

**THE MILITARY COMMANDER  
AND  
THE LAW**

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*Seventh Edition*

2004

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# The Military Commander and the Law

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## **FUNCTIONS OF THE STAFF JUDGE ADVOCATE**

### **PRELIMINARY MATTERS**

- Mission: The Judge Advocate General's Corps provides essential legal support for military operations; advocates and litigates to preserve command prerogatives; administers civil and criminal law programs; educates and counsels leaders and personnel in the law; and recruits, trains, and equips quality people

- Definitions

-- Judge Advocate: An AF officer designated as such by The Judge Advocate General

--- Graduate of an accredited law school, a member in good standing of the legal bar of some state, and a graduate of the Judge Advocate Staff Officer Course

--- Approximately 1,340 active duty Air Force JAGs

-- Staff Judge Advocate (SJA): Senior judge advocate on extended active duty normally on the installation commander's staff unless otherwise specified by The Judge Advocate General

-- Assistant Staff Judge Advocates: Other judge advocates assigned to the staff judge advocate's office. May wear other hats, such as

--- Claims Officer

--- Chief of Military Justice

--- Chief of Civil Law, etc.

-- Area Defense Counsel (ADC): Judge advocate performing defense counsel duties (for additional information, see "Area Defense Counsel" article in chapter 1)

### **FUNCTIONAL ORGANIZATION OF THE BASE LEGAL OFFICE**

- Military Justice Division: Commanders make decisions about discipline and impose punishment. SJA's provide advice on how best to achieve good order and discipline

-- "On-call" JAG available 24 hours a day

-- Assists commander in determining appropriate forum for disciplinary actions

-- Article 15 Actions (Nonjudicial Punishment [NJP]). SJA's advise on

- Whether there is enough evidence for the action (offender may demand trial by court-martial)
- Who should offer the Article 15
- What type of punishment fits the offense, the offender, and is consistent with base-wide and Air Force-wide discipline
- Whether supplementary actions should be taken after an Article 15 is concluded (vacation actions, suspensions, set asides, etc.)
- Courts-Martial
  - Pretrial matters
    - Pretrial confinement propriety
    - Search and seizure questions
    - Response to media inquiries
    - Subpoena of witnesses
  - Prosecution at trial
  - Post-trial review
- Claims Office: Investigates, adjudicates, and processes claims
  - Claims against the United States
    - Personnel claims "incident to service" (household goods damage, paint overspray, etc.)
    - Third party (from outside the AF) claims
      - Resulting from AF operations
      - Resulting from personnel actions committed outside the scope of duties
        - Overseas
        - Article 139 claims (willful damage by military personnel)
      - Tort claims (slip & fall, motor vehicle, medical malpractice, etc.)
  - Claims asserted on behalf of the United States

- Carrier Recovery Claims (against household goods carriers)
  - Hospital Recovery Claims (for cost of medical care to injured U.S. personnel)
  - Property Damage Tort Claims (for damage to U.S. property)
- International and Operations Law Division
  - Foreign Criminal Jurisdiction
  - International Agreements
  - Law of Armed Conflict training and guidance
  - Operations law issues (rules of engagement, targeting, etc.)
- Civil Law Division
  - Administrative discharges
    - Advice to squadron commanders, convening authority, and separation authority
    - Serves as Legal Advisor or Recorder in board hearing cases
  - Legal Assistance
    - Consultation on personal, civil (noncriminal) legal matters
    - No court representation
    - Wills, notary public services, and powers of attorney provided
    - Active duty, retirees, and family members
    - Attorney-client privilege exists
  - Preventive Law Program: Educating commanders, service members, and their family members on pertinent legal issues
  - Legal advice for other staff agencies
    - Contracting Squadron: Government procurement law, protests, disputes, etc.
    - Supply Squadron: Reports of Survey
    - Mission Support Squadron: Line of duty determinations

- Military Equal Opportunity: Equal Opportunity & Treatment investigations
- AFOSI and Security Forces: Law enforcement investigations
- Inspector General: Fraud, waste, and abuse inquiries and investigations
- Civil Engineering Environmental Flight: Environmental issues and compliance
- Comptroller Squadron: Fiscal law issues
- Communications Squadron: Freedom of Information and Privacy Act issues
- Civilian Personnel Office
  - Labor-management relations (collective bargaining agreements, unfair labor practices, grievances, etc.)
    - Adverse administrative actions against civilian employees
    - Equal employment opportunity complaints
  - Base Medical Facility
    - Quality assurance, risk management, and credentials programs
    - Legal/Medical issues: Informed consent, medical record release, training affiliation agreements, etc.
- Corporate counsel for installation commander
  - Base driving privileges
  - AAFES & Commissary shopping privileges
  - Ethics counselor: Gifts, financial disclosures, off-duty employment, etc.
  - Posse Comitatus Act issues
  - Base access questions
    - Debarment letters
    - On-base political demonstrations
    - On-base commercial solicitations

---- Open houses

--- Federal Magistrate's Court (depends on base jurisdiction)

---- Only civilians prosecuted

---- Only misdemeanor offenses tried

**Reference:**

AFI 51-102, *The Judge Advocate General's Department*, 19 July 1994

# *Chapter 1*

## ***CRIMINAL INVESTIGATIONS***

## **A COMMANDER'S GUIDE TO THE AFOSI**

The Air Force Office of Special Investigations (AFOSI) provides specialized investigation support to commanders.

### **ORGANIZATION**

Established following WWII to preclude "self-investigation"

- Patterned after FBI; removed from command channels; independent centralized organization
- To ensure unbiased, factual investigations

Became operational 1 Aug 48 and now organized under SAF/IG

Missions include investigating allegations of criminal activity and fraud, as well as force protection and counterintelligence operations

- To provide complete service to assist commanders in carrying out the responsibilities of command
- Since 1972, AFOSI's CONUS personnel security investigation function transferred to Defense Investigative Service (DIS); AFOSI still assists DIS in overseas needs

### **AFOSI AND COMMAND**

--Requesting AFOSI investigative service

--AFI 71-101V1 and AFPD 71-1

- Investigations initiated on authority of AFOSI/CC, as delegated to AFOSI Region/CC
  - AFOSI will brief Air Force commanders on progress of investigations affecting command
  - Direct contact with commanders is essential for mission, e.g., search authorizations
  - Any Air Force commander responsible for security, discipline, or law enforcement may request
  - Coordination with AFOSI and SJA is required prior to commanders ordering/permitting a commander directed inquiry/investigation when there is ongoing AFOSI investigation
  - Only SecAF may direct AFOSI to delay, suspend or terminate an investigation
- AFI 71-101V1, Attachment 2 (AFOSI and SF investigative responsibilities)

--- Generally, AFOSI will only investigate major offenses

--- Minor offenses are normally handled by Security Forces, Office of Investigations

--- Tailoring permissible to make best use of investigative resources; considering technical expertise, investigative capability and available manpower

#### Mutual support requirements

##### -- Command Role

--- AFOSI requests, and command issues, search and seizure authorizations based on probable cause requirements (the SJA should be involved in every case involving a probable cause determination)

##### --- Operations Security (OPSEC) of AFOSI Investigations

---- Knowledge of an ongoing AFOSI investigation by unnecessary parties may jeopardize operations and compromise efforts to neutralize criminal or counterintelligence activities

---- The exposure of AFOSI sources/agents/witnesses and investigative techniques could place persons and evidence at risk

---- OPSEC is critical; restrict to base/staff officials on strict “need-to-know” basis

##### --- Crime Scene Protection Support

---- AFOSI depends on command support and resources to protect crime scenes

---- Security Forces are usually the first-responders who secure and protect the scene for AFOSI

----- Exclude witnesses, curiosity seekers, and limit to minimum of authorized personnel (e.g., medical/fire department)

----- Rank or official position alone should not justify entry

----- Command support of AFOSI access and control of area is vital

---- Untrained, though well intentioned, personnel who disturb or change the physical environment or handle objects at the crime scene can alter or destroy critical evidence

##### --- Protection Of Agent's Grade (AFI 71-101V1)

---- The ability to carry out the mission is enhanced by concealing the rank of AFOSI special agents

---- Special procedures exist to protect agent personnel, medical and other administrative records

---- Host commander may authorize permanent or temporary housing in officer's quarters

--- Handling Complaints Against AFOSI Personnel

---- Due to nature of duties, complaints of intimidation or harassment are not uncommon

---- All should be immediately referred to person's immediate commander; all will be thoroughly and expeditiously investigated by AFOSI

-- AFOSI Support to Command

--- AFOSI Developmental Files

---- Preliminary inquiry initiated by AFOSI/CC or Region/CC and used to examine situation, which appears to warrant investigation

---- Information systematically collected on specific types of offenses or targets, typically using confidential informants

---- Information analyzed to determine need for individual substantive cases

--- Child Abuse/Neglect

---- Assist command in Family Advocacy Program

---- All allegations must be reported to AFOSI, regardless of origin of complaint (personnel of Family Support and Child Care Centers, social actions, medical, etc.)

----- AFOSI has greater access to certain informational records and files

----- Provides fact-finding role to assist command and staff to make decisions

--- AFOSI's Specialized Functions

---- Single manager of USAF polygraph program

---- Specially trained mental health professionals using supervised cognitive interviews or forensic hypnosis as an aid to witness or victim memory enhancement

---- Computer Crime Investigative Assistance

---- Regionally located Computer Crime Investigators serve as specialists in the investigation of cyber crime, (e.g., computer network intrusions and computer media search and seizure)

---- Forensic Science Consultants

----- Regionally located experts with forensic sciences masters degrees

----- For consultation, training, specialized investigative techniques in criminal cases, (e.g., death investigations), and assistance in aircraft accident investigation boards

---- Technical Services

----- Process and support requests to intercept wire, oral, or electronic communications for law enforcement purposes (See AFI 71-101 V1 for list of approval authorities)

---- Technical Surveillance Countermeasures

----- Agents specialized in neutralizing technical surveillance devices deployed against AF facilities

----- Conducts security vulnerability surveys

---- Protective Services

----- Provides threat assessments; protects designated AF officials; protects foreign official guests of DOD in CONUS

----- Assessments and estimates on terrorist and foreign intelligence threats to Air Force deployments, exercises, weapons facilities, and other base facilities upon request

---- Security Violations

----- AFOSI investigates all security incidents of espionage, suspected compromise of special access information, or deliberate compromise of classified information

----- Not routine security violations

## **AFOSI POLICY INFORMATION**

## Apprehension

- Agent's authority is derived from the *Manual for Courts-Martial*
  - Limited to people subject to UCMJ, not family members or nonmilitary U.S. citizens
  - Only if required by operation or emergency (Security Forces routinely do so at AFOSI's request)
- Military law enforcement personnel may temporarily detain civilians suspected of on-base offenses until civilian authorities arrive

## Arming

- AFD 71-1 authorizes agents to carry firearms (including concealed) for duties
- AFOSI offices required to maintain at least one handgun and ammunition for each agent assigned
- Weapons stored within AFOSI facilities or in Security Forces armory if the local detachment is inadequate for security purposes

## Sources and Undercover Agents

- Base human sources of information may be overt (officials) or covert (on a confidential basis)
- AFOSI undercover agents are specially trained and sent to installation to perform duties
- OPSEC and safety concerns dictate identity protections
  - Investigative reports conceal identities; release of identities requires either source consent and concurrence of AFOSI Region/CC or an order from a military judge. See MRE 507
  - Threatened Airman Program is a personnel program; AFOSI provides threat validation and assessment as prelude to reassignment action

- Invaluable information about crimes planned/in progress

## Agent Standards to Expect

- Civilian attire authorized as neat, professional appearance
- Must comply with AF standards while in uniform; impeccable ethics

## **TYPES OF AFOSI REPORTS AND RELEASE OF INFORMATION**

Routinely provided to commanders and their representatives, (i.e., SJA)

#### Interim Case Reporting

- Upchannel internal AFOSI reporting of special interest cases where publicity or Congressional interest is expected
- Informs HQ AFOSI, Air Staff, commanders and other agencies of significant matters affecting AF and DOD
- Separate and distinct from MAJCOM upchannel reporting

#### Report of Investigation (ROI) on specific crime

- Information obtained through investigation and witness interviews
- No recommendations or suggestions on appropriate command action

#### Special Reports provided by HQ AFOSI highlighting a particular kind of investigative activity and pinpointing problems so commanders can better handle them

- Provides description of weaknesses or susceptible areas under command to alert functional managers for possible correctional or remedial actions (e.g., Fraud Information Reports; Narcotics Information Reports; Narcotics Briefs)
- Reports requested by the Air Staff or other senior AF or DOD officials containing in-depth analysis of some area of concern Air Force-wide (e.g., damage to USAF aircraft)

#### Command reporting of actions taken

- Commanders determine and then provide information of actions taken to AFOSI
- Reasons provided with "No Action" reports

#### Release of Information

- "For Official Use Only" and sensitive records
- Safeguarding, handling, and releasing information from AFOSI reports
  - May be released in whole or in part, only to persons who require access for official duties
    - Refer all requests for release to non-AF officials to the servicing AFOSI detachment

---- Only HQ AFOSI may authorize release outside the Air Force; or release or deny information under Freedom of Information Act (FOIA) or Privacy Act (law enforcement records exemption)

---- Release Report of Investigation (ROI) to defense attorneys through the SJA

--- Safeguard ROIs in locked file cabinets

-- Press or news inquiries for information require close coordination between Public Affairs and AFOSI in all cases

**References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002)

AFI 71-101V1, *Special Investigations, Criminal Investigations*, 1 December 1999

AFPD 71-1, *Criminal Investigations and Counterintelligence*, 1 July 1999

DoDR 5400.7/AF Supp, *DoD Freedom of Information Act Program*, 24 June 2002

## ADVISING SUSPECTS OF RIGHTS

Good order and discipline is a function of command. At times, a commander may need to question a member suspected of breaching good order and discipline. It is important that a commander understands when and how to advise the member of his/her Article 31 rights

-- The moment a commander or supervisor suspects someone of an offense and starts *asking questions* or taking any action in which an incriminating response is either sought or is a reasonable *consequence of such questioning*, the individual must advise the suspect of his/her rights

-- Proper rights advisement enables the government to preserve any admissions or confessions for later use as evidence for any purpose

-- Unadvised admissions and confessions cannot normally be admitted as evidence at trial. Additionally, any evidence that may have been obtained as a result of the unadvised confession is usually excluded from use at trial

-- The advisement of rights for both military personnel and civilians is set out in the attached Advisement for Military Suspects and Advisement for Civilian Suspects

Who must give Article 31 rights advisement

-- Any person subject to the UCMJ must advise another individual if they suspect that person of a criminal offense, *and* they are interrogating (questioning) the person as part of an official law enforcement investigation or disciplinary inquiry

-- Military supervisors and Commanders are *presumed* to be acting in a disciplinary capacity when questioning a subordinate

When must Article 31 rights be given

-- Whenever there is "*interrogation*"

--- Interrogation includes any formal or informal questioning in which an incrimination response is either sought or is a reasonable consequence of such questioning

--- Interrogation does not have to involve actual questions. Sometimes actions, if they are intended to elicit responses, are deemed to be interrogation

-- Once again, supervisors and commanders are held to an unusually high standard. When in doubt, give rights advisement and consult with your SJA

What must Article 31 rights include

-- The general nature of the suspected offense. Legal specifications are not necessary; lay terms are okay. However, the allegation must be specific enough so that the suspect understands what offense you are questioning him/her about

-- The suspect's right to remain silent

-- The consequences of making a statement

-- Although it is not necessary that the advisement be verbatim, it is best to read the rights directly from AF Visual Aid (AFVA) 31-231, which is a wallet-size card with Article 31 rights advice for military personnel on one side and Fifth Amendment/Miranda rights for civilians on the other side

-- Even though Article 31 does not include a right to counsel (that comes from the Constitution), it is listed on the rights advisement card and should be included when reading a suspect his/her rights

Rights advisement must be understood and acknowledged by the suspect

-- The suspect must affirmatively acknowledge understanding of the rights, and affirmatively waive his/her rights and consent to make a statement without counsel present

-- Consent to make a statement cannot be obtained by coercion, threats, promises, or trickery

-- Be cautious when advising an intoxicated person of his rights. If significantly under the influence of drugs or alcohol, the individual may be legally incapable of knowingly and voluntarily waiving his rights

-- If the suspect equivocates over whether or not to assert his/her rights, clarify whether or not they will waive their rights. Do not question until any doubt is resolved

If the individual indicates a desire to remain silent, stop questioning. (This does not mean, however, that you cannot give the individual orders or directions on other matters)

If the suspect requests counsel, stop all questioning. Inform the SJA, and get advice before re-initiating any questioning. No more questions can be asked until counsel is present

-- There are several complex legal rules relating to re-initiating questioning once a suspect has requested counsel. The rules vary depending on whether or not the suspect has been in continuous custody, whether or not the suspect re-initiates the questioning, and whether or not you are questioning about the same or a different offense

-- As a rule of thumb, if a suspect has asserted his/her rights, do not speak to that individual again regarding the offense in question unless you have consulted with the SJA regarding this area of the law

If the individual waives his/her rights and agrees to talk

- When possible, obtain the waiver in writing using AF Form 1168, *Statement of Suspect*
- Have a witness present
- Try to get the statement in writing. Handwritten by the suspect is best
- If, after electing to talk, the suspect changes his/her mind, STOP THE QUESTIONING
- Prepare a memorandum for the record (MFR) after the session ends, including
  - Where the session was held
  - What and when you advised the suspect
  - What the suspect said
  - What activities took place (suspect sat, stood, smoked, drank, etc.)
  - What the suspect's attitude was (angry, contrite, cooperative, combative, etc.)
  - Duration of the session with inclusive hours

**References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304 and 305 (2002)  
UCMJ Art. 31  
AF Visual Aid 31-231, *Advisement of Rights*  
AF Form 1168, *Statement of Suspect*

## **ADVISEMENT FOR MILITARY SUSPECTS**

I am \_\_\_\_\_, (commander of the) \_\_\_\_\_, \_\_\_\_\_ AFB. I am investigating the alleged offense(s) of \_\_\_\_\_, of which you are suspected. Before proceeding with this investigation, I want to advise you of your rights under Article 31 of the Uniform Code of Military Justice. You have the right to remain silent, that is, to say nothing at all. Any statement you do make, either oral or written, may be used against you in a trial by court-martial or in other judicial, nonjudicial or administrative proceedings. You have the right to consult with a lawyer prior to any questioning and to have a lawyer present during this interview. You have the right to military counsel free of charge. In addition to military counsel, you are entitled to civilian counsel of your own choosing at your own expense. You may request a lawyer at any time during this interview. Have you previously requested counsel after advisement of rights? (If the answer is yes, stop. Consult your SJA before proceeding). If you decide to answer questions during this interview, you may stop the questioning at any time. Do you understand your rights? Do you want a lawyer? (If the answer is yes, cease all questioning.) Have you already consulted an attorney about this matter? (If the answer is yes, stop questioning and contact the SJA) Are you willing to answer questions? Do you understand that you are free to end this interview at any time?

## **ADVISEMENT FOR CIVILIAN SUSPECT**

I am \_\_\_\_\_, (grade, if any, and name), (a member of the Air Force Security Forces/AFOSI). I am investigating the alleged offense(s) of \_\_\_\_\_, of which you are suspected. I advise you that under the Fifth Amendment to the Constitution you have the right to remain silent, that is, to say nothing at all. Any statement you make, oral or written, may be used as evidence against you in a trial or in other judicial or administrative proceedings. You have the right to consult with a lawyer and to have a lawyer present during this interview. You may obtain a civilian lawyer of your own choosing, at your own expense. If you cannot afford a lawyer, and want one, one will be appointed for you by civilian authorities before any questioning. You may request a lawyer at any time during the interview. If you decide to answer questions, you may stop the questioning at any time. Do you understand your rights? Do you want a lawyer? (If the answer is yes, cease all questions at this point.) Are you willing to answer questions? Have you previously requested a lawyer after rights advisement? (If the answer is yes, stop immediately. Consult your SJA before proceeding).

