complaints. Encourage use of chain of command, mediation, etc.

c. File formal complaint within 60 days (absent justification or extenuating circumstances).

d. Cannot withdraw formal complaint without approval.

e. Complaint "clarification" (investigation). Preponderance of evidence.

f. Timelines (para. 4.19). Extensions granted by Chief of Social Actions.

g. Commander briefs/debriefs alleged offender(s). Protect complainant's identity when possible.

h. Appeals. Para. 4.25. Final appeal with SAF/MIB.

3. Marines: MCO P5354.1D. Discrimination & Sexual Harassment (DASH) complaints.

a. Informal Resolution System. NAVPERS 15620, Resolving Conflict. Direct approach, Informal Third Party, Training Information Resources (TIR).

b. Formal Complaint Procedures. Request Mast is preferred method. Article 138 (UCMJ) complaint, Article 1150 of Navy Regulations (Redress of Wrong Committed by Superior), IG, Congressional also options.

c. Make complaint orally or in writing, or both. Complaint forwarded to commander of offending person.

d. The request mast will be conducted at the earliest reasonable time, normally within 24 hours, but no later than 3 working days after the initial submission. See MCO 1700.23, Request Mast.

e. Timelines. Formal complaints filed within 60 days of alleged incident. Commander initiates investigation within 72 hours or 3 working days. GCMCA notification within 72 hours. Investigation complete within 14 days. Extension (30 days only) granted by GCMCA.

f. If complaint against commander, refer to next higher command for resolution.

g. Complaints involving Flag/GO's or SES will be referred to DNIGMC for investigation.

B. Army: AR 600-20, Appendix D.

1. Applies to soldiers, DA civilian employees, and family members (but DA civilian employees will generally use more specific means (the EEO complaint process; *see* para. IV.A.1 *supra*).

2. Informal Complaint. AR 600-20, Appendix D-1(a).

   a. Any complaint that the soldier, employee, or family member does not wish to file in writing.

   b. Not subject to time suspense or reporting.

   c. Attempted resolution at the lowest possible level.

3. Formal Complaint. AR 600-20, Appendix D-1(b).

   a. Complainants do NOT have to file an informal complaint first. Complainant may choose to do so, however.

   b. Filed by submitting a sworn statement on DA Form 7279 (2005 Edition).

      (1) Basis of complaint.

      (2) Dates, parties, witnesses.

      (3) Requested remedy.

4. Timely submission required (w/in 60 calendar days of the incident). Compliant processed through chain of command or alternative agency.

5. Reporting complaint to chain of command is “strongly encouraged,” but NOT required.

6. “Alternative agencies” are available when complainant perceives the chain of command as the problem:

   a. Higher echelons of chain of command.

b. Inspector General. Investigation governed by AR 20-1, not AR 600-20. DA Form 7279-R not used. IG confidentiality policy applies. EO timelines not used.

c. Chaplain.

d. Provost Marshall, Criminal Investigation Command.

e. Medical agency personnel.

f. Staff Judge Advocate.

g. Chief, Community Housing Referral and Relocation Services Office.

7. The EO complaint process, in itself, provides no promises of confidentiality. Note, however, that other regulations may provide confidentiality to complainants (e.g., Inspector General, Staff Judge Advocate Legal Assistant Attorney, Chaplain).

8. Actions by "alternative agencies." AR 600-20, Appendix D-2 (except for the IG, see AR 600-20, Appendix D-3).

a. Initial actions by alternative agencies are the same for informal and formal complaints.

b. Upon receipt of EO complaint, the alternative agency must: talk with the complainant; advise him/her of his/her rights and responsibilities; gather as much information as possible (including what the reasons were for using the alternative agency and what the complainant's expectations are for resolution of the complaint); tell complainant what role (if any) that agency will have in resolving the complaint; tell complainant what support services are available from other organizations, what the complaint processing procedures are (mainly the differences between informal and formal complaints) and what will be done with the complaint. AR 600-20, Appendix D-2.

c. Agency annotates receipt of formal complaint on DA Form 7279-R (except IG).

d. If resolution is beyond agency's charter, refer complainant to appropriate agency or commander, with complainant's consent. Referral must be made within 3 calendar days.

e. Most "alternative agencies" do not have an independent investigatory charter. Exceptions: Inspector General; higher commanders in the chain of command.

9. Investigation. *Commander* will either conduct an investigation personally or immediately appoint an investigating officer according to the provisions of AR 15-6, Appendix D-4(b).

a. Referral to battalion/brigade commander for appointment of investigating officer under AR 15-6.

b. Fourteen days (Reserves - 3 weekend drill periods) to complete the investigation. Possible extension of 30 days (Reserves - 2 weekend drill periods).

10. General Court Martial Convening Authority (GCMCA) Notification. All formal complaints will be reported within 3 calendar days to the first GCMCA in the chain of command. AR 600-20, para. D-4a.

11. Reprisal Plan. AR 600-20, para. D-4c. The most often overlooked part of the formal EO complaint. Commander must implement a written plan to protect the complainant, any named witnesses, and the alleged perpetrator from acts of reprisal. See para. D-4c. for required contents of the plan. Plan should not become an administrative burden; it need only consist of a one-page list of actions to be accomplished. *Investigating officer must include the plan as an exhibit in the ROI.* The "plan" will include, at a minimum, specified meetings and discussions with the complainant; subject and key witnesses.

12. Feedback. Written feedback to complainant within 14 days (Reserves - 3 weekend drill periods) after acknowledgment of complaint.

a. Summary of investigative results.

b. Remedial actions taken.

c. Copy of DA Form 7279-R provided to complainant.

13. Appeal by complainant in writing to the next higher commander, up to GCMCA.

a. Within 7 days following notification of results of investigation and acknowledgment of actions taken by the command to resolve the complaint.

b. Options outside the EO system.

14. Follow up. Thirty to forty-five days after final decision on the complaint, Equal Opportunity Advisor conducts an assessment on all EO complaints, substantiated and unsubstantiated, to determine effectiveness of any corrective action taken and to detect reprisal.