## THE AIR FORCE URINALYSIS PROGRAM

The primary purpose of the Air Force urinalysis program is to assist commanders in ensuring their troops are mission ready by deterring Air Force members from using illegal drugs and other illicit substances.

Other objectives of the program include

Identifying individuals who use and abuse illegal drugs and other illicit substances; and

Providing a basis for action, adverse or otherwise, against a member based on a positive test result

Close command coordination with legal, law enforcement, and other agencies is required for an effective urinalysis program

Carefully controlled and standardized collection, storage, and shipment procedures, supported by a legally defensible chain of custody, are required by directive and instruction to ensure the integrity of the program

By failing to follow proper procedures, use of urinalysis test results in Uniform Code of Military Justice (UCMJ) or administrative actions may be limited or, in some cases, prohibited

With the exception of urine samples that are tested for steroids and other nonstandard drugs of abuse, all Air Force member urine samples are tested at the Air Force Drug Testing Laboratory (AFDTL), Brooks City Base, Texas. Testing for all drugs is coordinated through the AFDTL. (See the section on steroids for information regarding urine testing procedures for steroids)

--The AFDTL tests for the greatest number of drugs per specimen in the Department of Defense

The AFDTL tests for the presence of cocaine, marijuana, PCP, amphetamine/methamphetamines (and derivatives, to include "ecstasy"), and LSD

The AFDTL alternatively "pulse" tests 10% of all specimens for the presence of either barbiturates or opiates

The AFDTL uses a DoD prescribed combination of analytic techniques to determine whether or not samples are positive for various drugs

Each sample must undergo *at least* three tests before it may be considered positive: screen, rescreen, and confirmation

## Screen Test ("Immunoassay Test")

Kinetic Interaction of Microparticles in Solution (KIMS) is used to test for the presence of marijuana, cocaine, opiates, PCP, amphetamines, and barbiturates

Enzyme multiplied immunoassay (EMIT) is used to test for the presence of LSD

## Adjunct Testing

The AFDTL tests all specimens that screen positive for amphetamines/methamphetamines for the presence of the "designer drugs" Ecstasy (MDMA), Adam (MDA) and Eve (MDEA) using the TDx System or fluorescence polarization immunoassay (FPIA) technology

The AFDTL tests all specimens that screen positive for opiates for the presence of heroin (6-MAM) also using the TDx system

Solid-phase radioimmunoassay (RIA) is used as an additional test for the presence of LSD before the rescreen

## Rescreen Test

KIMS is used to test for the presence of marijuana, cocaine, opiates, PCP, amphetamines, and barbiturates

Enzyme multiplied immunoassay (EMIT) is used to test for the presence of LSD

## Confirmation Test

Gas chromatography/mass spectrometry (GC/MS) is used for all confirmation testing

The GC/MS is the industry "gold-standard" for drug testing

It is extremely accurate in determining the type and amount of a drug or drug metabolite present in a person's system

## Additional Testing

Specimens that confirm above the DoD "cut-off" for methamphetamines are also subjected to a "d/l isomer" analysis

Only samples that test positive above the DoD prescribed minimum level on every test are reported as positive. Samples not testing positive on any screen or on the confirmation test are discarded

There are several bases to conduct urinalysis testing: inspection, commander-directed, probable cause, consent, and medical

#### Inspection testing

Urine specimens may be ordered as part of an inspection under Military Rule of Evidence (MRE) 313(b)

The primary purpose of an inspection must be to determine if the command is functioning properly, if proper standards of readiness are maintained, and if personnel are present, fit and ready for duty

Individual members may not be singled out for inspection

An entire unit or a part of the unit may be inspected, or you may participate in a base-wide random selection process

Do not use an inspection when you suspect specific individual(s) of drug abuse. Consult with the Staff Judge Advocate

Coordinate inspections with the Demand Reduction Program Manager. Do not announce the inspection in advance to those being inspected

Inspection testing is the best deterrent presently available against drug abuse

Results may be used for UCMJ or administrative actions, including adverse characterization of administrative discharges

#### Commander-directed

Appropriate where the member displays aberrant, bizarre, or unlawful behavior or where the commander suspects or has reason to believe drugs may be present, but probable cause does not exist

Drug rehabilitation testing is commander-directed

Results obtained through commander-directed testing can be used as a basis for administrative discharge action (honorable discharge only) or to support administrative actions such as letters of reprimand and promotion propriety actions

Test results cannot be used to take UCMJ action (court-martial, Article 15) or to adversely characterize administrative discharges

## Probable cause

Requires a search and seizure authorization from a military magistrate or commander to seize a urine specimen (See section on Inspections and Searches)

There must be a reasonable belief illegal drugs, or drug metabolites, will be present in the individual's urine

Always coordinate with the Staff Judge Advocate prior to obtaining a urine sample through a probable cause search

Results may be used for UCMJ or administrative actions, including adverse characterization of administrative discharges

## Consent

Prior to a probable cause or commander-directed urinalysis test, first ask the member if he or she will consent to a urinalysis test

You are not required to give Article 31, UCMJ, rights prior to asking for consent, however, evidence that a member was read these rights may be used to help demonstrate the members consent was voluntary

Results may be used for UCMJ or administrative actions, including adverse characterization of administrative discharges

## Medical

A urine specimen collected as part of a patient's routine or emergency medical treatment, including routine physical examinations, may be subjected to urinalysis drug testing

Results may be used for UCMJ or administrative actions, including adverse characterization of administrative discharges

## Positive results

Upon receipt of a report of a positive test, regardless of the category of test used, immediately contact the Staff Judge Advocate

AFOSI or SFS will schedule an interview with the member. DO NOT advise the member in advance of the interview or of the positive test result

## ACTIONS AUTHORIZED BY POSITIVE DRUG TEST RESULTS

*AFI 44-120, para. 19, Table 1*

Basis of Test	UCMJ USE	AFFECTS DISCHARGE CHARACTERIZATION	ADMINISTRATIVE ACTION (See Note 1)
Inspection - Military Rule of Evidence (Mil. R. Evid.) 313 (See Note 2)	Yes	Yes	Yes
Voluntary Consent – Mil. R. Evid. 314(e)	Yes	Yes	Yes
Probable Cause – Mi. R. Evid. 315 - 316 (See Note 3)	Yes	Yes	Yes
Commander - Directed (See Note 4)	No	No	Yes
Self Identification, Initial Testing (See Note 5)	No	No	Yes
Valid Medical Purpose – Mil. R. Evid. 312(f) (See Note 6)	Yes	Yes	Yes

**Notes:**

1. Administrative actions include, but are not limited to, letters of admonishment, counseling and reprimands, denial of re-enlistment, removal from duties involving firearms, removal from flying status or sensitive duties, suspension of security clearance, and removal of restricted area badges. If there are any questions regarding actions authorized for positive drug test results, consult the local servicing staff judge advocate.
2. Inspections under Mil. R. Evid. 313(b) include inspections under the installation’s random urinalysis drug testing program and unit sweeps.
3. Probable cause tests are authorized searches and seizures ordered by a military magistrate or commander (*See* Mil. R. Evid. 315 and 316)
4. Absent probable cause, commander directed results may not be used for disciplinary action under the UCMJ or to characterize an administrative separation.
5. Members may not be disciplined under the UCMJ when they legitimately self-identify for drug abuse and enter the Alcohol and Drug Abuse **Error! Bookmark not defined.** Prevention and Treatment (ADAPT) Program. In the interests of safety and security, commanders may initiate non-adverse administrative actions such as removal from flying status, removal from PRP, removal of restricted area badges, etc... Urinalysis tests of individuals following entry into the ADAPT Program are for valid medical purposes. Individuals in the ADAPT Program may be disciplined under the UCMJ when independent evidence of drug use is obtained.
6. Urine specimens obtained from an examination for a valid medical purpose may be used for any purpose.

References:

- MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 312, 313, and 315 (2002)
- DoD Directive 1010.1, *Military Personnel Drug Abuse Testing Program*, 9 December 1994 with Change 1, 11 January 1999
- DoD Instruction 1010.16, *Technical Procedures for the Military Drug Abuse Testing Program*, 9 December 1994
- AFI 44-120, *Drug Abuse Testing Program*, 1 July 2000
- AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, 26 September 2001

## **URINALYSIS CHECKLIST FOR UNIT COMMANDERS**

Note: This checklist is intended to alert commanders to important urinalysis inspection issues. It is not a complete checklist, nor is it intended to replace or supersede any local or higher headquarters checklist(s) or guidance pertaining to urinalysis inspections.

### **GENERALLY**

Do you brief the consequences of drug abuse at commander's calls? Do you invite a judge advocate to speak?

Do you ensure that all military members, regardless of rank or status, are subject to inspection testing?

Do you restrict knowledge of unit or random inspections only to those individuals with a "need-to-know"?

### **PERSONNEL**

Are tests coordinated with the Demand Reduction Program Manager (DRPM)?

Do you coordinate all inspections and searches (i.e., unit sweeps, consent, probable cause, and commander-directed testing) with the Staff Judge Advocate?

Have you chosen credible observers in accordance with AFI 44-120?

Have you reviewed the Personnel Information Files of the observers and determined they have no UIF, history of conviction by prior courts-martial or civilian court, Article 15s, LORs, or similar administrative action for misconduct involving dishonesty, fraud or drug abuse?

Have you ensured no observer has any pending action, either UCMJ or administrative?

Do all observers have more than six months remaining time in service until either separation or retirement from active duty?

Have you ensured that observers have no medical profile that could prevent them from performing observer duties?

Are all observers commissioned officers or enlisted members in the grade of senior airman or above? (If SrA are selected, have you obtained the concurrence of the Staff Judge Advocate?)

Are there enough observers, both male and female, to accommodate the number of individuals being tested? (Have arrangements been made for relief, or additional observers, to meet unexpected requirements?)

Have you ensured that no observer is assigned to work in any legal office?

Have you appointed credible Trusted Agents to notify individuals for testing?

Have you reviewed the Personnel Information Files of the Trusted Agents and determined they have no UIF, history of conviction by prior courts-martial or civilian court, Article 15s, LORs, or similar administrative action for misconduct involving dishonesty, fraud or drug abuse?

Have you ensured no Trusted Agent has any pending action, either UCMJ or administrative?

### **NOTIFICATIONS**

Do you personally sign the written order to each member directing each inspection?

Do you notify members no sooner than two hours prior to collection time?

Do you or your Trusted Agent serve on each member selected for testing the written order (signed by you) to provide a urine sample?

Do you require each member to properly acknowledge (date, time and member signature), in writing, receipt of the order?

If a member refuses to acknowledge receipt of the order, does the person serving the order document the member's refusal?

Do you ensure copies of such orders are maintained within the unit?

Do you ensure that all members selected for testing report to the collection site within the designated collection time on the written order?

Do you make sure shift workers or personnel on scheduled "days off" report for testing on the selection day?

## **POST INSPECTION**

Do you make sure members who are in TDY or leave status, quarters, flying or on crew rest are tested upon return of the member to duty? Do you coordinate this with the DRPM?

Do you seek advice and assistance from the SJA regarding members who fail or refuse to provide a sample?

Do you immediately contact the Staff Judge Advocate for advice and assistance regarding all positive test results?

## **AREA DEFENSE COUNSEL**

The ADC program provides Air Force members independent legal representation. Airmen suspected of an offense or facing adverse administrative actions receive confidential legal advice from an experienced judge advocate outside the local chain of command, avoiding even an appearance of possible command influence or conflicts of interest.

The ADC is a certified judge advocate performing defense counsel duties in the following areas

- Counsel in courts-martial, administrative discharge actions and Article 32, UCMJ, investigations
- Counsel in Article 15 actions
- Counsel in interrogations
- Any other adverse actions in which counsel for an individual is required or authorized

All ADCs are assigned outside the local chain of command

- The ADC's prime responsibility is to vigorously and ethically represent the client
- The ADC is an advocate for the client, not an advisor for the command
- The ADC Office is physically separate from the base legal office

If an active duty military member under any type of investigation requests legal advice, refer him or her to the ADC. Civilians are not entitled to ADC representation

The ADC program requires strong command and SJA support to enhance perception of fairness of military justice/disciplinary process

The ADC is available, subject to workload and client confidences, to help base commanders educate the base population on the military justice system and the role of the ADC in the process (normally accomplished at commander calls and workshops)

### **References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002)

AFI 51-201, Chapter 5, *Administration of Military Justice*, 26 November 2003

## INSPECTIONS AND SEARCHES

### INTRODUCTION

This discussion is only a general overview of the rules governing searches, seizures and inspections. Because there are many legal considerations and technical aspects involved in this area, which may vary because of unique factual settings, it is crucial that legal advice be sought from the Staff Judge Advocate when questions arise.

As a commander, military law authorizes you to direct inspections and probable cause searches and seizures of persons and property under your command. However, a commander authorizing such a search or seizure must be neutral and detached to the case and facts. It is therefore important to separate the command functions of gathering facts and maintaining overall military discipline from the command function of granting search authorizations.

Most bases and MAJCOMS have centralized the search authorization role in the Installation Commander, who is also normally the Special Court-Martial Convening Authority. The Installation Commander has discretion to appoint, in writing, up to two military magistrates who are then also authorized to act concurrently with him/her on search and seizure (including apprehension) requests. Each magistrate must receive training provided by the Staff Judge Advocate on search and seizure issues. Law enforcement personnel are also trained on the very strict legal procedures that must be followed in obtaining proper search authorizations.

A commander must also appreciate the difference between the legal concepts of inspections/inventories and searches/seizures as failure to do so may result in exclusion of crucial evidence in a court-martial.

### KEY TERMS

Searches are examinations of a person, property or premises for the purpose of finding criminal evidence

Seizures are the meaningful interference with an individual's possessory interest in property

Inspections are examinations of a person, property or premises for the primary purpose of determining and ensuring the security, military fitness, or good order and discipline of your command

Inventories are administrative actions that account for property entrusted to military control

CONSULTATION WITH THE STAFF JUDGE ADVOCATE TO DISTINGUISH AMONG THESE FOUR CONCEPTS IS ESSENTIAL

## SEARCHES

A search may be authorized for

- Persons subject to military law and under your command
- Persons or property situated in a place under your command and control
- Military property or property of a nonappropriated fund instrumentality; or
- Property situated in a foreign country which is owned, used, occupied by or held in the possession of a member of your command

A search may be authorized for the following types of evidence:

- Contraband, i.e., drugs, unauthorized government property
- Fruits of a crime, i.e., stolen property, money; or
- Evidence of a crime, i.e., bloody T-shirt, weapon, fingerprints, photographs, etc.

## PROBABLE CAUSE SEARCHES

As a general rule, probable cause must be present before a commander can legally authorize a search

- Probable cause exists when there is a reasonable belief that the person, property, or evidence sought is currently located in the place or on the person to be searched
- Probable cause may arise from:
  - Your personal knowledge
  - Oral or written information from others; or
  - A combination of personal knowledge and information from others
- The search authority will make a decision based on the “totality of the circumstances” (e.g. believability of information & specific, known facts)
- An anonymous telephone call, by itself, will never justify a probable cause search
- When relying on drug dogs to establish probable cause, the search authority must have observed and be personally aware of the dog's successful training exercises, as well as the dog's actual record of success in similar search situations

-- While not legally required, when requesting the authorization for a search, a witness should swear to the information used in finding probable cause. Commanders and military magistrates are authorized to administer oaths or affirmations for these purposes

The search may be an oral authorization to search, based upon probable cause, when exigent circumstances exist and delay may otherwise impair the likelihood of success

Putting together a search request

-- Refer source of information to Security Forces who will investigate or refer to AFOSI

-- Do not personally investigate; and

-- If you discover information which may justify a search

--- "Freeze" the situation

--- Immediately notify Security Forces Investigations or OSI

--- Note any incriminating evidence or statements

--- Coordinate with the legal office on probable cause facts to be presented to the search authority

## EXCEPTIONS TO THE PROBABLE CAUSE REQUIREMENT

Consensual searches

-- Even if the search authority has authorized a search, try to get the written consent of the individual whose person or property is to be searched. If a judge later rules that the search authorization was somehow improper, discovered evidence may still be admitted at trial if the individual consented to the search

-- Consent must be knowledgeable and genuinely voluntary. It cannot result from threats, coercion, or pressure. Try to have a witness present

-- You may request an individual to consent to a search regardless of whether he or she has previously exercised the right to remain silent under Article 31, UCMJ

-- Mere acquiescence to a search is not sufficient to justify a consensual search--consent must be clearly given and voluntary

-- The individual giving consent must have either an exclusive or joint interest in the premises or property to be searched

--- An assigned occupant of a dormitory room can consent to a search of the joint/common areas of the room

--- Only the individual who has the exclusive use of a separate closet, locker, or other part of the premises may consent to a search of those areas

Besides consensual searches, there are other searches and seizures that may be conducted without probable cause

-- Border searches

-- Searches upon entry to, or exit from, U.S. installations, aircraft, or vessels

-- Searches of government property (though this may be limited: e.g., dorm rooms, family housing)

-- Searches within jails

-- Searches incident to a lawful stop or apprehension; or

-- Other searches as deemed valid under the U.S. Constitution and case law, such as an emergency search to save life, searches of open fields, etc.

## INSPECTIONS AND INVENTORIES

### Inspections

-- An "inspection" is an examination of a person, property or premises for the primary purpose of ensuring the security, military fitness, and/or good order and discipline of the organization or installation

--- Inspections are not searches: a search is a quest for incriminating evidence for use in criminal proceedings

--- Inspections may be "announced" or "unannounced" and may be authorized without probable cause

--- Inspections for weapons and/or contraband are specifically permitted while conducting a previously scheduled inspection

--- An examination for the primary purpose of obtaining evidence for use in disciplinary proceedings is not an "inspection"; it is a "search" and, if not authorized based on probable cause, is illegal

--- Contraband, weapons, or other evidence uncovered during a proper inspection may be seized and are admissible in a court-martial

--- An inspection that turns up contraband should continue as planned. Commanders who abandon inspections upon the discovery of contraband risk making the inspection appear to be a search in disguise

--- Inspections may be conducted personally by the commander, or by others at the commander's direction

-- Two requirements for conducting an inspection

--- First, it must not be for the primary purpose of obtaining evidence for use in disciplinary proceedings. Commanders should prepare a memo for record concerning their purpose so that they may refresh their memory when called to testify, which is often months later

--- Second, inspections must be conducted in a "reasonable manner"

---- An inspection is "reasonable" if the scope, intensity, and manner of execution of the inspection is reasonably related to its purpose

---- For example, if the purpose of an inspection is to look for large items, inspecting in drawers is unreasonable since a large item would not fit in a drawer. In such a case the inspection has gone beyond the scope of the purpose of the inspection

#### Inventories

-- Inventories may be conducted for valid administrative purposes including:

--- Furniture inventories of dormitories or dormitory rooms

--- Inventories of an AWOL member's or a deserter's property; or

--- Inventories of the contents of an impounded or abandoned vehicle

-- Unlawful weapons, contraband, or other evidence may be lawfully seized during a valid inventory

### **USE OF BLOOD ALCOHOL TESTS AND DRUG DOGS**

#### Blood Alcohol Tests (BATs)

-- Voluntary

--- You can ask a member of your command who is suspected of being under influence of alcohol to voluntarily take a BAT; and

--- Follow procedures of local hospital/clinic laboratory

-- Nonvoluntary

--- Although commanders have authority over subordinate members within their units, BAT tests are normally directed by a Military Magistrate (appointed by the Installation Commander), based on probable cause

CAVEAT: A BAT is not required to prove a DUI offense. Observation of the suspect by the Security Forces specialist, including a field sobriety test, may be enough

-- Implied consent

--- Invoked by the Security Forces for DUI offenses; and

--- Often results in automatic adverse action for refusal to cooperate

-- Physician authorized

--- For medical reasons determined by examining physician; and

--- Results may be used criminally

#### Drug dogs

-- Drug dogs may be used at any time in common areas since there is no reasonable expectation of privacy in a common area

-- Common areas include dormitory hallways, day rooms, parking lots, and duty sections

-- Drug dogs may be used during inspections anywhere within the scope of the inspection (i.e., dormitory rooms, whether the occupant is present or not)

-- What to do when a drug dog "alerts" in a common area

--- Can immediately "search" all common areas for contraband; and

--- If it appears that the "alert" in a common area is on contraband in a noncommon area, for example a dormitory room or automobile, immediately call the search authority and seek to obtain a search authorization before proceeding further with the search

-- What to do when a drug dog "alerts" during an inspection

--- Immediately stop the inspection in the area of the dog alert, e.g., that particular dormitory room, and secure that area

--- Call the search authority and obtain a search authorization before proceeding with the inspection or a search in that particular area; and

--- After the search of that particular area has been completed pursuant to a search authorization, continue the inspection as to all other areas previously determined within the scope of the inspection

**References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 311-317 (2002)

AFI 51-201, *Administration of Military Justice*, 26 November 2003

## **PRELIMINARY INQUIRY INTO REPORTED OFFENSES**

When a military member is accused or suspected of an offense, the member's immediate commander is responsible for ensuring a preliminary inquiry is conducted and appropriate command action is taken.

In some cases, the commander or first sergeant may conduct the preliminary inquiry (e.g., failure to go, dereliction of duty). This may involve nothing more than talking with the member's supervisor

In more serious cases, law enforcement agents (i.e., SFOI or OSI) will normally conduct the investigation and report the results to the commander for disposition of the case. When the commander receives a report of investigation from law enforcement, he or she may fulfill the preliminary inquiry requirement by reviewing the report and any witness statements

In any case involving a disciplinary action or a criminal offense, the commander should consult with the Staff Judge Advocate

The commander determines the appropriate action. Allegations of offenses should be disposed of at the lowest appropriate level. Options available to the commander include:

No action

Administrative action (e.g., letter of reprimand, removal from supervisory duties)

Nonjudicial punishment (Article 15)

Preferral of court-martial charges

Before preferring charges against a military member, be sure to thoroughly review the report of investigation and any other evidence or documentation

At the time of referral of charges, the commander (known as the "accuser") is required to take an oath that he or she is familiar with facts underlying the charges

A commander, who is a court-martial convening authority or who acts as a search authority, must remain neutral and detached from the cases they are involved in. Those commanders will not generally act in an investigative capacity

### **Reference:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2002)

## **PRETRIAL CONFINEMENT**

Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges. Only a person who is subject to trial by court-martial may be confined.

### **NEVER CONFINE ANYONE WITHOUT FIRST CONSULTING THE SJA!!!**

The imposition of pretrial confinement starts the Speedy Trial Clock, regardless of whether charges have been preferred

If confinement is not appropriate, it can hurt the government's case at trial

A person may be ordered into pretrial confinement only when there is reasonable belief that

An offense triable by court-martial has been committed

The person to be confined committed it

Confinement is required by the circumstances

Upon entry into confinement, the person to be confined must be promptly notified of

Nature of the offenses for which he or she is being held

Right to remain silent and that any statements made may be used against him/her

Right to request assignment of military counsel

Right to retain civilian counsel at no expense to the U.S.

Procedures by which pretrial confinement will be reviewed

If the person ordering confinement is not the confinee's commander, then the confinee's commander must be notified within 24 hours of the entry to confinement

48-hour Probable Cause Determination: Within 48 hours of entry into confinement, a neutral and detached officer must review the adequacy of probable cause to continue confinement by considering the following

The nature and circumstances of the offense(s)

Weight of the evidence against the accused

The accused's ties to the local community (family, off-duty employment, etc.)

Likelihood that the accused will flee

The accused's character and mental condition

The accused's service record

Likelihood the accused will commit further serious misconduct if not confined

Effectiveness of lesser forms of restraint

**72-hour Commander Review:** If confinement is continued, within 72 hours of entry into confinement, the confinee's commander must decide whether pretrial confinement is warranted and will continue

If the commander determines that confinement should be continued, AFI 51-201 requires this decision be put in writing, including an explanation of the reasons

**NOTE:** If the commander is neutral and detached and acts within 48 hours, the provision calling for a 48-hour Probable Cause Determination will be satisfied. However, if the commander is not neutral and detached, another officer must make the 48-hour Probable Cause Determination

**Pretrial Confinement Hearing:** A Reviewing officer must decide, within 7 days of entry into confinement, whether the confinee shall be released or continued in pretrial confinement, and prepares a memorandum documenting the decision

Reviewing officer is a "neutral and detached" officer and will be either

Pretrial Confinement Review Officer appointed by the convening authority

Military Magistrate appointed by the convening authority; or

Military Judge (unusual for judge to conduct initial review of pretrial confinement unless it's after referral)

Reviewing officer must determine whether

An offense triable by court-martial has been committed

The prisoner committed it

Confinement is necessary because it is foreseeable that

Prisoner will not appear at trial; or

Prisoner will engage in further serious criminal conduct; and

Less severe forms of restraint are inadequate. **NOTE:** It is not necessary to try lesser forms of restraint but they **MUST** be considered in determining whether confinement is appropriate. (For a discussion of other types of pretrial restraint, see article, *Pretrial Restraint*, this Chapter)

Reviewing officer shall consider matters submitted by confinee, and, unless overriding circumstances or time constraints dictate otherwise, shall allow confinee and counsel an opportunity to appear and present a statement or evidence at the hearing

A representative of command (commander, first sergeant or other person) may also appear before the hearing officer

The review is not an adversary proceeding and prisoner and counsel have no right to cross-examine witnesses

Reviewing officer's memorandum is forwarded to convening authority who may only override decision to continue pretrial confinement. Reviewing officer's decision to release may not be reversed without new evidence. Member's commander may, however, impose lesser forms of pretrial restraint

Pretrial confinees **MUST** not be subjected to pretrial punishment

Pretrial confinees may not be treated the same as sentenced prisoners (e.g., required to wear special uniforms for sentenced prisoners, perform punitive labor, or undergo punitive duty hours). Whether a particular condition amounts to pretrial punishment is a matter of the intent of the official(s) imposing the condition. Upon review at or before trial, a military judge will examine the purposes served by the restriction or condition and whether such purposes are "reasonably related to a legitimate governmental objective"

Commingling pretrial and sentenced prisoners, without more, is not automatically considered pretrial punishment. Confinement officers and guards must be aware of the differences between sentenced prisoners and pretrial confinees. The lack of guidance in local confinement regulations will not excuse the mistreatment of a confinee

Restriction may be found to be tantamount to confinement in some cases. The factors to be considered include

Limits of restriction

Limits on activities (was the accused able to go to the gym, BX, etc.); or

Conditions (e.g., was accused required to report to commander and, if so, how often)

Prisoners receive day-for-day credit for pretrial confinement against any confinement adjudged by the court. Credit for unlawful pretrial confinement (including pretrial punishment) or for

restriction tantamount to confinement is an additional day or more for each day of pretrial confinement

#### Review by military judge

Once charges are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief made by the defense. **NOTE:** Before referral of charges, the accused or counsel may request release from pretrial confinement or modification of other forms of restraint from the convening authority

The remedy for noncompliance with pretrial confinement rules (e.g., review by neutral and detached person is not made within 48 hours) or abuse of discretion can range from is one or two days of additional credit for each day of illegal confinement to dismissal of the charges

#### **References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 304 and 305 (2002)

AFI 51-201, *Administration of Military Justice*, 26 November 2003

## PRETRIAL RESTRAINT

Pretrial restraint is moral or physical restraint on a person's liberty that is imposed before or during trial by court-martial. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.

### **ALWAYS CONSULT WITH YOUR STAFF JUDGE ADVOCATE BEFORE IMPOSING ANY PRETRIAL RESTRAINT!!!**

The imposition of restriction, arrest, or pretrial confinement starts the Speedy Trial Clock running, whether or not charges are preferred

Speedy trial violation can result in dismissal of the charges, regardless of a commander's good intentions

Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts

May be imposed in conjunction with other forms of restraint or separately

Typical example is a commander's order to an accused to stay away from a victim (usually termed a "no contact order")

Restriction in lieu of arrest is imposed by directing a person to remain within specified limits

Normally restriction is to remain within the confines of the base

A restricted person shall, unless otherwise directed, perform full military duties

Arrest is the restraint of a person, directing the person to remain within specified limits

An arrested person does not perform full military duties

Not common, but sometimes seen in officer cases (i.e., "house arrest")

Pretrial confinement is physical restraint (e.g., jail) imposed by competent authority, depriving a person of freedom pending trial. (For a more detailed discussion of pretrial confinement, *see* article, *Pretrial Confinement*, this Chapter)

Who may order pretrial restraint

Only a commanding officer to whose authority an officer is subject may impose pretrial restraint on an officer (this authority may NOT be delegated)

Any commissioned officer may impose pretrial restraint on any enlisted person

Commanding officer can delegate authority to order pretrial restraint of enlisted personnel under his or her command to noncommissioned officers (usually the first sergeant)

Pretrial restraint requires a reasonable belief that

An offense triable by court-martial has been committed

The person to be restrained committed it; and

Restraint is required by the circumstances

Individual must be personally notified of the nature and terms of the restraint

An officer must be personally notified by the restraining authority or another commissioned officer

An enlisted member must be notified by the restraining authority or through another person subject to the Uniform Code of Military Justice (UCMJ)

Upon restraint, the individual must be advised of the offense that is the basis for the restraint

A person may be released from pretrial restraint by any person authorized to impose the restraint

**References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 304, 305, & 707 (2002)  
AFI 51-201, *Administration of Military Justice*, 26 November 2003

## **STEROIDS**

Air Force members are prohibited from using anabolic steroids except as prescribed by competent medical authority. Urinalysis testing is available to help enforce this prohibition. Steroid use can cause liver cancer and bleeding, high blood pressure, behavioral changes, and other adverse effects

The Schedule of Controlled Substances (21 U.S.C. § 812) includes anabolic steroids among those controlled drugs currently listed in the Schedules of the Act

Offenses involving steroids are punishable under Article 112a of the Uniform Code of Military Justice (UCMJ)

The Air Force Drug Testing Laboratory (AFDTL), Brooks City Base, Texas, is the approval authority for steroid urinalysis testing requests

Steroid testing can be conducted through command-directed, consensual, or probable cause searches. (For a more details on urinalysis inspections, see articles *Inspections and Searches* and *The Air Force Urinalysis Program*, this Chapter)

Test results indicating the presence of steroids may be used under the same circumstances and for the same purposes as other controlled substances

### **References:**

Manual for Courts-Martial, United States (2002)

21 U.S.C. § 812, Schedules of Controlled Substances

Art. 112a, UCMJ

DoD Directive 1010.1, *Military Personnel Drug Abuse Testing Program*, 9 December 1994, with Change 1, 11 January 1999

DoD Instruction 1010.16, *Technical Procedures for the Military Drug Abuse Testing Program*, 9 December 1994

## UNAUTHORIZED ABSENCE

Our unique military mission and its fundamental principles of morale, good order, and discipline require that military members be present for duty at the time and place prescribed by superior authorities. Although this is an individual responsibility, it is incumbent on supervisors and commanders to ensure that their subordinates understand and comply with the rules. When a member is absent without leave (AWOL), the commander has a continuing responsibility to locate and return the member to military control. All forms of unauthorized absence, from simply being late for work ("failure to go"), to an extended absence without leave, are punishable under Article 86, Uniform Code of Military Justice (UCMJ). Those that form an intent to permanently abandon their military duties obtain a deserter status and are subject to prosecution, pursuant to Article 85, UCMJ. There are certain requirements and considerations the unit must satisfy in handling cases involving an unauthorized absence.

When an unauthorized absence is discovered, it is important to note the date and time

An absence of less than 24 hours is classified as a failure to go

When the absence continues longer than 24 hours, orderly room personnel must change the member's administrative status to "AWOL"

On the 31st day of continuous absence, orderly room personnel must change the member's status to "deserter"

Except as noted below, these actions must normally be taken even if the commander suspects that the absence may be legally excused. Consult AFI 36-2911, Table 1.1, for a comprehensive list of actions to be taken upon realization of an unauthorized absence. NOTE: Taking these administrative steps will not (standing alone) prove that the member has committed an unauthorized absence

Regardless of the reason for the absence, the member's welfare is of highest concern, and commanders must promptly make every effort to determine the reason for the absence and the member's whereabouts. If the commander's initial investigation reveals any indication that the absence results from an involuntary casualty rather than desertion or unauthorized absence, a status of Duty Status Whereabouts Unknown (DUSTWUN) may be appropriate. Consult AFI 36-3002, *Casualty Services*, the Military Personnel Flight (MPF), and the Staff Judge Advocate (SJA) for advice in such cases

If a member is absent, the unit commander should interview all persons who may have information relative to the member's absence to determine if the member is truly absent without authority. For reporting procedures, consult AFI 36-2911, Chapter 2. Under AFI 36-2911, Table 1.1, if the member reasonably appears to be absent without authority, the commander must

Immediately contact the MPF and inform them of the member's status

Immediately determine if the member meets any of the criteria under AFI 36-2911, para. 1.5 (e.g., duty or travel restrictions, access to classified documents, request for asylum or residence in a foreign country, uncompleted action for a previous AWOL, escaped prisoner, wanted for a serious UCMJ violation, or evidence of intent to remain away permanently). If so, immediately change the member's status to "Deserter," take all appropriate actions under AFI 36-2911, Table 1.1, Steps 1-5, and, in cases involving national security, take all appropriate actions under para. 2.2.7

Evaluate the case to determine whether AFI 36-3002, *Casualty Services*, applies

Notify Security Forces (SFs) and request assistance once it becomes clear that the member is not merely late for duty

After 24 hours of absence: Prepare an AF Form 2098, changing the absentee's status to either "AWOL" or "Deserter" as appropriate, and forward it to the MPF, with a copy to the local Financial Services Office (FSO), and inform the FSO by telephone of member's status

On the third day of absence: Prepare and forward a 72 hour inquiry (IAW AFI 36-2911, para. 2.2.3) to your base SFS/CC and MPF/CC and re-evaluate whether AFI 36-3002, *Casualty Services*, applies. If the SJA is not yet involved, it is advisable to inform them about the case at this point

On the 10th day of absence: Prepare and forward letters to the next of kin and allotment payees, and provide copies of these letters to MPF. AFI 36-2911, para. 2.2.4

On the 31st day of absence: Notify MPF of the member's continued absence; retrieve dependent ID cards as required by AFI 36-3026(I), paras. 1.4.1.9 and 4.1; ensure processing of DD Form 553 (MPF will assist in preparation), and decide (with SF and MPF help) to whom DD Form 553 should be sent; initiate AF Form 2098 changing status from "AWOL" to "Deserter"; consult with SJA about filing court-martial charges; and prepare 31st day status report IAW AFI 36-2911, para. 2.2.5

On the 60th day of absence: Notify SF and MPF of the member's continued absence, obtain update input from SF and include it in 60 day status report. IAW AFI 36-2911, para. 2.2.5

On the 180th day of absence: Personnel Data Systems program automatically drops absentee from the unit rolls. Commander notifies SF of status change and consults with SJA concerning other options and/or requirements

Civilian and appropriate military authorities may apprehend absentees and deserters. Deserters may be arrested summarily by civilian law enforcement agents and returned to military control. AFI 36-2911, Chapter 3

United States authorities may apprehend absentees and deserters in foreign countries only when an international agreement with the country authorizes it or under an agreement with proper local

authorities that does not violate an existing international agreement. *See* AFI 36-2911, para. 3.2.3. Always consult the SJA in these cases

Disposition once the member has been returned to military control is covered by AFI 36-2911, Chapter 4 and Table 4.1

Previous Air Force practice was to prefer desertion charges at the time the member is administratively classified as a deserter, and not later than the 180th day of absence. This is no longer required to prevent statute of limitations problems. However, close coordination with the SJA is required to avoid potential speedy trial problems when the member is returned to military control

**References:**

AFI 36-2911, *Desertion and Unauthorized Absence*, 1 June 1998

AFI 36-3002, *Casualty Services*, 26 August 1994

AFI 36-3026(I), *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel*, 20 December 2002

AFI 51-201, *Administration of Military Justice*, 26 November 2003

*Chapter 2*

***COURT-MARTIAL ISSUES  
AND  
PROCEDURES***

## **COURT-MARTIAL JURISDICTION UNDER THE UCMJ**

### **TYPES OF JURISDICTION**

Military Offenses: Courts-martial have exclusive power to hear and decide “purely military offenses.” Rule for Courts-Martial (R.C.M.) 201(d)(1)

Nonmilitary Offenses: Crimes that violate both the UCMJ and local criminal law may be tried by a court-martial, a civilian court, or both. R.C.M. 201(d)(2)

A military member may not be tried for the same misconduct by both a court-martial and another federal court. U.S. CONST. amend. V; R.C.M. 907(b)(2)(C)

A military member may be tried for the same misconduct by both court-martial and state court. However, if a military member was tried by a state court, regardless of the outcome, as a matter of policy, Secretary of the Air Force approval is required before proceeding with a court-martial. AFI 51-201, para. 2.5

Host nation treaties govern exercise of jurisdiction over military members overseas

### **JURISDICTION OVER THE OFFENSE (RCM 203)**

The Supreme Court has held that jurisdiction in a court-martial is based solely on the status of the accused as a member of the armed forces. Essentially, if the member is on active duty, the service has jurisdiction. *Solorio v. United States*, 483 U.S. 435 (1987)

### **JURISDICTION OVER THE PERSON (RCM 202)**

General Rule: Article 3(a), UCMJ, authorizes court-martial jurisdiction in all cases in which the service member was subject to the UCMJ at the time of the offense and is subject to the UCMJ at the time of trial

Fraudulent Enlistment: Article 2(c), UCMJ, provides that, notwithstanding any other provision of law, a person serving with the armed forces who

Submitted voluntarily to military authority

Met the mental competence and minimum age qualifications at the time of voluntary submission to military authority

Received military pay or allowances; and

Performed military duties

Is subject to the UCMJ until such person's active duty service has been terminated in accordance with law or regulations promulgated by the Secretary of the Air Force

Reservists: Articles 2(a)(1) and 2(a)(3), UCMJ, extend court-martial jurisdiction over reservists whenever they are in Title 10 status (Inactive Duty Training (IDT), Active Duty (AD), or Annual Training (AT)). For guidance in this area, see RCM 204(b)(1), or AFI 51-201, Section 2D, para. 2.8, *Exercise of Jurisdiction over Air Force Reserve and National Guard Members*

Article 2(d), UCMJ, authorizes a member of the reserve to be ordered to active duty for nonjudicial punishment, Article 32 investigation, and trial by court-martial

The Air Force has placed certain restrictions on involuntary recall of reserve members

An AF Reserve member may be ordered to active duty by an active component general court-martial convening authority. AFI 51-201, para. 2.8.4

An AF Reserve member recalled to active duty for court-martial may not be sentenced to confinement, or be required to serve a punishment consisting of any restrictions on liberty during the recall period of service, without approval of the Secretary of the Air Force. The Staff Judge Advocate will coordinate approval, as needed, to recall an AF Reserve member for court-martial when the sentence may include confinement. AFI 51-201, para. 2.8.5

AF Reserve members will not be involuntarily called to active duty solely for nonjudicial punishment or summary court-martial, although MAJCOM commanders may grant waivers to this restriction in appropriate cases. AFI 51-201, para. 2.8.3

--- When determining whether the commander has UCMJ jurisdiction over the member, the commander must ask two questions:

---- Was the member in military status at the time he or she committed the alleged misconduct? If not, then no UCMJ jurisdiction exists

----- A member in active status (i.e. special tour, annual tour) is subject to the UCMJ from the beginning to the end of the tour, 24 hours a day

----- Generally, a member performing Inactive Duty Training (IDT) or a Unit Training Assembly (UTA) is subject to the UCMJ from the beginning to the end of the duty day, (e.g., 0730 –1630)

----- Even if no UCMJ jurisdiction exists, commanders always have jurisdiction to perform administrative actions and can hold members accountable for wrongdoing by using a variety of adverse administrative actions such as letters of counseling, admonishment, reprimand, etc.