15. File maintained by the EOA for two years.

16. Complaints against promotable colonels, active or retired GOs, IGs, members of the Senior Executive Service (SES) or Executive Schedule personnel must be transferred directly to the Investigations Division, US Army Inspector General Agency, ATTN: SAIG-IN, Pentagon, Washington DC 20310-1700 "by rapid but confidential means within 5 calendar days of receipt." AR 600-20, Appendix D-2c.

17. Sexual Harassment Complaints and 10 U.S.C. § 1561.

a. 10 U.S.C. § 1561. The National Defense Authorization Act for fiscal year 1998 added section 1561 to Title 10 of the U.S. Code. It applies to complaints of sexual harassment by a member of the armed forces or a civilian employee of the DoD received by a commanding officer or officer in charge from a member of the command or a civilian employee under the supervision of the officer. 10 U.S.C. § 1561 established new requirements for processing sexual harassment complaints.

b. Directed at workplace sexual harassment.

c. AR 600-20 implements 10 U.S.C. § 1561 when a **military member** files a *formal* complaint of sexual harassment. See, AR 600-20, Appendix D and complaints procedure above.

VII. SANCTIONS.

A. Soldiers. (AR 600-20, Appendix D-7(a)(1)).

1. Administrative action.

2. Action under the Uniform Code of Military Justice (UCMJ).

B. Civilian employees.

1. May be subjected to administrative discipline in accordance with the current Army Table of Penalties (AR 690-700, chap 751, Table 1-1).

2. No requirement for victims to file EEO complaints. A victim may seek redress or not, as he or she sees fit, but the right of the service to discipline employees who harass or discriminate is not affected in either event. *Hostetter v. United States*, 739 F.2d 983 (4th Cir. 1984).

VIII. OFF-POST ACTIVITIES.

A. In the United States.

1. Establishments open to the general public.

a. Title II of Civil Rights Act of 1964, 42 U.S.C. §§ 2000a - 2000a-6: Public Accommodations.

b. Command enforcement: Off-limits sanction. AR 600-20, para 6-8; AR 190-24, para 2-6; OPNAVINST 1620.2A; AFI 31-213; MCO 1620.2C.

2. Private establishments. Title II of the Civil Rights Act of 1964 addresses the practice of discrimination and segregation in public establishments (hotels, restaurants, community housing, etc.) AR 600-20, para 6-8c.

a. General rule: A commander may not apply off-limits sanctions to a bona fide private establishment, club, activity, or organization.

b. Exception: A private entity may be placed off limits if the following conditions are met:

(1) It is open to military personnel in general or Soldiers who meet specific criteria (*e.g.*, E-5 and above) but segregates or discriminates against other Soldiers solely on the basis of race, color, religion, gender, or national origin.

(2) It is not primarily political or religious in nature.

(3) Commander, in consultation with SJA and other staff officers, determines facts support allegations of discrimination. Must give entity an opportunity to challenge or refute allegations.

(4) Commander must make reasonable efforts to bring about the voluntary termination of discriminatory practices.

(5) Commander determines that continued discrimination will undermine morale, discipline, or loyalty of Soldiers.

B. Overseas. AR 600-20, para 6-8a.

1. Title II of Civil Rights Act of 1964 does not protect overseas military personnel while off-post.

2. Commander's options:

a. Off-limits sanction.

b. Local law.

C. Off-post housing policy. Designed to eliminate discrimination in housing on the basis of race, color, religion, gender, national origin, age, physical disability, or familial status.

1. General.

a. Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended. 42 U.S.C. §§ 3601-3631.

b. Command enforcement: restrictive sanctions. AR 210-50, Chap 6, Section III.

2. Enforcement. Community Homefinding, Relocation, and Referral Services Office (CHRRSO) responsibility. *See* AR 210-50. CHRRSO, like any other staff agency, may turn to SJA for advice and assistance.

IX. MILITARY WHISTLEBLOWER CASES.

A. References.

1. Military Whistleblower Protection Act, Title 10, U.S.C. § 1034 (2005).

2. Department of Defense Directive 7050.6, Military Whistleblower Protection (23 June 2000).

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

4. AR 20-1, Inspector General Activities and Procedures (23 May 06).

5. AR 1-20, Chapter 6, Communications with Congress (20 Jan 04).

6. AR 600-20, Army Command Policy (7 Jun 06).

7. NGR 600-22, National Guard Military Discrimination Complaint System (30 March 2001).

8. SECNAVINST 5370.B, Military Reprisal Investigations.

9. MCO 5041.1, Military Whistleblower Protection.

10. AFI 90-301 (IG Complaints).

11. DOD Website: www.dodig.osd.mil/hotline/index.html

B. Prohibitions.

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

2. No person may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing

a. A communication to a Member of Congress or an Inspector General; OR

b. A communication that is made or prepared to be made to

(1) A Member of Congress;

(2) An Inspector General;

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

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

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

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

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

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

C. Definitions.

1. Member of the Armed Forces. Includes all Regular and Reserve component officers and enlisted members on active duty and Reserve component officers and enlisted members in any duty or training status (includes officers and enlisted members of the National Guard). DODD 7050.6, para. E1.1.6.

2. Audit, Inspection, Investigation, and Law Enforcement Organizations. The law enforcement organizations at any command level in any of the DoD components, the Defense Criminal Investigative Service, the U.S. Army Criminal Investigation Command, the U.S. Army Audit Agency, and the Defense Contract Audit Agency. [For full definition (which includes investigative agencies of other DOD agencies), see DODD 7050.6, para. E1.1.1].

3. Personnel Action. Any action taken on a member of the Armed Forces that affects or has the potential to affect that military member's current position or career. Such actions include a promotion; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; *referral for mental health evaluations* under DODD 6490.1; and any other significant change in duties or responsibilities inconsistent with the military member's rank. DODD 7050.6, para. E1.1.7.