---- Will the member be in military status at the time the commander will impose punishment? (such as an Article 15, nonjudicial punishment)

----- Commanders can always ask whether the member will voluntarily submit to UCMJ jurisdiction by extending his or her tour or IDT/UTA

----- Commanders can wait until the member's next scheduled training to offer Article 15 punishment

----- If the member is under orders, the commander can involuntarily extend the member to impose Article 15 punishment before the orders expire

----- If the member is performing an IDT or a UTA, the member cannot be extended because there are no orders to extend

Air National Guard: A member of the National Guard is subject to court-martial jurisdiction only when in Federal service. UCMJ art. 2(a)(3), UCMJ; 10 U.S.C. 12301, 12401 (1998)

Retirees: Court-martial jurisdiction continues over retired Regular Air Force personnel entitled to pay. UCMJ art. 2(a)(4) and (5)

Retired members should not be court-martialed unless their conduct clearly links them with the military or is adverse to a significant military interest of the United States. Commanders should not prefer charges without Secretary of the Air Force approval unless the statute of limitations is about to run. The Staff Judge Advocate will coordinate approval, as needed, to recall a retired member for court-martial. AFI 51-201, para. 2.9

## **TERMINATION OF JURISDICTION**

General Rule: A valid discharge terminates jurisdiction

There must be the delivery of a valid discharge certificate

A final accounting of pay; and

Completion of the clearing process required by appropriate service instructions

Exceptions under Article 3, UCMJ:

The member was subject to the UCMJ at the time of the offense and is subject to the UCMJ at the time of trial

A fraudulently obtained discharge does not terminate military jurisdiction

An AF Reserve member is not, by virtue of the termination of a period of active duty or inactive-duty training, "shielded" from jurisdiction for an offense committed during such period of active duty or inactive-duty training

**References:**

U.S. CONST. amend. V

UCMJ arts. 2 & 3

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201, 202, 203 and 204 (2002)

AFI 51-201, *Administration of Military Justice*, 26 November 2003

AFI 36-3209, *Separation Procedures for Air Force National Guard and Air Force Reserve Members*, 1 February 1998

*Solorio v. United States*, 483 U.S. 435 (1987)

## IMMUNITY

Immunity for an individual should be granted only when a person's information is necessary to the public interest, including the needs of good order and discipline, and when the person has refused or is likely to refuse to testify or provide the information on the basis of the privilege against self-incrimination.

There are two types of immunity under Rule for Courts-Martial (RCM) 704

Testimonial immunity or "use" immunity bars the use of a given person's testimony, statements, and information directly or indirectly derived therefrom against that person in a later court-martial

Transactional immunity bars any subsequent court-martial action against the immunized person concerning the immunized transaction, regardless of the source of the evidence against that person

Testimonial or "use" immunity is preferred because it does not prevent the government from trying the person for a criminal offense; it only prevents the government's use of information obtained (directly or indirectly) from the immunized person against him or her

However, if you intend to prosecute an individual to whom a grant of immunity may be required, it is best to prosecute him or her first, then obtain a grant of immunity for the statements or testimony provided in the subsequent case

If prosecution of the immunized person occurs after the individual has testified or provided statements under the grant of immunity, the government has a heavy burden to show that it has not used the person's immunized testimony or statements in any way for the prosecution of that person. Often the government cannot meet this burden. The outcome is no prosecution for those offenses that were disclosed as a result of the testimonial immunity

Only a General Court-Martial Convening Authority (GCMCA) may grant testimonial or transactional immunity. RCM 704(c)

The GCMCA's authority to grant immunity extends only to grants of immunity to individuals subject to the UCMJ

The GCMCA can disapprove immunity requests for witnesses not subject to the UCMJ, but may approve such requests only after receiving Department of Justice (DOJ) authorization

If the witness is subject to federal prosecution, requests for immunity must be approved by DOJ, even if the individual is subject to the UCMJ

In National Security Cases, immunity requests must be coordinated with DOJ and other interested U.S. agencies

***Approval Authority For Cases Other Than National Security***

	Court-Martial	U.S. prosecution
Person Subject to UCMJ	GCMCA can approve	DOJ must approve
Person Not Subject to UCMJ	GCMCA can disapprove, but DOJ must approve	DOJ must approve

A grant of immunity constitutes an order to testify

Under Military Rule of Evidence 301(c), an immunized person may not refuse to testify by asserting the 5<sup>th</sup> Amendment right against self-incrimination because, as a result of the grant of immunity, he or she will not be exposed to criminal penalty

An immunized person may be prosecuted for failure to comply with an order to testify

Immunity does not bar prosecution for perjury, false swearing, or false official statement made by an individual while testifying under a grant of immunity

Care is required when dealing with an accused or suspects to avoid a grant of *de facto immunity*. This occurs when an officer, other than the GCMCA

Manifests apparent authority to grant immunity. Commanders, First Sergeants, and investigative agents may, by their actions or words, manifest such apparent authority

Makes a representation that causes the accused to honestly and reasonably believe that he or she will not be brought to court if a certain condition is fulfilled (and the accused fulfills the condition); and

Has at least the tacit approval of the GCMCA

A finding of *de facto* ("in fact") immunity will operate the same as an actual grant of immunity

**References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 704; MIL. R. EVID. 301(c) (2002)  
AFI 51-201, para. 6.6, *Administration of Military Justice*, 26 November 2003

## **PREPARATION, PREFERRAL, AND PROCESSING OF CHARGES**

The preparation of court-martial charges involves drafting the charge(s) and specification(s). Preferral of charges in the military is the act of formally accusing someone of a violation of the UCMJ. Processing of the charge(s) involves forwarding the charge(s) and specification(s) to a convening authority for action.

Preparation of charges

The charge states which article of the UCMJ has allegedly been violated

The specification is a concise statement of exactly how the article was allegedly violated

Since precise legal language is required, the legal office normally drafts the charge(s) and specification(s)

The charges are documented in Section II, block 10 of the DD Form 458, Charge Sheet

Preferral of the charge(s)

It is the first formal step in initiating a court-martial

Anyone subject to the UCMJ can prefer charges against another who is also subject to the Code

By custom, at least in the Air Force, it is normally the accused's immediate commander who prefers the charge(s)

Preferral is documented in section III, block 11 of the Charge Sheet, DD Form 458

It requires the "accuser," the one preferring the charge(s), to take an oath that he/she is a person subject to the Code, and therefore a proper person to prefer charges, and that he/she either has personal knowledge of or has investigated the charge(s) and specification(s), and that they are true to the best of his/her knowledge and belief

This oath is normally given by a judge advocate

This does not require the accuser to believe that the accused is guilty, only that there is a basis in fact for the charge(s)

Processing of the charge(s)

After preferral, the commander must personally read the charge(s) to the accused and complete block 12 of the Charge Sheet indicating the accused has been notified of the preferral. Since the commander is normally the accuser, the notice to the accused will typically occur at the same time as the preferral

The charge(s) is/are then received by the Summary Court-Martial Convening Authority (SCMCA). This authority to receive the charge(s) can be delegated to the SCMCA's SJA. A first indorsement by the commander and a personal data sheet are forwarded along with the Charge Sheet

To convene a court-martial, the charge(s) must be forwarded to a convening authority, usually the Special Court-Martial Convening Authority (SPCMCA). In the Air Force, the SCMCA is also normally the SPCMCA, so this extra step of forwarding the charge(s) from the SCMCA to the SPCMCA is not necessary

The SPCMCA takes one of the following actions, if he/she decides the charge(s) should go to a court-martial

Refers the charge(s) to a Special Court-Martial; or

Appoints an Article 32 Investigating Officer (IO) to conduct an Article 32 investigation, if the SPCMCA thinks a general court-martial might be appropriate

---- After the IO completes the Article 32 Report, he/she sends it to the SPCMCA, who then forwards it, along with the charge(s), to the General Court-Martial Convening Authority (GCMCA) for referral to a general court-martial

The GCMCA either refers the charge(s) to a general court-martial or returns them to the SPCMCA

Once the charges have actually been referred to trial, the appointed trial counsel will then formally serve the accused with a copy of the charges and specifications. This is documented in block 15 on the back page of the Charge Sheet

Time constraints are involved in the referral and trial of court-martial charges. Timely processing is critical not only to the survival of the charge(s) and specification(s) (e.g., against a motion for dismissal because of a speedy trial violation) but also to the prompt administration of military justice

**References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M 307 (2002)

AFI 51-201, *Administration of Military Justice*, 26 November 2003

DD Form 458, Charge Sheet, May 2000

## **PRETRIAL AGREEMENTS**

Pretrial agreements (PTAs) are agreements between the accused and the convening authority. Generally, the accused agrees to enter a plea of guilty to one or more offenses in exchange for a “cap,” or upper limit, on the sentence (period of confinement, type of punitive discharge, amount and/or period of forfeitures, etc.) that the convening authority will approve.

The decision to accept or reject a PTA offer submitted by an accused is within the sole discretion of the convening authority who referred the case to trial. The accused is entitled to have the convening authority personally act upon the offer before trial.

### **Procedures**

Either the government or the defense may initiate PTA negotiations. The defense however, must submit the actual written PTA offer to the Staff Judge Advocate (SJA)

The SJA will forward the written PTA offer to the convening authority with a recommendation

The SJA will obtain the appropriate approval from the Department of Justice to enter into PTA discussions or agreements in cases involving an offense of espionage, subversion, aiding the enemy, sabotage, spying, or violation of punitive rules or regulations and criminal statutes concerning classified information or the foreign relations of the U.S.. This includes attempt, conspiracy, and solicitation to commit any of the above offenses

The entire PTA must be in writing and signed by the accused, defense counsel, and the convening authority. The PTA must not involve any informal oral promises or representations

Either party may void a PTA by withdrawing from it. The convening authority may withdraw anytime before the accused begins performance of promises contained in the agreement. Additionally, the convening authority can withdraw upon the accused’s failure to fulfill any material promise or condition of the agreement, when the military judge’s inquiry discloses a disagreement as to a material term of the PTA, or when the findings of guilty are set aside during the appellate review. Also, if an accused has violated conditions of a PTA that involve post-trial misconduct, the convening authority may withdraw up to the time of his or her final action in the case. The convening authority may not withdraw from a PTA in any way that would be unfair to the accused. Withdrawals by either party must be in writing

If an accused withdraws from a PTA at any time, the convening authority is no longer bound by the agreement

At trial, the military judge will conduct a full inquiry into the specific terms of the PTA to ensure the accused fully understands both the meaning and effect of each provision of the PTA, has voluntarily entered into the PTA, and that no oral promises were made in connection with the PTA. This inquiry is in addition to the judge's inquiry into the validity of the guilty plea itself

In a trial by military judge alone, the military judge will not examine the sentencing cap of the PTA until after he or she has independently adjudged a sentence. In a trial by members, the members will not be told about the PTA

If the sentence adjudged by the military judge or members exceeds the limits of the PTA, the convening authority may only approve the lesser sentence agreed to in the PTA. If the adjudged sentence is less than the PTA cap, only the lesser, adjudged sentence may be approved. In summary, the accused will get the benefit of the lesser sentence, regardless of whether it was adjudged or in the PTA

#### Permissible PTA conditions

A promise to enter into a reasonable stipulation of fact concerning the facts and circumstances surrounding the charged offenses

A promise to testify as a witness in a trial of another person

A promise to provide restitution

A promise to conform conduct to certain conditions of probation before final action is taken by the convening authority

A promise to waive certain procedural requirements, such as

An Article 32 investigation

The right to a trial before court members

The right to a trial before military judge sitting alone

The opportunity to obtain the personal appearance of certain witnesses at the sentencing proceeding

#### **References:**

Manual for Courts-Martial, United States, R.C.M. 705 (2002)

AFI 51-201, *Administration of Military Justice*, 26 November 2003

## **SERVING AS A COURT MEMBER**

At some time in your military career you will probably be detailed to sit as a member of a court-martial. Court members serve essentially the same function in a military court-martial as jurors serve in civilian trials. Some things you should know about duty as a court member are:

When convening a court-martial, the convening authority personally selects members who are, in his or her opinion, best qualified for this duty. Article 25(d)(2) of the Uniform Code of Military Justice outlines what factors should be considered when determining who is “best qualified.” These include age, education, training, experience, length of service, and judicial temperament

Prior to sitting as a member in a court-martial, court members are usually asked to complete a written questionnaire, providing information such as date of birth; sex; race; marital status and sex, age, and number of dependents; home of record; civilian and military education; current unit of assignment; past duty assignment(s); award(s) and decoration(s); date of rank; and any disqualifying information. This questionnaire provides counsel for both sides information about a member's background that assists them in determining whether there is reason to excuse that particular member from sitting on the court

Having been detailed to sit on a court-martial, it is important that a member avoid allowing others to speak about upcoming cases in that member's presence. Court members are required to be impartial. Having prior knowledge of the facts of a case may impact on a member's ability to remain impartial

If, after being detailed to sit on a court, a member needs to be excused, keep the following in mind

Although the convening authority may excuse members prior to assembly for any reason, requests to be excused from court member duty should be based on good cause. Requests should be written and forwarded to the convening authority through his or her staff judge advocate. Members detailed to a court-martial should not depart the local area on leave or TDY, without coordination with the staff judge advocate, until after they have been properly relieved from duty

After the court-martial is assembled, the convening authority can no longer excuse members unless the member has good cause. After assembly, court members are normally only excused as a result of being challenged by trial or defense counsel, or after being released by the military judge for good cause

Trial and defense counsel, as well as the military judge, are entitled to ask court members questions at trial to ensure that the accused is brought to trial before an impartial court panel. This questioning is referred to as “voir dire,” and occurs prior to the court members hearing any evidence in the case

Both the trial and defense counsel can challenge any member for cause. There is no limit to the number of court members who can be removed for cause. Each side is also permitted one

challenge without cause. This is called a peremptory challenge. Its only limitation is that it may not be used to improperly remove a member on the basis of that member's race or other Constitutionally protected status

If the accused pleads "not guilty," the court members receive evidence, arguments from counsel, and instructions on the law from the military judge in order to determine whether the accused is guilty beyond a reasonable doubt. A finding of "not guilty" can be made even if the members do not believe the accused to be "innocent." In other words, if the members believe that the accused probably committed the offense(s), but are not convinced beyond a reasonable doubt, they must still vote "not guilty." The decision of the court is called the "finding(s)"

The senior ranking court member is called the "president." It is the president's job to announce the findings of the court-martial panel to the accused and counsel and to check the vote count and to announce the results to the other members. The junior ranking court member collects and counts the votes

If the accused is found "guilty," the court members will hear evidence in aggravation, extenuation, and/or mitigation, listen to arguments from counsel recommending a sentence, then receive instructions from the military judge on sentencing procedures. They will then deliberate and decide on an appropriate sentence for the accused. The president will announce the sentence in open court in the presence of the accused and counsel

If the accused pleads "guilty," but wishes to be sentenced by court members, the same procedures for sentencing apply as when the accused is found "guilty" by the members

Throughout the course of the trial, the military judge may choose to hold sessions on the record outside the presence of the court members. These are called Article 39(a) sessions because they are authorized under Article 39(a) of the Uniform Code of Military Justice. During these sessions, the military judge and counsel often discuss matters that would be inappropriate for the court members to hear, such as the admissibility of evidence. Other times, administrative matters may be discussed that do not require the presence of the court members. During these out-of-court sessions, court members may not discuss the case among themselves or with anyone else

Court members are given an opportunity to question witnesses after the counsel have completed their examinations. A court member proposes a question by writing it down on the question forms provided. Both counsel will review the question and can object to the question posed by a court member. The military judge will rule on the objection. In asking questions, court members must remember not to become advocates for either side, but must remain impartial

Court members are allowed to take notes during the trial. A court member may refer to his or her notes during deliberation, but the notes are not evidence, cannot be used by any court member as evidence, and may not be shown or read to other members. Ultimately, if the members cannot agree on whether particular evidence was presented, or what the exact nature of the evidence was, the members may ask the military judge to reopen the court and present the evidence again

Each member has an equal voice and vote in discussing and deciding a case. The influence of superiority in rank must not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Service as a court member, while important, is not a rating factor to be considered on any member's performance report

No one may enter the deliberation room while the members are deliberating. All members must be present during any deliberation. Therefore, if the members have a question or otherwise need to communicate with the military judge, or if they want a break, one of the members should contact the bailiff. The bailiff will notify the military judge that the members have a question, want a break, etc. Members may not discuss the case with anyone during the recess, even among themselves. The military judge notifies the counsel and accused and reopens the court. The members are brought into the courtroom and are allowed to ask their question(s), or the military judge will formally recess the court so that the members may take a break. After a recess, the court is again formally opened to return members to their deliberations. These procedures ensure that no one improperly communicates with members during their deliberations and that no deliberations are carried on without all members being present

Each member has a right to be free from harassment or ridicule based upon that member's participation as a court member. Therefore, court member deliberations are conducted in private, and each member takes an oath not to disclose their own or any other member's opinion(s) or vote(s). Furthermore, no member may be compelled to answer questions about the deliberations unless lawfully ordered to do so by a military judge

**References:**

UCMJ art. 25

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 501-505, 804-807, 813, 901, & 911-1007 (2002)

U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (15 Sep. 2002)

## **SPECIAL COURT-MARTIAL CONVENING AUTHORITY DUTIES**

The Special Court-Martial Convening Authority (SPCMCA) has several duties as a result of this position.

### **Military Justice Duties**

Appoints military magistrates to authorize apprehensions, searches, and seizures

AFI 51-201, chapter 3, discusses the military magistrate program

The SPCMCA appoints, in writing, up to two officers of judicial temperament to act as military magistrates. Ordinarily the SPCMCA will only appoint a military magistrate of the rank of lieutenant colonel or above. The appointment of any magistrate in the rank of major or below may only be made by, or with the concurrence of, the GCMCA over the installation. A chaplain, member of an office of a staff judge advocate having responsibility for that installation, security policeman, AFOSI member, or court-martial convening authority may not serve as a military magistrate

The appointment letter specifies over which installation(s) the military magistrate has jurisdiction

The military magistrate receives a briefing from the SJA on his/her responsibilities as a military magistrate as soon as possible

Appoint pretrial confinement reviewing officers (PCRO)

PCRO holds a hearing and makes a neutral determination of whether an accused should be continued in pretrial confinement awaiting trial

There is no limit to the number of PCROs the SPCMCA can appoint

PCROs should be mature officers with good judgment

Detail court members

Refer charges and specifications to special courts-martial

Approve pretrial agreements (PTAs) for an accused to be tried by a special court-martial

Take action on findings and sentences of special courts-martial

Appoint Article 32, UCMJ, Investigating Officer (IO)

Occurs after charges have been preferred and when the SPCMCA believes a general court-martial may be the appropriate forum for the charge(s) and specification(s)

The IO completes an Article 32 hearing, which is roughly similar to a grand jury proceeding in the civilian community, and writes a report for the SPCMCA, which recommends action(s) the SPCMCA should take on the charge(s) and specification(s)

Forward the charge(s) and specification(s), along with the completed Article 32 report and recommendation for disposition, to the General Court-Martial Convening Authority (GCMCA) if the SPCMCA believes a GCM is appropriate

#### Administrative Action Duties

Disapproves or recommends approval of requests for discharge in lieu of court-martial

The SPCMCA may disapprove a request for discharge when the case involves a special court-martial

The SPCMCA may not approve a request for discharge, even if the case involves a special court-martial

If the case involves a special court-martial, and the SPCMCA wants the request for discharge approved, the request must be forwarded to the GCMCA, with a recommendation that the request be approved and of the appropriate type of discharge characterization

If the SPCMCA has ordered an Article 32 hearing, but the Article 32 report has not been forwarded to the GCMCA, the SPCMCA may disapprove the request and return it to the accused's commander

If an Article 32 report has been forwarded to the GCMCA, the SPCMCA forwards the request for discharge to the GCMCA, with his/her recommendation as to approval or disapproval, and type of discharge

Convene discharge boards, depending upon the status of the respondent and act on the findings and recommendations of the board

Act as separation authority depending upon the status of the respondent, the basis for the discharge, and/or the findings and recommendations of the board

#### **References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002)

AFI 51-201, *Administration of Military Justice*, Chapter 3, 26 November 2003

AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003

## TESTIFYING AS A WITNESS

As a Commander, First Sergeant, or supervisor, you or one of your subordinates may be called upon to testify at a court-martial or other administrative hearing.

Either the trial counsel or defense counsel may call witnesses during the findings portion of the trial to either help prove an element of the offense or provide a defense to the charge

Either counsel may also call witnesses during the sentencing portion of the trial. A sentencing witness may be called to testify about a variety of things, such as the character of the accused, the impact of the offenses on the unit, or relating an opinion about the accused's rehabilitative potential. You will not be allowed to testify about your opinion as to an appropriate sentence, including whether or not the accused should be punitively discharged from military service. When testifying about the accused's potential for rehabilitation, the witness must be able to show that he/she possesses sufficient information and knowledge about the accused, separate and apart from the offenses committed by the accused. In short, the witness must have knowledge of the accused as a "whole person"

The judge advocate calling you or your subordinate as a witness should, before trial, discuss the questions he or she will ask and questions the opposing counsel will likely ask on cross-examination. If you are going to be a witness, you should reserve the time necessary to permit the trial or defense counsel to ensure you are properly prepared to take the stand. Furthermore, the opposing counsel should also have the opportunity to interview you or your subordinate prior to testifying

You have an absolute duty to testify honestly when called, and if anyone attempts to influence your testimony one way or the other, even if you consider it a remark made in jest, you should immediately report that fact to the Staff Judge Advocate

The next page provides some general guidelines on testifying

### **References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002)

MCM, R.C.M. 1001

*See also, article The Air Force Victim and Witness Assistance Program, Chapter 3, this Deskbook*

### **Attachment:**

Tips to Witnesses in Preparation for a Hearing or Trial

## **TIPS TO WITNESSES IN PREPARATION FOR A HEARING OR TRIAL**

Always tell the truth

Review the facts prior to trial

Don't worry about being nervous; just remember, everyone in the courtroom feels the same way

Never argue with the military judge or counsel for either side. Use military courtesy when addressing the military judge or officers of superior rank

Be yourself on the stand and answer questions in a natural, conversational tone; try not to be overly emotional or to appear insolent

Don't try to answer a question you do not understand. Simply state, "I'm sorry, I do not understand your question"

Do not be afraid to say you do not know the answer to the question. If it's the truth, "I don't know" is a perfectly acceptable answer

Be prepared for cross-examination. Don't forget that the court members or the military judge can also ask you questions. Just stay on the stand until the military judge states that you are excused

Do not be baited into emotional or angry reactions if the cross-examiner is verbally aggressive or is questioning your truthfulness. Remember that the counsel who called you as a witness can always set the record straight during a re-direct examination

Do not give conclusions and do not express an opinion unless you are requested to do so and no objection is made to your expression of opinion

If an objection is made to any question asked of you, wait until the military judge rules on the objection before answering the question

If you are asked for a "yes" or "no" answer to a question that cannot be answered with a "yes" or "no," state that the question cannot be answered with a "yes" or "no" and explain your answer when you are asked to do so

If you are asked if you have discussed the case with the representative of either party, reply truthfully. Remember that there is a distinction between discussing a case and being told what to say.

Don't try to guess why a counsel may ask an unusual (to you) question during cross-examination. If there is no objection to the question, just answer it the best you can

## **TRIAL FORMAT**

A military accused may elect to be tried by a military judge alone or by a panel of court members (the military equivalent of a civilian jury). In either case, the trial will consist of two major portions, findings and sentencing.

Findings is the first part of the trial, and it is where guilt or innocence is determined

The accused may plead “guilty”

In guilty plea cases, a military judge, sitting alone, will question the accused to make sure that he understands the meaning and effect of his plea, and that he is, in fact, guilty

If the military judge accepts the guilty plea, the accused will then be sentenced by the military judge, or a panel of members, whichever the accused elects

Guilty pleas are not allowed in capital cases, i.e., where the death penalty is available

The accused may plead “not guilty”

Guilt or innocence is then determined by the military judge alone, or a panel of members, whichever the accused elects

Trial by military judge alone is not allowed in capital cases

An enlisted accused may elect to have at least one-third enlisted members included in the court-martial panel

As in all other American criminal courts, the accused is presumed innocent

The prosecution must prove the accused's guilt beyond a reasonable doubt

The accused has an absolute right to remain silent and present no evidence. The accused may also choose to testify or present other evidence in his defense

In a trial with members, two-thirds of the members, voting by secret written ballot, must concur in any finding of guilty. Thus, if less than two-thirds of the members vote “guilty,” then the accused is not guilty. In order to sentence the accused to death in a capital case, however, the vote of guilty on findings must be unanimous

Sentencing is the second part of the trial, and it is where an appropriate punishment is determined

Unlike many civilian courts, sentencing in a court-martial normally occurs immediately after findings

Sentencing may be by military judge alone or a panel of members

In guilty plea cases, the accused may elect sentencing by either a military judge alone or by members

In contested cases, the accused's choice of either members or military judge for findings also applies to sentencing

Judge-alone sentencing is not permitted in capital cases

Sentencing is an adversarial process

The prosecution can present matters in aggravation and can rebut evidence the accused presents in extenuation and mitigation

As in the findings portion of trial, the accused has an absolute right to remain silent and present no evidence during sentencing. However, the accused also has a right to present evidence in extenuation and mitigation

In sentencing by members, two-thirds must concur, voting by secret written ballot, in any sentence except that of confinement in excess of 10 years, where a three-fourths concurrence is required, and a sentence to death, where the vote must be unanimous

**Reference:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002)

## **POST TRIAL MATTERS, CONVENING AUTHORITY ACTION, AND APPEALS**

The findings and sentence adjudged by a court-martial are not final until approved or disapproved by the Convening Authority

For courts-martial sentences adjudged

Any adjudged forfeiture of pay and reduction in grade takes effect 14 days after the announcement of sentence, or when the Convening Authority takes action on the sentence, whichever is sooner. The accused may request a deferment until action

Any accused sentenced to death, or a punitive discharge and confinement for six months or less, or confinement for more than six months, shall automatically forfeit their pay and allowances up to the jurisdictional limits of their court-martial (GCM - total forfeitures; SPCM - 2/3 forfeitures), for any period of confinement or parole. The Convening Authority can waive any or all of these forfeitures for a period not to exceed six months to direct an involuntary allotment to provide for the support of the accused's dependent family members

A sentence to confinement begins as soon as it is adjudged, unless the accused requests a deferment. Unless a deferment of confinement is requested by the accused and approved by the Convening Authority, the time of confinement will run even if the accused is not actually confined

The accused may submit written matters relevant to the Convening Authority's decision whether to approve findings of guilt or to approve or disapprove all or part of the sentence. Written matters may include

Allegations of legal errors that affect the findings or sentence

Portions or summaries of the record and copies of documentary evidence offered or introduced at trial

Matters in mitigation that were not available for consideration by the court; and

Clemency recommendations by any court member, the Military Judge, or any other person

In cases where a punitive discharge is adjudged, the discharge cannot be ordered executed until appellate review is completed

Members are usually placed in mandatory excess leave (nonpay) status in cases where no confinement was adjudged or when all confinement is served, but before appellate review is completed

The Convening Authority, or successor, must take additional action to execute the punitive discharge after appellate review has been completed

The type of appellate review depends upon the adjudged sentence

The Judge Advocate General is the review authority in cases where the sentence does not include death, punitive discharge, or confinement for one year or more. The Judge Advocate General may elect to certify any case he/she reviews to the Air Force Court of Criminal Appeals (AFCCA)

Unless appellate review is waived by an accused, the AFCCA automatically reviews all cases involving sentences of death, punitive discharge, or confinement of one year or more. The AFCCA reviews both legal and factual sufficiency

After review by the AFCCA, the United States Court of Appeals for the Armed Forces (USCAAF) may elect to review any case. Review is automatic in death penalty cases and cases certified to the court by The Judge Advocate General of each service. The USCAAF reviews only questions of law and legal sufficiency

Cases actually reviewed by the USCAAF may be considered for review by the Supreme Court of the United States

**References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1101 - 1107, and 1201 - 1205 (2002)

UCMJ Arts. 57(a), 58(b), 60, 66-69 and 76a

AFI 51-201, *Administration of Military Justice*, 26 November 2003

*Chapter 3*

***MILITARY JUSTICE ISSUES  
FOR  
COMMANDERS***

## **MEDIA RELATIONS IN MILITARY JUSTICE MATTERS**

The Air Force must balance three important societal interests when there is media interest in military justice proceedings: protection of the accused's right to a fair trial, the privacy rights of all persons involved in the proceedings, and the community's right to be informed of and observe criminal proceedings. These interests are especially relevant when the proceeding involves high profile cases.

Release of information relating to criminal proceedings is subject to the Privacy Act (PA), Freedom of Information Act (FOIA), Victim and Witness Assistance Protection (VWAP) laws, Air Force Rules of Professional Conduct, Air Force Standards for Criminal Justice, implementing directives, security requirements, classified information laws, and judicial orders. It is critical that commanders always consult with the SJA before releasing any information about such proceedings.

### **PROVIDING INFORMATION**

AFI 51-201, Section 12D, covers the rules for releasing information pertaining to criminal proceedings. It prohibits release of information that has a substantial likelihood of prejudicing the criminal proceeding

AFI 51-201, para. 12.6.1.1, states that release of extrajudicial statements is a command responsibility. Obviously, the installation's SJA and its Public Affairs Officer (PAO) must work closely to provide informed advice to the commander. If a proposed extrajudicial statement is based on information contained in agency records, the Office of Primary Responsibility for the record should also coordinate prior to release. The convening authority responsible for the criminal proceeding makes the ultimate decision about release of extrajudicial statements relating to that criminal proceeding. MAJCOM (or equivalent) commanders may withhold release authority from subordinate commanders. In high interest cases, the SJA and the PAO should consult with their MAJCOM representatives

Rules for release of permissible extrajudicial statements are complex and vary according to the type of information to be released and its source, the type of proceeding, and the stage of the proceeding when the information is released

### **EXTRAJUDICIAL STATEMENTS GENERALLY**

Extrajudicial statements are oral or written statements made outside of a criminal proceeding that a reasonable person would expect to be disseminated by means of public communication

There are valid reasons for making certain information available to the public in the form of extrajudicial statements. However, extrajudicial statements must not be used to influence the course of a criminal proceeding

Usually, extrajudicial statements should include only factual matters and should not offer subjective observations or opinions

## **PROHIBITED EXTRAJUDICIAL STATEMENTS**

Extrajudicial statements relating to the following matters ordinarily have a substantial likelihood of prejudicing a criminal proceeding and generally should not be made:

- The existence or contents of any confession, admission or statement by the accused or the accused's refusal or failure to make a statement
- Observations about the accused's character and reputation
- Opinions regarding the accused's guilt or innocence
- Opinions regarding the merits of the case or the merits of the evidence
- References to the performance of any examinations, tests or investigative procedures (e.g., fingerprints, polygraph examinations and ballistics or laboratory tests), the accused's failure to submit to an examination or test, or the identity or nature of expected physical evidence
- Statements concerning the identity, expected testimony, disciplinary or criminal records, or credibility of prospective witnesses
- The possibility of a guilty plea or other disposition of the case other than procedural information concerning such processes
- Information a government counsel knows or has reason to know would be inadmissible as evidence in a trial; and
- Before sentencing, facts regarding the accused's disciplinary or criminal record, including nonjudicial punishment, prior court-martial convictions, and other arrests, indictments, convictions, or charges. Do not release information about nonjudicial punishment or administrative actions even after sentencing, unless admitted into evidence. However, a statement that the accused has no prior criminal or disciplinary record is permitted

## **PERMISSIBLE EXTRAJUDICIAL STATEMENTS**

When deemed necessary by command, the following extrajudicial statements may be made regardless of the stage of the proceedings, subject to the limitations stated above (substantial likelihood of prejudice and prohibitions under FOIA, PA, and/or VWAP)

- General information to educate or inform the public concerning military law and the military justice system
- If the accused is a fugitive, information necessary to aid in apprehending the accused or to warn the public of possible dangers

- Requests for assistance in obtaining evidence and information necessary to obtain evidence
- Facts and circumstances of an accused's apprehension, including time and place
- The identities of investigating and apprehending agencies and the length of the investigation, only if release of this information will not impede an ongoing or future investigation and the release is coordinated with the affected agencies
- Information contained in a public record, without further comment; and
- Information that protects the Air Force or the military justice system from the substantial, undue prejudicial effect of recent publicity initiated by some person or entity other than the Air Force. Such statements shall be limited to that necessary to correct misinformation or to mitigate substantial undue prejudicial information already available to the public. This can include, but is not limited to, information that would have been available to a spectator at an open Article 32 investigation or an open session of a court-martial

The following extrajudicial statements may be made only after preferral of charges, subject to the limitations stated above (substantial likelihood of prejudice and prohibitions under FOIA, PA, and/or VWAP)

- The accused's name, unit, and assignment
- The substance or text of charges and specifications, along with a mandatory statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty. As necessary, redact all VWAP and PA protected data from the charges and specifications
- The scheduling or result of any stage in the judicial process
- Date and place of trial and other proceedings, or anticipated dates if known
- Identity and qualifications of appointed counsel
- Identities of convening and reviewing authorities
- A statement, without comment, that the accused has no prior criminal or disciplinary record, or that the accused denies the charges
- The identity of the victim where the release of that information is not otherwise prohibited by law. Generally, however, seek to avoid release of the name of victims of sex offenses, the names of children or the identity of any victim when release would be contrary to the desire of the victim or harmful to the victim; and

-- The identities of court members and the military judge. Do not volunteer the identities of the court members or the military judge in material prepared for publication. This information may be released, if requested, after the court members or the military judge have been identified in the court-martial proceeding, if the convening authority's SJA determines release would not prejudice the accused's rights or violate the members' or the military judge's privacy interests

## **ARTICLE 32 INVESTIGATIONS**

Article 32 investigations should ordinarily be open to the public because the public has an interest in attending Article 32 investigations

-- Access by spectators to all or part of the proceeding may be restricted or foreclosed by the commander who directed the investigation or by the investigating officer (IO) when, in that officer's opinion, the interests of justice outweigh the public's interest in access

-- For example, it may be necessary to close an investigation to encourage complete testimony of a timid or embarrassed witness, to protect the privacy of an individual, or to ensure an accused's due process rights are protected

-- Make every effort to close only those portions of the investigation that are clearly justified and keep the remaining portions of the investigation open

-- If the hearing is closed, the commander or IO ordering it closed should provide specific, articulated reasons, in writing, for closure. These reasons should be attached to the IO's report of investigation

-- The commander directing the investigation may maintain sole authority over a decision to open or close an Article 32 investigation by giving the IO procedural instructions at the time of appointment or at any time thereafter

-- Prior to issuing procedural instructions to open an Article 32 investigation that has been closed, the commander must consider the investigating officer's written reasons for closing the investigation

## **REDUCING TENSION WITH THE MEDIA**

Command should take positive steps to reduce tension with the media

-- Have JA and PA work together to develop a coordinated press release that explains how the military justice system works, and how it compares and contrasts with the civilian system

-- Advise the media up-front of the prohibition against courtroom photography, television, and audio and visual recording, and provide an alternate location, room or office for media interviews, broadcasts, etc.

- Air Force representatives must not encourage or assist news media in photographing or televising an accused being held or transported in custody
- Provide reserved seating in the courtroom for at least one pool reporter and a sketch artist
- Advise PA about regulatory and ethical requirements that limit trial counsel from commenting on the case
- Consider establishing controlled parking areas for military judge, counsel, witnesses, and court members
- Consider controlled access areas for military judge, counsel, witnesses, and court members
- When appropriate, discuss with the SJA the possibility of having trial counsel request a judicial "gag order" from the military judge. Such an order can direct court members not to view media accounts of the case, or discuss the case with the media

**References:**

AFI 51-201, *Administration of Military Justice*, 26 November 2003  
AFI 35-101, *Public Affairs Policies and Procedures*, 26 July 2001  
MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 (2002)  
The Freedom of Information Act, 5 U.S.C. § 552, *as amended*  
The Privacy Act of 1974, 5 U.S.C. § 552a, *as amended*  
AFI 33-332, *Privacy Act Program*, 29 January 2004

## COMMAND SUCCESSION

An officer succeeds to command in one of two ways, either by assuming command or by appointment to command. Both assumption and appointment are based on seniority and may be either temporary or permanent.

Assumption of command is a unilateral act taken under authority of law and regulation by the officer who assumes command

Command passes to the senior military officer assigned to the organization who is present for duty and eligible to command

Authority to assume command is inherent in that officer's status as the senior officer in both grade (captain, lieutenant colonel, colonel) and rank (seniority within a grade)

An officer can assume command only of an organization to which that officer is assigned by competent authority (except that the officer serving as the Commander, Air Force Forces (COMAFFOR) for a given contingency operation exercises command authority over those Air Force members deployed in support of that contingency). Assignment to a subordinate organization is an assignment to all superior organizations having the subordinate organization as a component

Appointment to command occurs by an act of the President, the Secretary of the Air Force, or by his or her delegate(s)

An officer assigned to an organization, present for duty, and eligible to command may be appointed to command if they are at least equal in grade to all other eligible officers, without regard to rank within grade

A temporary assumption or appointment is used when the commander being replaced is only temporarily absent or disabled

Absence or disability for only short periods doesn't incapacitate the commander and normally doesn't warrant an assumption of command by another officer

No need to publish assumption of or appointment to command orders when officer who originally held the command position resumes command after a temporary absence, so long as they are still equal or senior in grade to any other officer then present for duty, assigned to the organization, and eligible to command

If during the permanent commander's temporary absence, another officer senior in grade to him/her, who is eligible to command, is assigned or attached to the organization, then the returning commander may not resume command

## **SPECIAL ITEMS**

There is no title or position of "acting commander." The term, "acting commander" is not authorized

Officers assigned to HQ USAF cannot assume command of personnel, unless competent authority specifically directs

No officer may command another officer of higher grade who is present for duty and otherwise eligible to command

Enlisted members cannot exercise command

No commander may appoint his own successor

Chaplains cannot exercise command, although they do have the authority to give lawful orders and exercise functions of operational supervision, control, and direction

Students cannot command an Air Force school or similar organization

Judge Advocates can only exercise command if expressly authorized by The Judge Advocate General; as the senior ranking member among a group of POWs; or under emergency field conditions

Flying organizations may only be commanded by Line of the Air Force crewmembers occupying active flying positions. Exception: Officers from other military departments who have USAF-equivalent crewmember ratings or certifications can command consolidated flying training organizations in accordance with appropriate interservice agreements

Certain types of organizations, such as air base wings or groups, which have multiple missions that include responsibility for controlling or directing flying activities, are considered nonflying units and may be commanded by nonrated officers

Only Reserve Component officers on extended active duty orders can command organizations of the Regular Air Force. "Extended active duty" is defined as a period of 90 days or more during which the officer is on active duty (other than for training) orders. NOTE: The COMAFFOR or delegate may authorize Reserve Component officers not on extended active duty to command Regular Air Force units operating under the COMAFFOR's authority, though COMAFFOR may delegate this authority no lower than the commanders of Aerospace Expeditionary Wings for expeditionary units operating under their authority

Regular officers and Reserve officers on extended active duty cannot command organizations of the Air Force Reserve unless approved by HQ USAF/RE

Only officers designated as a medical, dental, veterinary, medical service, or biomedical sciences officer, or as a nurse may command organizations and installations whose primary mission involves health care or the health profession

Officers quartered on installation, but assigned to another organization not charged with operating that installation, cannot assume command of installation by virtue of seniority