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). DODD 7050.6, para. E2.1. Reprisal allegations may also be reported to the chain of command; however, complaints must be filed with an IG to get whistleblower protection. AR 20-1, paras. 1-11f, 8-10c; *see* 1998 revision to 10 USC 1034 (Military Whistleblower Protection Act). IGs and SJAs are to so inform complainants.

2. Time Limit. No investigation is required when a complaint is submitted to an IG more than *60 days* after the date the member became aware of the personnel action that is the subject of the allegation. DODD 7050.6, para. E2.1.1.; AR 20-1, para. 8-10c(2).

E. Investigating.

1. Military whistleblower reprisal allegations are investigated by the DOD IG or the military service IGs. The Army's Inspector General (TIG) has limited the authority to investigate whistleblower reprisal allegations to one level above that of the IG servicing the complainant. AR 20-1, para. 8-10c(1). Investigations must be conducted outside the immediate chain of command of the complainant and the alleged retaliating official.

2. The investigation must be completed *within 180 days* of the original reprisal allegation being received by the IG, or the IG will so inform the Deputy Under Secretary of Defense for Program Integration (DUSD(PI)) and the complainant, in writing, of the estimated date of Report of Investigation (ROI) completion and the reasons for delay. A copy of the ROI will be forwarded to the complainant [without interview summaries or documents, unless requested by the complainant] and the DUSD(PI) not later than *30 days* after ROI completion. The ROI given to the complainant will include all factual findings and recommendations (maximum disclosure of information possible), subject to security classification and FOIA limitations. DODD 7050.6, paras. 5.1.6; 5.1.7.

3. DOD IG is the final approval authority for cases involving allegations of whistleblower reprisal and improper referral for mental health evaluation. AR 20-1, para. 8-10c(5).

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

G. Military violators of the Military Whistleblower Protection Act are subject to prosecution under Article 92, UCMJ. Civilian DOD employees who violate the Act shall be subject to disciplinary or adverse action for misconduct pursuant to Chapter 75 of the Civil Service Reform Act. DODD 7050.6, para. 4.5.

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

1. Military whistleblower reprisal complaint resolutions may be reviewed, at the complainant's request, by a BCMR and the Secretary of Defense. The BCMR may conduct a hearing, if appropriate. DODD 7050.6, para. 5.3.4.2.3.

2. The Military Service Secretary must issue a final decision on an application for correction of military records within *180 days* after the application is filed. DODD 7050.6, para. 5.3.5.

3. The complainant may request review of the matter by the Secretary of Defense. The request for review by the Secretary of Defense must be submitted within *90 days* of receipt of the final decision by or for the Military Service Secretary. DODD 7050.6, para. E2.3.

4. The DUSD(PI) will review the final decision of the Military Service Secretary and decide whether to uphold or reverse the decision of the Military Service Secretary. This decision is final. DODD 7050.6, para. 5.2.2.

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

X. CONCLUSION.

Appendix A

REFERENCES

I. FEDERAL.

A. U.S. Constitution.

1. 5th Amendment.

a) Due process clause: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

b) Equal protection component of due process. Bolling v. Sharpe, 347 U.S. 497 (1954).

2. 13th Amendment.

a) "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

b) Applicable to private conduct; prohibits slavery and the "badges and incidents of slavery." Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

3. 14th Amendment.

a) Equal protection clause: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

b) Does not reach Federal action or purely private action; State action required. District of Columbia v. Carter, 409 U.S. 418 (1973); Loving v. Virginia, 388 U.S. 1 (1967).

B. Statutes.

1. Civil Rights Acts of 1866 and 1871.

a) 42 U.S.C. § 1981 -- racial discrimination. Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987). *See also* §101, Civil Rights Act of 1991, Pub. L. No. 102-166, amending 42 U.S.C. § 1981.

b) 42 U.S.C. § 1982 -- racial discrimination in the acquisition, holding, and sale of real and personal property. Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

c) 42 U.S.C. § 1983 -- violations of federal rights under color of state law. District of Columbia v. Carter, 409 U.S. 418 (1973); Monroe v. Pape, 365 U.S. 167 (1961).

d) 42 U.S.C. § 1985(3) -- conspiracies to deprive persons of their civil rights. United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983).

2. Civil Rights Act of 1964.

a) Title II -- public accommodations. 42 U.S.C. §§ 2000a - 2000a-6.

b) Title VI -- federally assisted housing. 42 U.S.C. § 2000d.

c) Title VII -- Federal employment. 42 U.S.C. § 2000e-16. Applied to federal civilian employees by the Equal Opportunity Act of 1972. Not applicable to uniformed members of the armed forces.

3. Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended. 42 U.S.C. §§ 3601-3631.

4. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981a.

II. DEPARTMENT OF DEFENSE.

A. DoD Dir 1350.2, Department of Defense Military Equal Opportunity Program (18 Aug 95 and Change 1, 13 Jun 97).

B. DODI 1100.16, Equal Opportunity in Off-Base Housing (14 Aug 89).

C. Department of Defense Human Goals Charter.

III. ARMY.

A. AR 190-24, Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations (30 Jun 93).

B. AR 210-50, Housing Management (3 Oct 05).

C. AR 600-20, Army Command Policy (7 Jun 06).

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EQUAL OPPORTUNITY COMPLAINT FORM

For use of this form, see AR600-20; the proponent agency is DCS, G-1.

PRIVACY ACT STATEMENT

AUTHORITY: Title 10, USC Section 3013, Secretary of the Army: Army Regulation 600-20, Army Command Policy and E.O. 9397 *(SSN)*

PRINCIPAL PURPOSE: To provide a means for filing complaint based on discrimination due to race, color, religion, or national origin.

ROUTINE USES: None

DISCLOSURE: Voluntary; However, failure to provide all the requested information could lead to rejection of complaint for inadequate data.