#### **METHOD FOR ASSUMPTION OR APPOINTMENT TO COMMAND**

Use written orders to announce and record command succession, unless precluded by exigencies

Use standard memorandum format or use AF Form 35 (Request and Authorization for Assumption of/Appointment to Command) to document such orders. AFI 51-604, Attachment 2, sets out detailed instructions for preparing the AF Form 35. Consult AFI 33-328 for uniformity of orders formats and general order publishing guidance

#### **References:**

AFI 33-328, *Administrative Orders*, 1 February 1999

AFI 51-604, *Appointment to and Assumption of Command*, 1 October 2000

## **FRATERNIZATION AND UNPROFESSIONAL RELATIONSHIPS**

AFI 36-2909, *Professional and Unprofessional Relationships*, sets out a detailed discussion of Air Force policy concerning fraternization and unprofessional relationships

Professional relationships are essential to the effective operation of all organizations. The nature of the military mission requires absolute confidence in command and an unhesitating adherence to orders that may result in inconvenience, hardships, or, at time, injury or death

Personal relationships become matters of official concern when they adversely affect or have the reasonable potential to adversely affect the Air Force by eroding morale, good order, discipline, respect for authority, unit cohesion or mission accomplishment

### **UNPROFESSIONAL RELATIONSHIPS**

Unprofessional relationships, whether pursued on or off-duty, are those relationships that detract from the authority of superiors or result in, or reasonably create the appearance of, favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests. Unprofessional relationships can exist between officers, between enlisted members, between officers and enlisted members, and between military personnel and civilian employees or contractor personnel

Certain kinds of personal relationships present a high risk of becoming unprofessional

Familiar relationships in which one member exercises supervisory or command authority

Shared living accommodations, vacations, transportation, or off-duty interests on a frequent or recurring basis in the absence of any official purpose or organizational benefit

### **FRATERNIZATION**

Fraternization is an aggravated form of unprofessional relationship. It is defined as a personal relationship between an officer and an enlisted member which violates the customary bounds of acceptable behavior in the Air Force and prejudices good order and discipline, discredits the armed services, or operates to the personal disgrace or dishonor of the officer involved

The following officer conduct is specifically prohibited by AFI 36-2909, and may be prosecuted under either Article 92, UCMJ or Article 134, UCMJ (with reasonable accommodation of married members or members related by blood or marriage)

Officers will not gamble with enlisted members

Officers will not lend money to, borrow money from, or otherwise become indebted to enlisted members

Officers will not engage in sexual relations with or date enlisted members. NOTE: In dealing with officer/enlisted marriages, the evidence should be assessed. When evidence of fraternization exists, the fact that an officer and enlisted member subsequently marry does not preclude appropriate command action based on the prior fraternization

Officers will not share living accommodations with enlisted members

Officers will not engage, on a personal basis, in business enterprises with enlisted members, or solicit or make solicited sales to enlisted members, except as permitted by the Joint Ethics Regulation

## COMMAND AND SUPERVISORY RESPONSIBILITIES

A commander or supervisor should take corrective action if a relationship is prohibited by AFI 36-2909 or is causing a degradation of morale, good order, discipline, or unit cohesion. If the commander does not take action, he or she may be punished as well

Action should normally be the least severe necessary to terminate the unprofessional aspects of the relationship

Counseling is often an effective first step in curtailing unprofessional relationships. However, the full spectrum of administrative actions should be considered. More serious cases may warrant nonjudicial punishment. Referral of charges to a court-martial is only appropriate in aggravated cases

An order to cease the relationship, or the offensive portion of the relationship, can and should be given. Any order should be in writing, if possible

Officers or enlisted members who violate such orders are subject to UCMJ action

### **References:**

AFI 36-2909, *Professional and Unprofessional Relationships*, 1 May 1999

UCMJ arts. 92 & 134

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002)

## **MILITARY JUSTICE ACTIONS AND THE INSPECTOR GENERAL**

The Inspector General (IG) has authority to investigate complaints related to "discipline." This authority is restricted, particularly as it relates to actions under the Uniform Code of Military Justice (UCMJ).

Both nonjudicial punishment proceedings and courts-martial have statutory appeal provisions

Additionally, Congress and the Air Force have provided additional administrative review mechanisms, such as the Air Force Board for the Correction of Military Records, Congressional Inquiries, etc.

AFI 90-301, *Inspector General Complaints*, should not be used as authority for an IG inquiry into military justice matters

IG personnel and investigating officers must have expeditious and unrestricted access to all Air Force records, reports, investigations, audits, reviews, documents, papers, recommendations, and other materials relevant to the investigation concerned

Role of the IG in UCMJ matters should be guided by the following information

Prior to a commander's initiation of an action under the UCMJ, the IG may conduct an investigation authorized by applicable regulations. If misconduct is involved, follow the procedures of AFI 90-301, para. 2.17 and table 2.5, Rule 15, requiring the IG to refer the case to the appropriate agencies or consult with the SJA

If charges have been preferred in a case, the IG should generally not have any direct involvement

If the investigation of matters tangential to the charges becomes necessary, the IG should consult the SJA to ensure the investigation does not in any way prejudice the administration of justice under the UCMJ

If action is initiated under Article 15, UCMJ, the IG should apply the policies of AFI 90-301, para. 2.17 and table 2.5

Appeal rights under AFI 51-202, Article 15 of the UCMJ, and Part V of the Manual for Courts-Martial (MCM) must first be exhausted

If it is necessary to process a complaint of procedural mishandling, the investigation should be confined to the procedural aspects of the Article 15 process and should NOT involve

Assessing the sufficiency of the evidence, or

Probing the commander's deliberative process concerning the decision to initiate action, the complainant's guilt, or punishment imposed

The complainant should also be referred to AFI 36-2603, *Air Force Board for Correction of Military Records*

The IG also investigates any allegations of reprisal. Any nonjudicial punishment or adverse administrative action taken against the individual who filed the reprisal complaint may be reviewed in the course of that investigation

**References:**

MANUAL FOR COURTS-MARTIAL, PART V, UNITED STATES (2002)

AFI 90-301, *Inspector General Complaints*, 30 January 2001

AFI 36-2603, *Air Force Board for Correction of Military Records*, 1 March 1996

AFI 51-202, *Nonjudicial Punishment*, 7 November 2003

## **MILITARY MAGISTRATE PROGRAM**

Military magistrates may be appointed by the Special Court-Martial Convening Authority (SPCMA) for each installation. A military magistrate's primary duty is to issue search authorizations based upon probable cause.

The SPCMA may appoint one or two officers, of judicial temperament, to serve as military magistrate for the installation

AFI 51-201, para 3.1 is the authority for appointment of a military magistrate to authorize searches on the installation

A military magistrate must ordinarily be in grade of lieutenant colonel or above. Below the grade of lieutenant colonel requires General Court-Martial Convening Authority (GCMCA) approval

May not be a chaplain, a member of an office of a staff judge advocate having responsibility for that installation, security forces specialist, AFOSI agent, or convening authority

The appointment must be in writing and specify the installation over which the magistrate has authority

Once appointed, these magistrates are authorized to issue search and seizure authorizations based upon probable cause

They may exercise this authority concurrent with installation commander

The installation commander need not be unavailable before they can exercise their authority

One magistrate should be designated the primary magistrate and the other as the alternate

The alternate should act only when the primary is absent or incapacitated

Primary magistrate is not absent if in a duty status within the vicinity of the installation and can be reasonably contacted

Action by alternate is not invalid solely on the basis that the primary was available

Each installation's Staff Judge Advocate will brief the magistrates on their duties when appointed and thereafter when appropriate

**References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 315 (2002)  
AFI 51-201, *Administration of Military Justice*, 26 November 2003

## NATIONAL SECURITY CASES

Commanders contemplating disciplinary or administrative action against military members or civilian employees that could lead to discharge or removal from the Air Force must first obtain permission to proceed when the member or employee holds a special access. "Special access" includes SCI access, SIOP/ESI, HQ USAF/XO special access programs, research and development (R&D) special access programs and AFOSI special access. Do not take action on personnel who now hold or have held certain access within the periods specified until approval is obtained from the appropriate special access program identified in AFI 31-501, para. 8.9.

Expeditious processing of such requests must be pursued to comply with speedy trial rules and restrictive time requirements in civilian removal cases. GOAL: 15 days from date of initiation request to date of approval/denial by OPR

Voluntary separation requests by officers (AFI 36-3207) and airmen (AFI 36-3208) will NOT be handled under these procedures unless they are in lieu of adverse action

### **ACTIONS PERMITTED PENDING DECISION TO PROCEED:**

**Courts-Martial:** In General Courts-Martial or Special Courts-Martial, command may complete preferral of charges and an Article 32 investigation, if applicable, but cannot refer charge(s) to trial without permission to proceed. Nature of the offense(s) is immaterial. Summary Courts-Martial are not subject to the same strictures as the other courts-martial

**Officer Discharges:** The show cause authority may not initiate the discharge, issue a show cause memorandum, or otherwise require officers to show cause for retention until the appropriate action office grants authority to proceed

**Airman Discharges:** In "notification" cases, the commander may proceed through giving the member notice of the proposed discharge, obtaining the member's response, scheduling necessary appointments, and conducting those appointments; however, the separation authority may not approve the discharge until permission to proceed is granted. In "board hearing" cases, the commander may proceed through initiation of the case, obtaining the member's response, and conducting those appointments. The convening authority may not order the board to be convened until authority to proceed is obtained

**Civilian Removals:** Commanders must coordinate with the servicing civilian personnel flight to compose the message to the appropriate Air Force OPR, seeking authority to proceed. Commanders must not, under any circumstances, issue a "notice of proposed removal" until authority to proceed is obtained

### Judge Advocate Notifications

Any investigation involving allegations of the following offenses must be approached as a national security case, including

Aiding the Enemy (Art. 104, UCMJ)

Spying (Art. 106, UCMJ)

Espionage (Art. 106a, UCMJ)

Sabotage (Art. 108, UCMJ; 18 U.S.C. 2155)

Subversion (Art. 94, UCMJ)

Violations of punitive instructions, regulations, or criminal statutes concerning classified information, or the foreign relations of the United States (Art. 92, UCMJ)

Any case with potential to become a national security case must be reported immediately to the Air Force Legal Services Agency's Military Justice Division (AFLSA/JAJM) by the local SJA

DoD Directive 5525.7 requires coordination between DoD and DoJ of the investigation and disposition of significant cases. Early reporting to AFLSA/JAJM is essential since national security cases often involve issues such as searches, seizures, immunity grants, polygraphs, etc., as well as the decision whether to prosecute and, if so, who will prosecute. Under no circumstances should a unit commander or an SJA take action initiating the court-martial process in a case potentially involving national security issues until AFLSA/JAJM has coordinated the case with DoJ through appropriate DoD channels

Any national security case involving court-martial, administrative discharge, or civilian removal action MUST be reported by the SJA to HQ USAF/JAA (General Law Division)

Commanders must file a Special Access Request Worksheet as part of the package requesting permission to proceed. Involve the unit security manager and the special access program manager in the collection and processing of this type of information

**References:**

AFI 31-501, *Personnel Security Program Management*, para. 8.9, 1 August 2000

AFI 51-201, *Administration of Military Justice*, paras. 3.3.2, 6.6.4, and 12.8 *et seq.*,  
26 November 2003

MANUAL FOR COURTS-MARTIAL, United States (2002), Appendix 3, DoD Directive 5525.7,  
*Implementation of the Memorandum of Understanding between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes*

## **EVIDENCE AT COURTS-MARTIAL USE OF INFORMATION IN THE PIF & REHABILITATION TESTIMONY**

Documents in a Personnel Information File (PIF) such as letters of reprimand can be admitted into evidence during the sentencing phase of court-martial if it is clear from the face of the document that the member received the document and had an opportunity to respond to the allegations. The document must also be complete. Any response submitted by the member becomes part of the record and must be filed with the action. Otherwise, the record is incomplete and may not be admitted. As a result, it is important to follow the procedures for imposing adverse administrative actions as set out in Chapter 5, Quality Force Management.

Rule for Courts-Martial 1001(b)(5) permits evidence of rehabilitative potential to be introduced in the sentencing phase of the trial. The term "rehabilitative potential" as defined in the *Manual for Courts-Martial* simply "refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society"

Evidence may be in the form of opinion concerning the accused's previous performance as a service member and potential for rehabilitation

The scope of the rehabilitation evidence must be limited to whether the accused indeed has rehabilitative potential, and the magnitude or quality of any such potential. An example would be "SSgt Doe has outstanding rehabilitation potential"

The witness cannot express an opinion as to whether the accused should receive a punitive discharge, or any similar euphemism, *i.e.*, "no potential for future service"; "he should be separated"; "retaining him would be a waste of Air Force resources"; "I don't want him back in my unit"; or "has no rehabilitation potential for service in the Air Force"

The opinion testimony in this area must be based on sufficient personal knowledge about the accused's character, duty performance, moral fiber, and determination to be rehabilitated, and cannot be based merely on the seriousness of the offense at issue

### **References:**

AFI 51-201, *Administration of Military Justice*, 26 November 2003

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5) (2002)

## **AIR FORCE VICTIM AND WITNESS ASSISTANCE PROGRAM**

The objectives of the Air Force Victim and Witness Assistance Program (VWAP) are to

- Mitigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by U.S. Air Force authorities
- Foster cooperation between victims, witnesses, and the military justice system; and
- Ensure best efforts are extended to protect the rights of victims and witnesses

The installation commander is the local responsible official (LRO) for identifying victims and witnesses of crimes and providing the services required by VWAP. He or she normally delegate this responsibility, in writing, to the base staff judge advocate (SJA)

LRO responsibilities to crime victims

- Inform victims about sources of medical and social services
- Inform victims of restitution or other relief to which they may be entitled
- Assist victims in obtaining financial, legal, and other social services
- Inform victims concerning protection against threats or harassment
- Provide victim notice of the status of investigation, pretrial status, preferral of charges, acceptance of a guilty plea or announcement of findings, and the sentence imposed

NOTE: If administrative action is taken, you may reveal “appropriate administrative action was taken.” You may not reveal the specific action taken, i.e., Art 15 punishment, because it is not public knowledge and is protected by the Privacy Act

- Safeguard the victim’s property if taken as evidence and return it as soon as possible
- Consult with victims and consider their views on preferral court-martial charges, pretrial restraint, dismissal of charges, pretrial agreements, discharge in lieu of court-martial, and scheduling of judicial proceedings; and

NOTE: Although victims’ views should be considered, nothing in the VWAP limits the responsibility and authority of officials involved in the military justice process from taking any action deemed necessary in the interest of good order and discipline and/or preventing service discrediting conduct

- Designate a victim liaison when necessary

In cases involving adverse actions for the abuse of dependents resulting in the separation of the military sponsor, victims may be entitled to receive transition assistance or compensation under the Uniform Services Former Spouses Protection Act

#### LRO responsibilities to all witnesses

- Notify appropriate authorities of threats and assist in obtaining restraining orders
- Provide a waiting area removed from and out of the sight and hearing of the accused and defense witnesses
- Assist in obtaining necessary services such as transportation, parking, child care, lodging, and court-martial translators/interpreters
- If the victim/witness requests, take reasonable steps to inform his/her employer of the reasons for the absence from work, as well as notify creditors of any serious financial strain incurred as a direct result of the offense; and
- Provide victims and witnesses necessary assistance in obtaining timely payment of witness fees and related costs

Each agency (JA, SF, OSI, HC, MDG & FSC) is responsible for training personnel on their responsibilities under this chapter. The SJA trains commanders and first sergeants

Each installation must prepare an information packet modeled after figure 7.2 of AFI 51-201 and provide the packet to each victim/witness

#### VICTIM SUPPORT LIAISONS

Pursuant to SecAF and CSAF Memorandum, Interim Measure for Support, dated 1 April 2004, each installation will appoint a representative to help assist victims of sexual assaults

The victim support liaisons sole responsibility is to support sexual assault victims throughout the entire process regardless of whether the case is prosecuted

Sexual Assault liaisons report directly to the vice wing commander

#### **References:**

*Victims of Crime Act of 1984*, 42 U.S.C. Sections 10601-10603 (1988)  
*Victims' Rights and Restitution Act of 1990*, 42 U.S.C. Sections 10606-10607 (Supp. III 1991)  
*Victim Rights Clarification Act of 1997*, 18 U.S.C. Section 3510  
DoD Directive 1030.1, *Victim and Witness Assistance*, 13 April 2004  
DoD Instruction 1030.2, *Victim and Witness Procedures*, 4 June 2004  
AFI 51-201, *Administration of Military Justice*, 26 November 2003  
Memorandum from SecAF and CSAF, Interim Measure for Victim Support, 1 Apr 04

## **THE RIGHT TO FINANCIAL PRIVACY ACT**

The Right to Financial Privacy Act (RFPA) provides privacy protection for customers' financial records held by financial institutions. It strikes a balance between an individual's privacy interest in these records and the government's interest in investigating criminal misconduct. The RFPA specifically describes the means by which government authorities can obtain an individual's financial records from a financial institution, provides notice and challenge procedures for the customer, and prohibits unfettered access by a government agent. The Act does not apply to obtaining access to financial records maintained by military banking contractors located outside of the United States, the District of Columbia, Guam, American Samoa, or the Virgin Islands. Failure to follow the requirements of the statute can result in litigation in U.S. District Court, delays in courts-martial or administrative actions, and civil penalties.

### **MEANS FOR OBTAINING RECORDS FOR A LAW ENFORCEMENT INQUIRY**

A DoD law enforcement office may request basic identifying information relevant to a legitimate law enforcement inquiry without consent or notice. Such information includes

- Name
- Address
- Account number

Preferred method is with the customer's consent. DoD and Air Force policy is to attempt to obtain consent, if feasible, before using other methods to obtain financial records

- Consent must be in writing in the prescribed form
- The consent form specifies the records being disclosed, explains the purpose for disclosure, and identifies the agency to which they may be disclosed

Second, by search warrant issued by either a federal magistrate or a state judge within the applicable federal district

- A military search authorization is only valid for records maintained at on-base banking institutions at overseas installations. Records must be maintained at the on-base location, not merely accessible from the on-base location
- AFOSI should coordinate with the SJA before obtaining warrants or search authorizations
- Within 90 days of executing a search warrant, the customer must be notified that the records were seized

Third, by judicial subpoena. Once the convening authority refers a case to trial by court-martial, the trial counsel has authority to issue subpoenas. Accordingly, trial counsel may subpoena the financial records of an accused or of witnesses. Subpoenas for an accused's records are exempt from the requirements of the RFPA. For witnesses, trial counsel must provide notification and an opportunity to challenge the subpoena

Fourth, by administrative subpoena. DoD/IG is authorized to issue such subpoenas

- Used in cases where the financial harm to the government exceeds \$1,000, and
- Only available before preferral of charges

Fifth, by formal written request. RFPA allows this procedure only if no administrative subpoena authority "reasonably appears to be available" to the government

- Investigators must follow RFPA, DoD, and AFOSI requirements exactly
- Notify the customer that if he wishes to prevent disclosure, he must complete a fill-in-the blank form and sworn statement attached to the notice. Then the customer must file the forms with the court. The RFPA gives the customer 10 days from personal service in which to file a motion with the court to prohibit disclosure. NOTE: DoD Directive 5400.12 gives the customer 14 days from service and 18 days from the initial mailing

The RFPA applies only in the states and territories of the U.S. (i.e., Puerto Rico, Guam, American Samoa, and the Virgin Islands), and the District of Columbia

- At other installations, DoD Directive 5400.12 allows use of a military search authorization to obtain records maintained by on-base military banking facilities and credit unions. If the records are maintained at a home office in the U.S., then the RFPA applies to the records maintained in the states
- Follow host nation procedures for off-base local national financial institutions

**References:**

12 U.S.C. § 3401, et seq.

DoD Directive 5400.12, *Obtaining Information From Financial Institutions*, 6 February 1980  
(Through Change 2, 15 April 1983)

AFI 71-101 (Volume 1), *Criminal Investigations*, 1 December 1999

Right to Financial Privacy Act Guide, available at the below site  
<http://www4.law.cornell.edu/uscode/12/ch35.html>

## UNLAWFUL COMMAND INFLUENCE

As the military courts have often stated, unlawful command influence (UCI) is the mortal enemy of military justice. The courts have been equally quick, however, to distinguish proper command influence from UCI. The key is to understand what constitutes proper involvement by the commander, and what crosses the line into UCI.