1. NAME	2. RANK	3. SSN	4. UNIT
5. RACE/ETHNIC GROUP		6. GENDER	7. DATE *(YYYY/MM/DD)*

PART I - COMPLAINT

8a. **NATURE OF COMPLAINT.** *(Give, in as much detail as possible, the basis for your complaint; describe the incident/behavior(s) and date(s) of the occurrence(s); the names of parties involved, witnesses, and to whom it may have been previously reported; plus, any additional information that would be helpful in resolving your complaint. Attach additional sheets, as needed.)*

8b. **REQUESTED REMEDY.** *(What do you think the final outcome should be?)*

9a. **AFFIDAVIT.**

I, ______________________________ have read or have had read to me this statement which begins on this page *(page 1)* and ends on page ______. I fully understand the contents of the entire statement made by me. The statement is true. I have initialed all corrections. I made the statement without threat of punishment, and without coercion, unlawful influence, or unlawful inducement.

____
(Signature of Person Making Statement)

Subscribed and sworn to before me, a person authorized by law to administer oaths, this

______ day of ________________, ______ at ______________________________.

______________________________ *(Signature of Person Administering Oath)*

______________________________ *(Typed/Printed Name of Person Administering Oath)*

9b. **AGENCY RECEIVING COMPLAINT.**

I acknowledge receipt of this complaint ______________________________ *(name/rank)*

of ______________________________ *(unit)* on ____________________ *(date)*.

I understand I have 3 calendar days *(next drill period for reserve soldiers)* in which to refer this complaint to the appropriate commander of the complainant.

9c. NAME	9d. GRADE	9e. DATE *(YYYY/MM/DD)*
9f. AGENCY	9g. SIGNATURE	

DA FORM 7279, DEC 2005 EDITION APR 99 IS OBSOLETE. APD V1.00

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MILITARY EQUAL OPPORTUNITY & MILITARY WHISTLEBLOWER PROTECTION

PRACTICAL EXERCISE

Appendix C

Specialist (SPC, E4) Running Bear, a Native American, went out to a local "bar and grille" Friday night with a group of his buddies from his platoon. He was drinking a few beers, listening to country music on the jukebox, and generally having a good time, at least until he saw his First Sergeant (1SG) come in. SPC Running Bear felt like he never hit it off with the 1SG; it just seemed like the 1SG didn't like him from day one. Although the 1SG seemed to look out for other soldiers in the platoon, SPC Running Bear felt like the 1SG never went to bat for him. In fact, SPC Running Bear was still seething from a recent counseling by the 1SG, during which he told SPC Running Bear that he was not recommending him for the Primary Leadership Development Course (PLDC). SPC Running Bear believes he is more than ready for PLDC, and knows he won't get promoted to E5 without it. SPC Running Bear decided to lay low in the bar, play some pool, and generally avoid the 1SG. After a couple of hours, he noticed the 1SG seemed pretty tanked. He was getting loud and boisterous and seemed to be doing a lot of smoking and joking with some of the other guys in the platoon. SPC Running Bear decided it was probably a good time to leave. As he was walking towards the door, the 1SG looked at him and said "whatsa' matter Running Bunny, you redskins can't hang with us cowboys?" Not surprisingly, SPC Running Bear relates that he was highly offended by this remark. He believes the 1SG is discriminating against him. He feels he will never be able to get ahead with this 1SG in charge.

After telling you this story, SPC Running Bear looks at you and asks: "What do you think, Sir/Ma'am? You always offer wise advice. What should I do about my 1SG? To whom should I complain?"

SPC Running Bear tells you he knows that his commander (CPT Smith) and the 1SG are very tight and believes he will get nowhere by reporting this to CPT Smith. What are SPC Running Bear's other options?

After hearing that the list of alternative agencies includes the Staff Judge Advocate and knowing of your excellent advocacy and legal skills as the Chief of Client Services, SPC Running Bear wants you to receive his EO complaint. What are your responsibilities?

After hearing a nice rundown of the EO complaints procedure from you, SPC Running Bear decides he wants to file a formal EO complaint and asks you to help him fill out the form (see block 8 on DA Form 7279-R). He asks whether the 1SG's remark in the bar (when he called Running Bear a "redskin") can be included since it happened off-duty and off-post. What is your advice?

New facts: A year has passed and Running Bear is back in your office! See, you should've asked for that one-year tour to Korea after all. SGT Running Bear brings you up to speed: his EO complaint was investigated and substantiated, the 1SG was disciplined (and wisely decided to retire), and SGT Running Bear graduated from PLDC and was promoted to E5. The company commander (CPT Smith) is still in charge, since there was no evidence he did anything wrong. SGT Running Bear just got his first noncommissioned officer evaluation report (NCOER). He is highly upset because CPT Smith gave him a very marginal rating. SGT Running Bear can't believe this is happening again. His performance has been adequate, if not exceptional. Although CPT Smith appears to be one cool-headed guy, SGT Running Bear is starting to think CPT Smith is still mad at him over filing the EO complaint against the old 1SG. SGT Running Bear wants to file a complaint regarding his NCOER. What <u>type</u> of complaint would you advise SGT R. Bear to file?

Given his positive experience with the battalion commander regarding his EO complaint, SGT Running Bear expresses a desire to raise the NCOER issue with the battalion commander. What do you recommend?

Assume SGT Running Bear immediately suspected retaliation/reprisal regarding his NCOER, but stewed about it for 3 months before deciding to report it. What impact, if any, will that have?

What evidence will the alleged offender, CPT Smith, have to show regarding SGT Running Bear's NCOER?

55TH GRADUATE COURSE

DEFENSIVE FEDERAL LITIGATION OVERVIEW

OUTLINE OF INSTRUCTION

I. REFERENCES.

A. Federal Civil Judicial Procedure and Rules (West 2003).

B. DOD Directive 5405.2, Release of Official Information in Litigation and Testimony by DOD Personnel as Witnesses (23 July 1985) (reprinted in Appendix C, AR 27-40).

C. DOD Directive 5145.1, General Counsel of the Department of Defense (2 May 2001).

D. Army Regulation No. 27-40, Litigation (19 September 1994). Currently under revision).

E. SECNAV Instruction 5820.8A, Release of Official Information for Litigation Purposes and Testimony by DON Personnel (27 August 1991).

F. Manual of the Judge Advocate General (JAGMAN), JAGINST 5800.7C (3 October 1990).

G. Air Force Instruction 51-301, Civil Litigation (1 July 2002).

H. United States Attorney's Manual, Department of Justice (www.usdoj.gov).

I. JA 200, Defensive Federal Litigation.

II. INTRODUCTION.

III. RESPONSIBILITY FOR LITIGATION.

A. United States Department of Justice.

1. Department of Justice (DOJ) exercises plenary authority over litigation involving the interests of the United States.

"Except as otherwise authorized by law, the conduct of litigation in which the United States, any agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to the officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516.

"Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States Attorneys, assistant United States Attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties." 28 U.S.C. § 519.

2. Organization of the Department of Justice

a) General.

b) Civil Division.

(1) Federal Programs Branch.

(2) Torts Branch.

(3) Commercial Litigation Branch.

(4) Appellate Staff.

(5) Office of Consumer Litigation.

(6) Office of Immigration Litigation.

B. United States Attorneys.

1. One United States Attorney appointed by the President for each judicial district. 28 U.S.C. § 541.

2. Assistant United States Attorneys (AUSAs) are appointed by the Attorney General. 28 U.S.C. § 542.

3. Responsibility of the United States Attorney.

a) General.

"[E]ach United States Attorney, within his district, shall . . . (2) prosecute and defend for the Government, all civil actions, suits or proceedings in which the United States is concerned." 28 U.S.C. § 547.

b) Retained and delegated cases.

4. Organization of the United States Attorney's Office.

C. Department of Defense. Office of General Counsel.

1. Provide litigation coordination among military departments and with DOJ.

2. Determine DoD position and resolve disagreements on specific legal issues.

D. Department of the Army.

1. "Subject to the ultimate control of litigation by DOJ (including the various U.S. Attorney Offices), and to the general oversight of litigation by the Army General Counsel, TJAG is responsible for litigation in which the Army has an interest." Army Regulation 27-40, para. 1-4b.

2. Within DA, the Chief, Litigation Division, has primary responsibility for supervising litigation of interest to the Army. AR 27-40, para. 1-4d. Acts for TJAG and SECARMY on litigation issues, to include settlement authority.

3. Only attorneys designated by TJAG may appear as counsel before any civilian court or in any preliminary proceeding (i.e. deposition) in litigation in which the Army has an interest. AR 27-40, para. 1-6a. Requests for appearance as counsel are processed through Litigation Division to the Personnel, Plans, and Training Office, OTJAG. AR 27-40, para. 1-6b.

4. Special Assistant U.S. Attorneys (SAUSAs) and DOJ Special Attorneys. See AR 27-40, para. 1-4e. Army Judge Advocate attorneys and civilian attorneys, when appointed as SAUSAs under 28 U.S.C. § 543, will represent the Army's interests in either criminal or civil matters in Federal court under the following circumstances:

a) Felony and misdemeanor prosecutions in Federal Court.

b) SAUSAs for civil litigation.

c) Special Attorneys assigned by DOJ (only in civil litigation).

5. Additional areas of DA involvement in litigation include:

a) Contract Law Division, OTJAG.

b) Legal Representatives of the Chief of Engineers.

c) Contract Appeals Division, USALSA.

(1) Trial Branch I, II, and III.

(2) Procurement Fraud Branch.

d) Regulatory Law and Intellectual Property Law Division, USALSA.

(1) Regulatory Law Office

(2) Intellectual Property Law Office

e) Labor and Employment Law Office, OTJAG.

f) Environmental Law Division, USALSA.

(1) Compliance and Policy Branch

(2) Litigation Branch

(3) Restoration and Natural Resources Branch

g) Criminal Law Division, OTJAG.

h) Litigation Division, USALSA.

(1) Military Personnel Branch.

(2) Civilian Personnel Branch.

(3) Torts Branch.

(4) General Litigation Branch.

i) Responsibilities of Installation Staff Judge Advocates (SJA).

(1) Establish and maintain liaison with United States Attorney. AR 27-40, para. 1-5b.

(2) Advise Litigation Division by telephone of significant cases and those requiring immediate attention (e.g., temporary restraining orders, habeas corpus, cases with short return dates, cases alleging individual liability arising from performance of official duties, etc.) AR 27-40, paras. 3-1 and 3-3a.

(3) Forward by FAX or express mail to HQDA, a copy of all process, pleadings, and other related papers. AR 27-40, para. 3-3b.

(4) Notify the appropriate local U.S. Attorney upon receipt of process or initiation of court proceedings involving the installation or its activities and provide necessary assistance. AR 27-40, para. 3-3c.

(5) Assist federal employees sued for actions taken within the course and scope of their employment in securing DOJ representation. AR 27-40, paras. 3-4 and 4-4.

(6) Prepare investigative (litigation) reports in appropriate cases. AR 27-40, paras. 3-9 and 4-4.

(7) Represent the United States in litigation when directed by the Chief, Litigation Division. AR 27-40, para. 1-4f.

E. Department of the Navy.

1. Office of the Judge Advocate General, Civil Law.

a) General Litigation – Code 14 (military personnel litigation, constitutional torts, FOIA/PA, disability, habeas corpus).

b) Tort Claims and Litigation – Code 15

c) Admiralty Litigation – Code 11

2. Navy General Counsel Litigation

a) Business & Commercial

b) Environmental

c) Civilian Personnel

d) Real/Personal Property

e) Intellectual Property

f) Procurement

3. SJAs Provide Litigation Reports IAW JAG Manual, Chapter II, 0210.

F. Department of the Air Force, Civil Law & Litigation Directorate – AFI 51-301

1. Branches:

a) General Litigation – JACL (Military Personnel Branch, Employment Litigation Branch, Information Litigation Branch, Utility Litigation Team, Central Labor Law Office).