Commanders at each level are given authority by virtue of their commands to impose discipline upon subordinates within their command. For example, a squadron commander may discipline anyone assigned to his or her squadron. Since that squadron would normally fall under a group and then a wing, those squadron members would likewise be subject to discipline from their group and/or wing commanders. Each commander in the chain must remain free to exercise his or her own discretion to impose discipline without inappropriate interference from a superior commander

A superior commander must not direct a subordinate commander to impose a particular punishment or take a particular action. To do so would constitute UCI because the decision was not that of the commander taking action or imposing punishment, but rather that of the superior commander

The key consideration is whether a commander is taking disciplinary action based upon that commander's own personal belief that the disciplinary action is appropriate or whether the commander is merely acquiescing to direction from a superior to impose the particular discipline

The superior commander can remove or withhold the authority from the subordinate commander to act in a particular case or type of cases and impose punishment himself

Superior commanders must not make comments that would imply they "expect" a particular result in a given case or type of cases. Examples of *unlawful* command influence

- A commander states at an officers' call that all drug users must be removed from the Air Force. Potential court members for an upcoming court involving drugs are present. The inference may be that the commander expects the court to impose a punitive discharge
- A commander makes comments on his displeasure at the "light" sentences adjudged by previous courts. The concern is future panel members may adjudge a "harsher" sentence than they might otherwise in order to please the commander
- A commander expresses his "concern" about court-martial cases in which subordinate commanders preferred charges, recommended a court, then testified

during sentencing on behalf of the accused. The suggestion was they refrain from testifying for the accused in upcoming courts. Any attempt to discourage a witness from testifying is improper

- A commander at speaking informally to a group of officers jokingly says he does not care how long a particular court takes, as long as the members "hang the SOB." The impression is that he believes the accused to be guilty and expects the members to agree
- A convening authority may not exclude classes of individuals from serving as court members if done to obtain a more severe sentence
- Unlawful interfering with a party's access to witnesses
- Intent to actually interfere with a case is not required. Command actions that have even the unintended effect of discouraging witnesses to testify or causing witnesses to conform is UCI

Superior commanders are not prohibited from establishing and communicating policies necessary to maintenance of good order and discipline. They are also free to pass on their experience and advice regarding disciplinary matters. Having done so, however, the superior commander must then step back and allow the subordinates to exercise their discretion in the matter. Examples of *proper* command involvement

- Withholding a subordinate's authority to act in an individual case or types of cases
- Requesting a subordinate to reconsider his/her action in light of new evidence
- Consulting with subordinates on judicial decisions -- at the subordinate's request. The subordinate alone must decide what action to take
- "Tough talk" policy letters, talks and briefings on issues of concern are permissible so long as they are not indicative of an inelastic attitude or an attempt to influence the finding and sentence in a particular case
- Focusing on problem areas is permissible. For example, characterizing illegal drug use as a threat to combat readiness and referring to "ferreting out" illegal drug dealers as a legitimate command concern
- A Chief of Naval Operations' promulgation of his policy against drug abuse was a necessary and proper exercise of command function

**References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002)  
AFI 51-201, *Administration of Military Justice*, 26 November 2003

*Chapter 4*

***NONJUDICIAL PUNISHMENT  
UNDER  
ARTICLE 15, UCMJ***

## NONJUDICIAL PUNISHMENT OVERVIEW AND PROCEDURES

Nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), is one of the commander's most valuable tools for maintaining morale, good order, discipline, and efficiency.

Generally, any commander who is a commissioned officer may impose NJP for minor offenses committed by members under his or her command. The offense must violate the UCMJ

In deciding whether or not an offense is minor, commanders should consider

The nature of the offense and the circumstances surrounding its commission

The member's age, rank, duty assignment, record, and experience; and

The maximum sentence a court-martial could impose

Generally, an offense is not considered minor if a general court-martial could punish the offense with a dishonorable discharge or confinement for more than one year

Commanders must confer with the Staff Judge Advocate (SJA), or a designee, before initiating nonjudicial punishment proceedings and before imposing punishment. The Military Justice Section of the base legal office prepares the Air Force (AF) Form 3070, *Record of Nonjudicial Punishment Proceedings*

While no standard of proof is applicable to any phase of Article 15 proceedings, commanders should recognize members are entitled to demand trial by court-martial where proof beyond a reasonable doubt by competent evidence is required for conviction. Therefore, commanders should consider whether such proof is available before initiating action under Article 15. If not, NJP is generally not warranted

Commanders should consider the punishment limitations of their grade when deciding whether a more senior commander should impose the NJP. Limitations are on the AF Form 3070 and in AFI-202, Tables 3.1 and 3.2 (attached)

Commanders should initiate NJP action (by serving the AF Form 3070) as soon as possible after a member has committed an offense and the facts have been adequately investigated

Commanders should serve the AF Form 3070 on members within 10 days of the case-ready date. In general, this is the date when the commander has adequate information to decide how to dispose of the case. Refer to AFI 51-202, Attachment 3, for more detailed information on how to determine the "case-ready date"

Failure to meet this suggested processing goal does not preclude commanders from initiating NJP proceedings at a later date

Once notified of NJP proceedings, by way of the AF Form 3070, members are allowed three duty days (72 hours) to respond. Upon written application and for good cause, the initiating commander may approve a request for additional time to respond

Commanders should encourage members to consult with the Area Defense Counsel (ADC) in all cases

Once served with the AF Form 3070, the member has the right to examine all statements and evidence available to the commander that the commander relied upon in offering/imposing NJP, unless privileged or restricted by law, regulation, or instruction. The legal office normally supplies the evidence to the ADC

If the member fails to indicate within three duty days whether he or she will accept the Article 15, the commander may continue with the proceedings. The commander notes the member's failure to respond on the AF Form 3070

The member's failure to respond in time is deemed acceptance of NJP proceedings. However, if the commander believes the failure to respond was for reasons beyond the member's control, the commander may not proceed with NJP action. Consult with the SJA before proceeding

If a member decides to accept NJP, he or she is entitled to present matters in defense, mitigation, and extenuation

By accepting NJP the member is not admitting guilt. The member is merely consenting to the procedure (choosing to have the commander decide the case, rather than going before a court)

Members may present matters in person, in writing, or both

If a member requests a personal appearance, he or she is entitled to various information and certain procedural rights. For example, he or she is entitled to

Be informed in accordance with Article 31(b), UCMJ, rights

Be informed of and have an opportunity to examine the evidence against him or her

Be accompanied by a spokesperson (who does not have to be a lawyer)

Request the presence of relevant, reasonably available witnesses; and

Present matters in defense, extenuation, and mitigation

Although certain exceptions exist, personal appearances will be open to the public at the member's request. The commander may also choose to open the presentation to the public, even if the member objects

After the personal presentation (if one is requested), and after consideration of all matters in defense, mitigation, and extenuation, the commander must decide

Whether the member committed the offense(s); and

If the member committed the offense(s), what punishment to impose

Commanders are required to confer with the SJA before imposing punishment except where impracticable due to military exigencies. (The legal office will normally type the appropriate punishment language on the AF Form 3070)

Commanders should tailor the punishment to the offense and the member

Ordinarily, the commander should impose the least severe punishment sufficient to correct and/or rehabilitate the member

For example, an unsuspended reduction in grade ("hard bust") may be reserved for repeat offenders, cases where past rehabilitative efforts have failed, or for the most serious offenses

Punishment limitations based upon the commander's grade and the member's grade are summarized in AFI 51-202, Tables 3.1 and 3.2 (attached)

There are limitations on the combination of some punishments

Correctional custody cannot be combined with restriction and/or extra duties

If restriction and extra duties are combined, they must run concurrently and must not exceed the maximum time imposable for extra duties (45 days when field grade or general officers impose punishment; 14 days when company grade officers impose punishment)

Arrest in quarters (officers only) cannot be combined with restriction

Unless the commander specifies otherwise, all punishments are effective when imposed

Appealing NJP: Members are entitled to appeal nonjudicial punishment to the "next superior authority" in the commander's chain of command

The member may appeal when he or she considers the punishment to be "unjust" or "disproportionate" to the offense. A member may assert the punishment was unjust because the offense was not committed. Thus, the "guilty finding," the punishment, or both may be appealed

Members must appeal the punishment within five calendar days unless they request an extension in writing within the five calendar days and the commander imposing the punishment grants it for good cause

Members must submit all evidence supporting their appeals to the commander who imposed the original punishment

The commander may deny all relief, grant partial relief, or grant all relief requested by the member. If the commander does not grant all the requested relief, he or she must forward the appeal to the appellate authority through the servicing SJA

The appellate authority may deny all relief, grant partial relief, or grant all relief requested by the member. The appellate authority's decision is final

Punishments are not stayed during the appeal process. However, if the commander and/or appellate authority fail to take action on an appeal within five days after submission, and if the member so requests, any unexecuted punishment involving restraint or extra duties will be delayed until after action on appeal is taken

**References:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part V and Article 15, UCMJ (2002)  
AFI 51-202, *Nonjudicial Punishment*, 1 July 2002

**Attachment:** Tables of Enlisted and Officer Punishments, AFI 51-202, Tables 3.1 and 3.2

**Table 3.1. Enlisted Punishments.**

<b>Punishment</b>	<b>Imposed by Lt or Capt</b>		<b>Imposed by Major</b>		<b>Imposed by Lt Col or Above</b>	
<b>Additional Restrictions</b>	May not Impose NJP on CMSgt or SMSgt		May not Impose NJP on CMSgt or SMSgt		See Note 2 for reduction of CMSgt or SMSgt	
<b>Correctional Custody</b>	Up to 7 days		30 days		30 days	
<b>Reduction (See Note 2)</b>	CMSgt	No	CMSgt	No	CMSgt	Note 2
	SMSgt	No	SMSgt	No	SMSgt	Note 2
	MSgt	No	MSgt	No	MSgt	One Grade
	TSgt	No	TSgt	One Grade	TSgt	One Grade
	SSgt	One Grade	SSgt	One Grade	SSgt	One Grade
	SrA	One Grade	SrA	to AB	SrA	to AB
	A1C	One Grade	A1C	to AB	A1C	to AB
	Amn	One Grade	Amn	to AB	Amn	to AB
<b>Forfeiture</b>	7 days pay		½ of 1 month’s pay per month for 2 months		½ of 1 month’s pay per month for 2 months	
<b>Reprimand</b>	Yes		Yes		Yes	
<b>Restriction</b>	14 days		60 days		60 days	
<b>Extra Duties</b>	14 days		45 days		45 days	

**NOTES:**

1. See MCM, Part V, paragraph 5d for further limitations on combinations of punishments...
2. CMSgt or SMSgt may be reduced one grade only by MAJCOM commanders, commanders in chief of unified or specified commands, or commanders to whom promotion authority to those ranks have been delegated. See AFI 36-2502, *Promotion of Airmen*.
3. Neither bread and water nor diminished rations punishments are authorized.
4. Frocked commanders may exercise only that authority associated with their actual pay grade. No increased punishment authority is conferred by assumption of the title and insignia of the frocked grade.

**Table 3.2. Officer Punishments.**

<b>Punishment</b>	<b>Imposed by Colonel</b>	<b>Imposed by General Officer or GCMCA</b>
<b>Correctional Custody</b>	No	No
<b>Reduction</b>	No	No
<b>Forfeiture</b>	No	½ of 1 month’s pay per month for 2 months
<b>Reprimand</b>	Yes	Yes
<b>Arrest in Quarters</b>	No	30 days
<b>Restriction</b>	30 days	60 days
<b>Extra Duties</b>	No	No

NOTES:

1. Officers in the grade of Lt Colonel and below (includes frocked Colonels) may not impose NJP on officers.
2. Only MAJCOM commanders, commanders in chief of unified commands and their equivalents, or higher may impose NJP on general officers.
3. See MCM, Part V, paragraph 5d, for further limitations on combinations of punishments.

## SUPPLEMENTARY NONJUDICIAL PUNISHMENT ACTIONS

Supplementary nonjudicial punishment (NJP) actions are important tools for commanders to understand when dealing with NJP. Commanders are required to consult with the servicing Staff Judge Advocate (SJA), or designee, before proceeding with any supplementary NJP actions.

Procedure: Supplementary NJP actions are accomplished on Air Force Form 3212, *Record of Supplementary Action under Article 15*, and are filed with the original NJP action. Members may request post-punishment relief (using the sample format in AFI 51-202, Atch. 6), or the commander may grant such relief on his or her own initiative

Suspension: Suspension postpones all or part of a punishment for a specific probationary period. The suspended punishment is later remitted (canceled) if the member successfully completes the period of the suspension without either committing another offense under the UCMJ or violating a condition of the suspension specified by the commander. Commanders must consult with the servicing SJA, or designee, before imposing conditions on suspensions

Suspension is usually appropriate for a first-time offender or where there are persuasive extenuating or mitigating circumstances

The period of a suspension may not exceed 6 months from the date of the suspension

Commanders may, at any time, suspend any part or amount of the unexecuted punishment imposed. An executed punishment of reduction in grade or forfeiture may be suspended if it is accomplished within 4 months of the punishment being imposed

When a reduction in grade is later suspended, the member's original date of rank, held before the reduction, is reinstated. However, the effective date of rank is the date of the document directing the suspension and the member is not entitled to back pay

If a member is undergoing a suspended reduction in grade, the member is ineligible for promotion, including testing and consideration if already tested. They are also ineligible to reenlist, but may be eligible for an extension of enlistment

Mitigation: Mitigation is a reduction in either the quantity or quality of a punishment, with its general nature remaining the same as the original punishment. Mitigation is appropriate when the member's later good conduct merits a reduction in the punishment, or when the commander later determines the punishment imposed was disproportionate

With the exception of reduction in grade, only the unexecuted part or amount of the punishments can be mitigated

Punishment consisting of reduction in grade may be mitigated even after it has been executed. In such cases, the mitigation date will become the offender's new date of rank and effective date of rank. The member will not be entitled to receive back pay

Reduction in grade may only be mitigated to forfeitures and may only be mitigated within 4 months after the date of execution.

Punishments involving loss of liberty, such as correctional custody or restriction, cannot be mitigated to forfeitures or reduction in grade

Mitigated restraints on liberty (for example mitigating correctional custody to extra duties) cannot run for a longer period than the remaining amount of punishment that was originally imposed

Remission: Remission excuses or cancels any unexecuted portion of a punishment. Remission is appropriate under the same circumstances as mitigation

Commanders may remit punishments any time before the execution of the punishment is completed

An unsuspended reduction in rank is executed at imposition, so it can never be remitted

Set Aside: Setting aside an Article 15 is an action where the punishment, or any part of the punishment, whether executed or unexecuted, is set aside and any property, privileges, or rights, affected by the portion of the punishment set aside are restored

Unlike suspension, mitigation, and remission, setting aside a punishment is not considered rehabilitative in nature and should not be used on a routine basis

Set aside is appropriate only if the commander believes that, under all the circumstances of the case, the punishment has resulted in a clear injustice

Punishments should be set aside within a reasonable time (4 months, except in unusual circumstances) after the punishment is originally imposed

Vacation: A vacation action involves imposing punishment that was previously suspended either at the time the original NJP was imposed or as part of supplementary NJP relief. *See* article, *Vacating Suspended Nonjudicial Punishment*, this Chapter

**References:**

AFI 51-202, *Nonjudicial Punishment*, 7 November 2003

MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part V (2002)

Article 15, UCMJ

## VACATING SUSPENDED NONJUDICIAL PUNISHMENT

Vacating suspended nonjudicial punishment (NJP) means imposing punishment that was previously suspended either at the time the original NJP was imposed or as part of supplementary NJP relief. A commander (including a successor in command) may vacate the suspension of punishment under Article 15 if he or she had the authority to impose the original punishment. Commanders must consult the servicing SJA before taking action to vacate suspended punishment.

Vacating a suspended punishment may be appropriate if, during the suspension period, the member violates: a condition of suspension specified in writing by the commander or any punitive article of the UCMJ. With respect to violating a punitive article of the UCMJ, the new offense does not have to be serious enough to warrant imposition of NJP, nor does it have to be of the same nature as the original offense

A new serious offense may be the basis for a vacation action and additional NJP action

Procedure for vacation actions

The commander must notify and advise the member of the intended vacation action by using an AF Form 366, *Record of Proceedings of Vacation of Nonjudicial Punishment*. It contains

The new offense which the commander suspects the member has committed (or what condition was violated)

The fact that the commander is considering vacating the suspended punishment; and

The member's rights during the vacation proceedings

The base legal office will type the language describing the offense and other pertinent information concerning the suspended punishment on the AF Form 366

The member must receive the AF Form 366 during the period of the suspension; however, the vacation action may be completed after the suspension period has run

Member's elections

The member has 3 duty days to make elections

Member is entitled to consult with a lawyer; may attach a written presentation; may request a personal appearance

If the member fails to respond within 3 duty days, the commander can continue by noting in item 3 of the AF Form 366 "member failed to respond." However, if the commander believes the

failure to respond was out of the member's control, the commander cannot continue without good cause

The member does not have the right to demand a trial by court-martial during a vacation action

Commander's decision

-- Following the commander's consideration of the evidence, including any matters presented by the member, the commander takes one of the following actions on the AF Form 366

--- Terminates the vacation proceedings because vacation of the suspended punishment is not appropriate or because the member did not violate the UCMJ or a condition of the suspension; or

--- Finds the members violated the UCMJ or a condition of the suspension

Effects of vacation action on suspended reductions

If a suspension of a reduction in grade is vacated, the member's date of rank will be the date the commander imposed the original punishment. The effective date however, will be the day the suspension is vacated, so the member will not be required to pay back any additional pay received while holding the higher rank

**References:**

AFI 51-202, *Nonjudicial Punishment*, 7 November 2003

MANUAL FOR COURTS-MARTIAL, UNITED STATES, U.C.M.J. Article 15 (2002)

## QUALITY FORCE MANAGEMENT EFFECTS OF NONJUDICIAL PUNISHMENT

Commanders have a great deal of discretion concerning quality force management consequences related to nonjudicial punishment (NJP) actions. The following guidance applies primarily to enlisted personnel.