b) Tort Claims and Litigation – JACT

c) Commercial Litigation – JACN

d) Environmental Litigation – JACE

e) Alternative Dispute Resolution – JACR

2. Litigation Reports. *See* AFI 51-301, para. 1.8.

IV. TYPES OF SUITS FILED AGAINST MILITARY DEPARTMENTS AND THEIR OFFICIALS.

A. Subject-matter of litigation includes:

1. Enlistments, inductions, activations.

2. Discharges.

3. Transfers and assignments.

4. Promotions.

5. Personnel policies.

6. Military programs.

7. Civilian personnel actions.

8. Installations management decisions.

9. Environmental compliance and remediation.

10. Bankruptcy (as a creditor).

11. Personal injury, death, or property damage caused by the negligence of Federal employees.

12. Civil challenges to courts-martial convictions (habeas actions, corrections of military records).

13. Contract disputes.

14. Freedom of Information and Privacy Act.

15. Federal and state administrative activities.

B. Types of Relief Sought.

1. Damages.

2. Mandamus.

3. Habeas corpus

4. Injunction

5. Declaratory judgment.

V. **METHOD OF ANALYSIS.** Perform a "systematic analysis"of the lawsuit. Identify any legal theory that provides a basis for a dispositive motion or narrows the legal dispute to the advantage of the United States.

A. Sovereign Immunity: Has the plaintiff asked for relief properly within a statutory waiver of sovereign immunity?

1. The Doctrine. The U.S. cannot be sued without the consent of Congress. *United States v. Sherwood*, 312 U.S. 584, 586 (1941)("The United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit.")

2. Scope of Doctrine. Applies to lawsuits against the U.S., its agencies, and its officials sued in their official capacities. *Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963).

3. Federal Judicial Power. Unlike state courts, federal courts are courts of limited, as opposed to general jurisdiction.

a) Limited by Article III. Constitutional original jurisdiction. U.S. Const. Art. III. § 2.

b) Statutory grants.

(1) Federal Question Jurisdiction, 28 U.S.C. § 1331, is not a general waiver of sovereign immunity (see infra at "B").

4. Justiciable case or controversy. Is the matter a controversy appropriate for judicial inquiry? "Justiciability" is the term of art used to express the dual limitations imposed upon the federal courts by the Case or Controversy Doctrine. A two pronged doctrine:

a) Adversarial.

(1) Advisory opinions.

(2) Ripeness.

(3) Mootness.

(4) Standing.

b) Political question.

B. Jurisdiction: the authority or power of the federal court to decide the case before it. Related to Sovereign Immunity; focuses on whether the court can grant the relief requested.

1. Illustrative statutory grants of jurisdiction (limited waivers of Sovereign Immunity).

a) The Tucker Act. 28 U.S.C. §§ 1346(a)(2) and 1491.

b) The Federal Tort Claims Act. 28 U.S.C. §§ 1346(b) 2671-2680.

c) Other Specialized Statutes.

(1) Government information management statutes (the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a).

(2) The Civil Rights Act. 28 U.S.C. § 1983.

(3) The Civil Rights Act of 1991. 42 U.S.C. § 1981.

(4) The Back Pay Act (civilians). 5 U.S.C. § 5596(b).

(5) The Military Pay Statute. 37 U.S.C. § 204.

(6) The Equal Access to Justice Act. 28 U.S.C. §§ 2412(b) and (d); 5 U.S.C. 504.

(7) The Administrative Procedures Act. 5 U.S.C. §§ 701-706 (see below at "d)(5)").

d) Commonly asserted statutes that do not waive sovereign immunity for money damages:

(1) The Federal Question Jurisdiction Statute. 28 U.S.C. § 1331.

(2) The Civil Rights jurisdiction statute. 28 U.S.C. § 1343.

(3) The Mandamus statute. 28 U.S.C. § 1361.

(4) The Declaratory Judgment Act. 28 U.S.C. §§ 2201-2202.

(5) The Administrative Procedures Act. 5 U.S.C. §§701-706 (waiver only for nonmonetary claims).

(6) The Constitution. See, e.g., United States v. Testan, 424 U.S. 392 (1976).

2. Types of remedies (what did the plaintiff ask for; does his cited basis permit it?)

a) Damages.

b) Mandamus.

c) Habeas corpus (see 28 U.S.C. §§ 2241-2255).

d) Injunctions (see Fed.R.Civ.P. 65).

e) Declaratory judgment.

C. Exhaustion of administrative remedies: has the plaintiff pursued all intra-agency remedies?

1. Basic doctrine.

2. Remedies available. Examples: Boards for Correction of Military Records, Discharge Review Boards, Article 138, UCMJ, clemency boards.

3. Caveat: Darby v. Cisneros, 509 U.S. 137 (1993)(In APA cases exhaustion is required only when specified by statute). Military services should continue to assert the exhaustion doctrine as a defense. Seek to distinguish *Darby*, which was not a military case.

D. Official Immunity and Judicial Bar.

1. Common Law Tort Lawsuit.

a) Statutory immunity under provisions of the Federal Employees Liability Reform and Tort Compensation Act (the "Westfall Act"), 28 U.S.C. § 2679.

b) Judicial Bar when the plaintiff is a service member and injury incident thereto. Feres v. United States, 340 U.S. 135 (1950).

2. Constitutional Tort Lawsuit.

a) Judicial qualified immunity—Harlow v. Fitzgerald, 457 U.S. 800 (1982).

b) Exceptions to qualified immunity—Judicial Bar:

(1) Judicial Bar when the activity is quasi-judicial, quasi prosecutorial. Butz v.Economou, 438 U.S. 486 (1978).

(2) Judicial Bar when the plaintiff is a service member and injury incident thereto (Feres analysis applied in constitutional tort setting). Chappell v. Wallace, 462 U.S.486 (1983).

(3) Judicial Bar when the plaintiff is a civilian employee and the claim is subject to the Civil Service System. Bush v. Lucas 462 U.S. 367 (1983).

E. Reviewability: should the court review and decide the issues in controversy? Typical situations: challenges to court-martial jurisdiction over the person; alleged violation of the Constitution, a statute, or regulation. General rule – Federal administrative actions are presumptively reviewable under the Administrative Procedure Act, 5 U.S.C. § 701. The presumption is rebuttable. Executive branch determinations in general, and military decisions in particular, are nonreviewable when Congress has proscribed review or when prudential considerations militate in favor of judicial abstention.

1. Exception to presumptive reviewability – "statutory preclusion." Another statute precludes judicial review. 5 U.S.C. § 701(a)(1).

a) Military Claims Act, 10 U.S.C. §§ 2733, 2735.

b) National Guard Claims Act, 10 U.S.C. § 715.

c) Civil Service Reform Act, 5 U.S.C. §§ 4301-4305.

2. Exception - Action is committed to agency discretion by law. 5 U.S.C. § 701(a)(2).

3. The "Mindes Test." Establishes a framework for courts to determine the reviewability of military activities. The Supreme Court has not explicitly adopted the "Mindes Test" and there is a split among the Circuits as to its applicability.

a) Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

(1) Threshold allegations.

(a) Violation of a constitutional, statutory, or regulatory provision.

(b) Exhaustion of administrative remedies.

(2) Balancing factors:

(a) Nature and strength of plaintiff's claim.

(b) Potential injury to plaintiff if review is refused.

(c) Interference with the military function.

(d) Degree of military expertise and discretion involved.

b) Examples: Diekan v. Stone, No. 92-11309-Z, 1992 WL 390749 (D. Mass. 1992), aff'd, 995 F.2d 1061 (1st Cir. 1993); Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991).

F. Scope of review: to what extent should the federal court substitute its judgment for that of the military decision-maker? The unique character of the armed services influences the scope of review.

"We know that from top to bottom of the Army the complaint is often made . . . that there is objectionable handling of men. But judges are not

given the task of running the Army. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be not to intervene in judicial matters." Orloff v. Willoughby, 345 U.S. 83, 93 (1953).

Typical situations: enlistment contracts, recruiter representations, conscientious objector determimations, challenges to agency interpretations of regulations or agency policies.

G. Trial on the merits.

V. CONCLUSION.

55TH GRADUATE COURSE

REPRESENTATION, IMMUNITIES & JUDICIAL BARS, INDEMNIFICATION, & REMOVAL

OUTLINE OF INSTRUCTION

I. REPRESENTATION OF AGENCY EMPLOYEES

A. Representation defined.

1. Representation of an employee named in a lawsuit in his official capacity.

2. Representation of an employee named in a lawsuit in his individual capacity or when the allegations of the pleadings are unclear.

B. Procedure for obtaining representation. 28 CFR § 50.15.

1. The employee must affirmatively seek representation by written request.

2. Complies with the procedures delineated in AR 27-40, chapter 4.

3. Installation SJA's role in representation process:

a. Apprise employee of his right to seek representation and assist employee in preparing required documentation (including an employment statement from a supervisor) (28 C.F.R. §50.15 and AR 27-40, chapter 4);

b. Immediately notify JA technical chain (Litigation Division) and appropriate U.S. Attorney's Office, transmitting all available process and pleadings;

c. Investigate and prepare a report on the incident giving rise to the lawsuit. This includes the SJA memorandum and recommendation;

d. Transmit report and allied papers up the JA technical chain;

e. Request the local U.S. Attorney provide conditional (temporary) representation to preserve an employee's rights pending final action on a request for representation--used when "time for response is limited" (AR 27-40, para. 3-2a, and U.S. Attorney's Manual § 4-5.412).

4. Litigation Division reviews and forwards a recommendation to DOJ.

5. DOJ makes the final determination concerning representation of the employee, 28 C.F.R. § 50.15.

a. Criteria used by DOJ to make the representation decision:

(1) Employee of the federal government at time of incident (current or former);

(2) Acting within the scope of office or employment at the time of the alleged incident;

(3) The alleged incident is not related to any federal criminal proceeding or agency disciplinary action;

(4) Representation is in the best interests of the United States.

b. Routine requests for representation go to the Director, Torts Branch, Civil Division. Non-routine requests, or requests in which a recommendation against representation has been forwarded, go to the Representation Committee, Civil Division, for a determination (DOJ has not delegated to U.S. Attorneys the authority to grant a request for representation).

c. Reviewability of a denied request for representation.

(1) Decision of DOJ to refuse to provide representation is *not* reviewable by the courts. Falkowski v. EEOC, 764 F.2d 907 (D.C. Cir. 1985), cert. denied, 478 U.S. 1014 (1986).

(2) Distinguish this from DOJ decisions regarding scope of employment (FTCA cases)(called "scope certifications"). Employees whose alleged actions are common law torts as characterized by the Federal Tort Claims Act, 28 U.S.C. § 1346, *may* petition the federal district court to find and certify their actions as in the scope of office or employment, 28 U.S.C. § 2679(d)(3) (see "Westfall Act," infra).

d. Limitations on DOJ representation:

(1) Conflicts of interest--

(a) among multiple defendants

(b) in connection with a federal criminal proceeding after a decision to indict or present information;

(2) Appeal of adverse decision;

(3) Assertion of counterclaims, cross claims, third party claims.

II. IMMUNITIES AND JUDICIAL BARS

A. Immunities and Judicial Bars defined.

B. Common statutory immunities:

1. 28 U.S.C. § 2679(d) (the Westfall Act);

a. Absolute immunity for common law torts. Federal Employees Liability Reform and Tort Compensation Act, (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679). Federal employees, including members of the Armed Forces, who are sued for state law torts committed within the scope of their employment. United States v. Smith, 499 U.S. 160 (1991); Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994), cert. denied, 115 S. Ct. 723 (1995).

2. 10 U.S.C. § 1089 (the Gonzalez Act);

a. Absolute immunity for military medical or dental personnel performing medical, dental, or other health-related functions within the scope of their employment. 10 U.S.C. § 1089.

3. 10 U.S.C. § 1054 (DOD attorney immunity).

a. Absolute immunity for lawyers or members of legal staffs rendering legal advice within the scope of their employment. 10 U.S.C. § 1054. By statute, these actions are deemed tort actions brought against the United States.

C. Judicial Bars.

1. For common law torts--complete bar on liability--Judicial bar on liability in lawsuits filed by service member when claim arises incident to service. Feres v. United States, 340 U.S. 135 (1950).

2. For constitutional torts--"qualified immunity" from liability. Harlow v. Fitzgerald, 457 U.S. 800 (1982); Saucier v. Katz, 533 U.S. 194 (2001).

a. Test for qualified immunity: did the defendant's actions violate a clearly established constitutional right of which a reasonable person would have known?

b. Exceptions: absolutely immune when--

(1) the defendant's actions were quasi-judicial or quasi-prosecutorial in character. Butz v. Economou, 438 U.S. 486 (1978);

(a) quasi-judicial or quasi-prosecutorial actions have been construed not to include executing a certification for determination of probable cause--such action could be done by any competent witness. Kalina v. Fletcher, 522 U.S. 118 (1997).

(2) the suit is filed by a service member on a claim arising incident to service. Chappell v. Wallace, 462 U.S. 486 (1983);

(3) the suit is filed by a federal civilian employee on a claim that is covered by the Civil Service System. Bush v. Lucas, 462 U.S. 367 (1983).

D. Who Is Liable for an Adverse Judgment?

1. Judgments against the United States and individual federal employees are paid by the United States.

2. Judgments against individual federal employees are the responsibility of the employee.

III. REQUESTS FOR INDEMNIFICATION

A. Policy. AR 27-40, para. 4-6.

1. No right to reimbursement from Department of the Army (DA) for judgments rendered against an individual in his individual capacity.

2. DA will consider a request for indemnification from DA personnel where conduct within the scope of official duties has resulted in personal liability and indemnification is in the best interests of the United States.

3. Indemnification is strictly contingent upon an appropriation to pay the judgment, as well as availability of such funds.

B. Individual request procedures

1. An individual against whom an adverse judgment has been rendered may request indemnification. The request must include, at a minimum, the following:

a. Scope of employment statement,

b. Requestor insurance or any other source of indemnification; and,

c. How reimbursement is in the best interests of the United States.

d. The request must also contain the following statements: "I understand that acceptance of this request for indemnification for processing by DA does not constitute an acceptance of any obligation to make such a payment. I also understand that payment is contingent on availability of funds and that it will only be made if such is determined to be in the best interests of the United States."

e. The individual should attach a copy of relevant documents, for example, court's opinion, judgment, and other allied papers.

C. Supervisory and SJA procedures.

a. Request submitted through supervisory channels to the local SJA or legal adviser.

b. Each supervisor will make a recommendation on the propriety of reimbursement.

c. Forwarded to Chief, Litigation Division.

D. Approval Process.

a. The Chief, Litigation Division, will examine the submission and, after consultation with DOJ or other agencies, forward the packet with his recommendation to the Army General Counsel.

b. The General Counsel will obtain a final decision by the Secretary of the Army or his designee on the matter.

c. There is no administrative appeal of the Secretary's (or his designee's) decision.

E. Adverse Judgments.

1. Judgments against the United States are paid by the United States from the Judgment Fund. Exception: Beginning in FY 04, agencies must reimburse the Judgment Fund for payments made (settlements and adverse judgments) in Title VII (EEO) cases. (No Fear Act, Pub. L. No. 107-174).

3. Judgments against individual federal employees are the responsibility of the employee.

F. Professional Liability Insurance. Typically, insurance policies cover only official acts within the scope of employment. Review sample policy before you or your commander buy! See handout.

IV. REMOVAL OF SUITS AGAINST AGENCY EMPLOYEES

A. Removal defined.

B. Removal statutes:

1. 28 U.S.C. § 1441, general removal statute;

2. 28 U.S.C. § 1442, removal of cases involving federal officers sued or prosecuted in state court;

3. 28 U.S.C. § 1442a, removal of cases involving service members sued or prosecuted in state court (this is the statute normally used for removal of lawsuits involving service members--sometimes DOJ/AUSA is unaware of this statute and its favorable treatment of service members);

4. 28 U.S.C. §2679(d), the Federal Employees Liability Reform and Tort Compensation Act ("Westfall Act") (this is the statute normally used to remove lawsuits involving civilian employees of an armed service);

5. 10 U.S.C. § 1089, physicians' immunity act ("Gonzales Act");

6. 10 U.S.C. § 1054, DOD attorneys immunity act.

C. Removal procedures.

1. Civil actions, see 28 U.S.C. § 1446 and Fed. R. Civ. P. 81.

2. The "extra step" of certification of scope of office or employment under the Westfall Act, 28 U.S.C. § 2679(d).

a) Certification is subject to judicial review. *Guiterrez de Martinez v. Lamango*, 515 U.S. 417 (1995)(Attorney General's certification under the Westfall Act that federal employee was "acting within the scope of his office or employment" at time of incident giving rise to tort claim against employee is subject to judicial review).

3. Substitution of the United States as the party defendant after certification.

4. Because of the comprehensiveness of the Westfall Act, DOJ almost always bases its removal and substitution analysis on this statute.

5. Criminal actions, see 28 U.S.C. §§ 1442, 1446(c).

D. Disposition after removal.

1. Applicable law:

a. Procedurally--federal law applies to procedure and other federal questions. RTC v. Northpark Joint Venture, 958 F.2d 1813 (1992). Official immunity is one of the most important issues decided under federal law rather than state law.

(1) Note that state court orders, injunctions, or other judicial directives remain in effect after removal. Federal law governs the orders procedurally, Granny Goose Foods v. Brotherhood of Teamsters Local 70, 94 S. Ct. 1113 (1974).

b. Substantively--*lex loci delictus*, Arizona v. Manypenny, 451 U.S. 232 (1981). Substantive law of state remains applicable after removal.

IV. CONCLUSION