Unfavorable Information File (UIF) entries

Mandatory Entries: Where a member is punished under Article 15, a UIF entry is required if any portion of the executed or suspended punishment will not be completed within one month

Members are entitled to notice that the action will be entered into a UIF. Such notice is included on the AF Form 3070, *Record of Nonjudicial Punishment Proceedings*

NJP actions entered into a UIF must remain there until all punishment is completed or remitted, including any periods of suspension

Post-punishment actions to suspend a previously imposed punishment must be filed in the member's UIF, with the original NJP action, until the suspension period is completed

Actions to vacate a suspended punishment must be entered into the member's UIF

The commander may remove the NJP action and related documents from the member's UIF any time after the punishment or suspended punishment is completed (if removal is clearly warranted), or if the Article 15 is set aside. If the commander takes no action to remove the NJP action, it will remain in the UIF for two years

Discretionary UIF Entries: A commander always has the discretion to enter an NJP action into the member's UIF, even when entry is not required (when punishment does not exceed 1 month)

As in mandatory UIF entries, the commander must notify the member of his or her intent to enter an NJP action into the member's UIF

The commander may remove the NJP action from the member's UIF any time after the punishment or suspended punishment has been completed or remitted. If the commander takes no action, the NJP will remain in the UIF for one year

Related Administrative Actions: In addition to NJP, commanders may take other appropriate administrative actions. Such actions may include (but are not limited to)

Control Roster action

Entry of the member into counseling or rehabilitation programs such as the ADAPT

EPR comments concerning the member's underlying misconduct

Administrative discharge (in serious cases)

Removal from the Personnel Reliability Program, withholding a security clearance, or withholding access to sensitive materials; and

Readjustment of good conduct time

NJP may also adversely affect promotion, reenlistment, and assignment eligibility

#### Officer and Senior NCO Promotion Selection Records

In cases involving officers and senior NCOs, commanders who impose NJP must also decide whether to include the Article 15 in the member's promotion selection record

The imposing commander's decision to file the Article 15 in a selection record is subject to review by the next senior Air Force commander (unless the GCMCA imposed the punishment)

Article 15s placed in a senior NCO's promotion selection record remain there for two years or until the member meets the next selection board

Article 15s placed in an officer's promotion selection record (for lieutenant colonels and below) are generally kept in the record until the officer meets one IPZ and APZ promotion board and an appeal for removal has been approved

CSAF NOTAM 98-2, 1 May 1998, however, now permits early removal of NJP actions filed in an officer's selection record, at the direction of the wing commander or the review authority who has authority to direct placement of the Article 15 in the selection record in the first place

#### Officer Article 15 UIF actions

Any record of an NJP for officers is a mandatory UIF entry

Generally, such NJP actions are retained in a UIF for 2 years

In accordance with Commanders' NOTAM 98-2, 1 May 1998, however, removal by the wing commander or issuing commander (whichever is higher in rank) is now authorized

Commanders should also consider whether comments should be made in the next OPR and/or promotion recommendation form (PRF). Seek the advice of the SJA for assistance in determining when comments may be appropriate

#### **References:**

AFI 51-202, *Nonjudicial Punishment*, 7 November 2003

AFI 36-2907, *Unfavorable Information File (UIF) Program*, 1 May 1997

AFI 36-2406, *Officer and Enlisted Evaluation Systems*, 1 July 2000

AFI 36-2608, *Military Personnel Records System*, 14 May 2003

## **REMOTIVATION PROGRAM (CORRECTIONAL CUSTODY)**

The Remotivation Program, formerly Correctional Custody, is a form of nonjudicial punishment (NJP), available under Article 15 of the Uniform Code of Military Justice (UCMJ) that a commander may impose on enlisted members of his or her command. The Remotivation Program provides commanders a secure setting in which to maintain discipline with correctional treatment that returns members punished under Article 15 to the mainstream Air Force.

The Remotivation Program punishes, rehabilitates, and deters members punished under Article 15, and visibly deters others on the installation from engaging in misconduct

The Remotivation Program is not considered confinement, but is a significant restraint on an individual's liberty

The Remotivation Program includes the involvement of a number of referral services (such as religious, medical, legal, and/or personal affairs) to assist individuals in understanding the extent of their misconduct, the avenues available to assist them in the future, and ways to avoid future problems

The Remotivation Program should only be used in cases where the commander believes the member can benefit from the program and is a candidate for rehabilitation

In order for the Remotivation Program to be most effective, it should be imposed early in a member's career

Commanders should consider the Remotivation Program particularly when administering NJP to first-time offenders in the grades of E-1 through E-4, assuming the member has rehabilitative potential

Commanders should not normally consider the Remotivation Program in cases where the member

Will be separated for cause following completion of the NJP proceedings

Has previously been enrolled in the Remotivation Program

Is within six months of normal discharge and has not been recommended for retention; or

Is not a candidate for rehabilitation

Although legally permissible, the Remotivation Program is strongly discouraged for NCOs except in cases where an E-5 has been reduced to E-4 and thereby loses his or her NCO status. Commanders in the rank of major or above should strongly consider entering members into the Remotivation Program for a full 30 days to afford the member the maximum benefit of the program

In cases where the Remotivation Program appears appropriate, company grade commanders (who are limited to imposing 7 days in the Remotivation Program) should normally consider having the next superior field grade commander impose the NJP

Commanders may consider remitting a portion of the punishment in cases where members demonstrate a commitment to meet program objectives, however, the program is designed as a 30 day program and careful consideration should be given to remitting any portion of enrollment too early in the process

Unit commanders maintain command authority for personnel assigned to the remotivation program, regardless of location

The commander or first sergeant must review their member's progress weekly

The commander disciplines members who commit violations while in the Remotivation Program

The Remotivation Program is an optional program. The Installation Commander determines whether to support a Remotivation Program using a cost and benefit analysis and is responsible for developing local policies and procedures for operating the Remotivation Program

If a local program does not exist, commander could explore placing members in a regional program

**REFERENCES:**

MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part V (2002)

AFI 31-208, *Remotivation Program*, 11 May 2001

AFI 51-202, *Nonjudicial Punishment*, 7 November 2003

## *Chapter 5*

# ***QUALITY FORCE MANAGEMENT***

## **ADMINISTRATIVE COUNSELINGS, ADMONITIONS, AND REPRIMANDS**

Commanders, supervisors, and other persons in authority can issue administrative counselings, admonitions, and reprimands. These actions are intended to improve, correct, and instruct subordinates who depart from standards of performance, conduct, bearing, and integrity, on or off duty, and whose actions degrade individual and unit missions.

### **ORAL COUNSELINGS AND LETTERS OF COUNSELING (LOC)**

Counseling is an indispensable rehabilitative tool for commanders. The wisdom and maturity of the supervisor, first sergeant, or commander frequently provides the guidance needed to improve job performance or off-duty behavior before more serious action is required

Counseling should be initiated to correct habits or shortcomings which are not necessarily criminal or illegal, but which can ultimately affect job performance and good order and discipline

An airman should be counseled as soon as possible after displaying substandard duty performance or behavior in an effort to assist the individual in developing skills, attitudes, and behaviors that are consistent with maintaining Air Force readiness. Generally speaking, the closer the counseling follows the deficiency, the more effective the counseling will be in correcting the behavior. A formal counseling is normally recorded on an AF Form 174, Record of Individual Counseling (RIC)

### **LETTERS OF ADMONITION (LOA) AND LETTERS OF REPRIMAND (LOR)**

An admonishment is more severe than a written or oral counseling, but less severe than a reprimand. The appropriate response is a product of the seriousness of the misconduct. A reprimand indicates a stronger degree of official censure than an admonition. A more serious administrative response may be appropriate in cases of minor misconduct or deviation from standards if previous rehabilitative efforts have failed

Misconduct or a deviation from standards should be handled at the lowest possible level, but our step-tiered administrative system is designed to increase the response to continued misconduct by properly documenting and increasing the unit's response to misconduct. This achieves two goals. First, it stresses to the individual the significance placed on his or her misconduct and provides an opportunity for rehabilitation. Second, it provides a clear documented pattern of misconduct, which may be needed for further actions should the individual fail to adhere to Air Force standards

## ADMINISTERING A RIC, LOC, LOA OR LOR

- Counselings, admonitions, and reprimands may be administered orally or in writing. If written, the letter of counseling, admonition, or reprimand states

What the member did or failed to do, citing specific incidents and their dates

What improvement is expected

That further deviation **may** result in more severe action

That the individual has 3 duty days to submit rebuttal documents for consideration to the initiator, and

That all supporting documents received from the individual will become part of the record (AFI 36-2907, Chapter 3)

The document must include a Privacy Act statement. Consult the legal office with any questions. Failure to follow the required procedures could curtail the use of the document in a subsequent proceeding

## REFUSAL TO SIGN

If the service member refuses to acknowledge receipt of the letter, then the individual who administered the document should write, "Member refused to acknowledge" on the letter, then sign and date the document. The individual who administered the document should then serve it on the service member in the presence of witnesses

## DISPOSITION

There are detailed rules on how specific documents need to be disposed of or filed. The rules often vary depending on whether the member is an officer or enlisted member. For further guidance, consult the UIF section in this publication as well as the references below

### **References:**

AFI 36-2907, *Unfavorable Information File (UIF) Program*, 1 May 1997 (as amended by AFPC MSG 121300Z MAY 98, Re: CSAF NOTAM 98-2)

AFI 36-2608, *Military Personnel Records System*, 14 May 2003 (as **still** amended by AFPC MSG 121300Z MAY 98, Re: CSAF NOTAM 98-2)

AFI 51-201, *Administration of Military Justice*, 26 November 2003

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002)

## UNFAVORABLE INFORMATION FILES

The Unfavorable Information File (UIF) provides commanders with an official repository of substantiated derogatory data concerning an Air Force member's personal conduct and duty performance. Except for some officer cases and some enlisted cases involving Article 15s and criminal convictions, the commander has wide discretion as to what should be placed in a UIF and what should be removed. Regarding early removal, be sure to review CSAF NOTAM 98-2, referenced below. Of course, the legal office is available for consultation concerning the specifics of a particular case.

### ENLISTED PERSONNEL

#### - Optional Entries

-- At the commander's discretion, the following documents, among others, may be placed into the UIF for up to one year

--- A record of nonjudicial punishment under Article 15 of the Uniform Code of Military Justice when the time period in which the punishment is to be served does not exceed one month

--- A record of conviction by a civilian court or an action tantamount to a finding of guilty for an offense where the maximum confinement penalty authorized for the offense is one year or less

--- Written letters of reprimand, admonition, or counseling

--- Confirmed incidents involving discrimination or sexual harassment of personnel

#### - Mandatory Entries

-- This information must be placed into a UIF

--- Records of nonjudicial punishment when there is any period of suspension or when the punishment period is in excess of one month. Early removal is prohibited if the punishment has not been completed or remitted. However, once the punishment or suspension is complete, the commander may remove the information from the UIF at his/her discretion (Maximum two year disposition)

--- A record of conviction by a civilian court or an action equivalent to a finding of guilty of an offense which resulted in, or could have resulted in, a penalty of confinement for more than one year or death (Maximum two year disposition)

--- Records of court-martial convictions. The court-martial order can be removed early by the Wing Commander or Convening Authority, whichever is higher in rank (Maximum two year disposition)

--- Control roster actions (Maximum one year disposition)

## OFFICERS

(See also, Quality Force Management Effects of Nonjudicial Punishment, Chapter 4)

- The following rules apply to officer UIFs
  - A mandatory UIF will be established on officers who receive an Article 15 (regardless of punishment imposed), letter of reprimand (LOR), control roster placement, or court-martial conviction. A record of court-martial conviction must remain for a period of four years or PCS plus one year (whichever is later). Article 15s and letters of reprimand will remain on file for a maximum period of two years. Court-martial orders may be removed early by the Wing Commander or the Convening Authority, whichever is higher in rank. Article 15s and LORs may be removed early by the Wing Commander or issuing authority/imposing commander, whichever is higher in rank (See AFPC Message, Implementation Instructions for Accountability Enhancements, (Ref: CSAF NOTAM 98-2, DTG 121300ZMAY98 for guidance since this change has not yet been incorporated into the AFI)
  - A record of conviction by a civilian court or an action equivalent to a finding of guilty of an offense which resulted in, or could have resulted in, a penalty of confinement for more than one year or of death (Consult the SJA)
  - Letters of Admonition and Letters of Counseling are optional. If not filed in the UIF, they must be filed in the Personnel Information File (PIF). They will stay in the PIF until the officer's PCS. If filed in the UIF, they will stay in the UIF for a period of no more than two years and early removal by the Wing Commander or the issuing authority (whichever is higher in rank) is authorized
  - Control roster placement action requires a mandatory UIF filing, with a disposition date of one year. Early removal by the Wing Commander or issuing authority (whichever is higher in rank) is authorized

## ACCESS AND REVIEW

- Access
  - Besides the commander, only certain individuals have access to UIFs and their contents. They include
    - The member who has the UIF
    - First Sergeants
    - Rating officials, when preparing to write or endorse a performance report or when preparing a promotion recommendation
    - The senior Air Force officer or commander of an Air Force element in a joint command

- The Air Force element section commander in a joint command; or
- MPF personnel, IG personnel, inspection team members, legal office personnel, law enforcement personnel, MEO personnel, and substance abuse counselors authorized by the commander to review the document in the course of their official Air Force duties
- Review
- All UIFs require a periodic review to ensure continued maintenance of documents in the UIF is proper
- The unit commander must review all UIFs
- Within 90 days of assuming or being appointed to command
- Annually, with the assistance of the staff judge advocate; or
- Whenever individuals are being considered for, among other things, promotion, reenlistment, PRP duties, retraining of any kind, EPRs or OPRs

**References:**

AFI 36-2907, *Unfavorable Information File (UIF) Program*, 1 May 1997 (as amended by AFPC Message, Implementation Instructions for Accountability Enhancements, (Ref: CSAF NOTAM 98-2), DTG 121300ZMAY98)

AFI 36-2608, *Military Personnel Records System*, 14 May 2003 (as **still** amended by AFPC Message, Implementation Instructions for Accountability Enhancements, (Ref: CSAF NOTAM 98-2), DTG 121300ZMAY98)

## **CONTROL ROSTERS**

Commanders at all levels are authorized to use a control roster for individuals whose duty performance is substandard or who fail to meet or maintain Air Force standards of conduct, bearing, or integrity – on or off duty.

### **PURPOSE**

Control rosters assist commanders in controlling or evaluating a member's performance and provide the member an opportunity to improve that performance

A single incidence of substandard duty performance (or an isolated breach of other standards not likely to be repeated) ordinarily should not be a basis for a control roster action. Other rehabilitative tools should be considered before placing a member on the control roster. The control roster is generally regarded as a "last ditch" effort to bring about a change in the member's attitude and behavior

Placing an individual on the control roster is not a substitute for more appropriate administrative, judicial, or nonjudicial action. Additionally, individuals are not shielded from other appropriate actions by virtue of being placed on the control roster

### **PROCEDURE**

Commanders place an individual on the control roster by using AF Form 1058, which puts the member on notice that their performance and behavior must improve or they will face more severe administrative action or punishment

Members acknowledge receipt of the action and have three duty days to submit a response on their behalf before the AF Form 1058 is finalized

The control roster observation period may last for up to six months for active duty personnel

Commanders at all levels have the authority to add or remove enlisted members to or from a control roster

Commanders at all levels have the authority to add officers to a control roster

If the member's conduct or performance does not improve during the observation period, the commander should consider whether a more severe response is required, such as initiating an administrative discharge

Commanders may direct an OPR or EPR before entering or removing the person from the control roster, or both

UIF action is required if an individual is placed on the control roster

Numerous personnel actions are affected by the creation of a control roster

PCS/PCA reassignment is limited

All formal training must be canceled

Promotions and reenlistments may also be affected

**References:**

AFI 36-2907, *Unfavorable Information File (UIF) Program*, 1 May 1997 (as amended by AFPC

MSG 121300Z MAY 98, Re: CSAF NOTAM 98-2)

AFI 36-2608, *Military Personnel Records System*, 14 May 2003 (as **still** amended by AFPC

MSG 121300Z MAY 98, Re: CSAF NOTAM 98-2)

## **ADMINISTRATIVE DEMOTIONS**

An administrative demotion is another quality force management tool available to a commander, but should not be used when it is more appropriate to take actions authorized by the Uniform Code of Military Justice. In appropriate cases, Airmen should be given the opportunity to overcome their deficiencies prior to the initiation of a demotion action.

## **DEMOTION AND APPELLATE AUTHORITIES**

The demotion authority is the group commander (or equivalent level commander) for master sergeants (E-7) and below. For senior master sergeants (E-8) and chief master sergeants (E-9), the MAJCOM/CC, FOA/CC, or DRU/CC is the demotion authority (unless delegated to the CV, CS, MP, DP, or NAF/CC)

The appellate authority is the next level commander

## **REASONS FOR DEMOTION**

The basis for the demotion must have occurred in the current enlistment (*unless* the commander does not become aware of the facts and circumstances until the subsequent enlistment). Reasons for demotion include

Termination of student status

Failure to maintain or attain the appropriate skill/grade level

Failure to fulfill NCO responsibilities

Failure to keep fit

Failure to perform at USAF or USAF Space Command band standards; and

Voluntary reassignment or reclassification out of USAF or USAF Space Command bands

If a sufficient reason exists to initiate a demotion action, a commander should use the entire military record in deciding whether a demotion action is appropriate

## **DUE PROCESS**

Commanders should consult with the Office of the Staff Judge Advocate prior to initiation to ensure appropriateness of the action and legal sufficiency

The following procedures must be followed in an administrative demotion case

The immediate commander notifies airman in writing of the intention to recommend demotion, citing the paragraph and the recommended grade. The notification must also include the specific reasons for the demotion and a complete summary of the supporting facts

The immediate commander informs Airmen of their right to counsel and right to respond, within three (3) duty days, verbally in a personal hearing, in writing, or both

The initiating commander should secure a signed acknowledgement of receipt of the action from the Airman

The initiating commander must also inform eligible Airmen of their right to apply for retirement in lieu of demotion

Following the Airman's response, if the commander elects to continue the proceedings, the case file is forwarded (with a summary of the written and verbal statements) to the Military Personnel Flight for processing prior to forwarding to the demotion authority

The Airman must be notified of this decision in writing

The demotion authority obtains a written legal review before making a decision

The demotion authority may demote more grades than recommended by the initiating commander

If the decision is to proceed with the demotion, the demotion authority ensures the Airman is informed of his/her appeal rights

### **“DEMOTABLE” GRADES**

The following demotions are permitted

E-2 to E-1

E-3 to E-2

E-4 through E-9 may be demoted to E-3; however, a demotion of three or more grades is only appropriate to use when no reasonable hope exists that the airman will ever show the proficiency, leadership, or fitness that earned the initial promotion

## **RESTORATION OF GRADE**

Once demotion action is complete, the demotion authority can, if appropriate, restore the airman's original grade sometime between three months and six months after the effective date of the demotion

### **Reference:**

AFI 36-2503, *Administrative Demotion of Airman*, 20 July 1994

## **FITNESS PROGRAM**

The goal of the Fitness Program is to motivate all members to participate in a year-round physical conditioning program that emphasizes total fitness, to include proper aerobic conditioning, strength/flexibility training, and healthy eating. Note that AFI 10-248, *Fitness Program*, dated 1 January 2004, supersedes all guidance provided in AFI 40-501, *Air Force Fitness Program*, and AFI 40-502, *Weight and Body Fat Management Program*. The Fitness Program applies to all Air Force members.

### **PHYSICAL FITNESS STANDARD**

Members will receive a composite score on a 0 to 100 scale based on the following maximum component scores

50 points for aerobic fitness assessment

30 points for body composition (abdominal circumference)

10 points for push-ups, and

10 points for crunches

The following fitness levels are determined by a member's composite score

Excellent (90 or above)

Good (75 to 89.99)

Marginal (70 to 74.99)

Poor (under 70)

Members will *usually* complete their fitness testing according to the following timeline

Excellent/Good score (must test within 12 months)

Marginal score (must test within 180 days)

Poor score (must test within 90 days)

### **ADMINISTRATIVE AND PERSONNEL ACTIONS**

An unexcused failure to report for a scheduled fitness appointment may be punishable as a violation of the UCMJ, including, but not limited to, Articles 86, 90 or 92

Unit commanders should not use administrative action (LOC, LOA, or LOR) for members with a poor fitness score for the first 180 days after the member received a composite score under 70, if the sole basis for action is the fitness assessment

Unit commanders will take administrative action for unexcused failure to participate when an individual fails to accomplish a scheduled fitness test, fails to attend a scheduled fitness appointment, or negligently fails to maintain the required documentation of exercise while on the Fitness Improvement Program (FIP)

Entry into the FIP is required for all members receiving a composite fitness score under 70. Upon entry, the member will attend monthly follow-up sessions with the Fitness Program Manager (FPM) and will exercise four to five times per week, as instructed by the FPM

Unit commanders will take administrative action for members that have a composite score under 70 for greater than 180 days and each subsequent composite fitness score under 70 if member shows no sign of improvement

Failing to make progress in the FIP does not in itself constitute a violation of the Uniform Code of Military Justice. Unit commanders may not impose non-judicial punishment on members solely for failing to achieve a score of 70 points or greater

Commanders will review and determine personnel actions (eligibility for reenlistment, retraining, formal training, PME and promotion) for those individuals who are identified as “poor fit” for greater than six months and each subsequent test thereafter

Unit commanders will consider administrative separation if a member remains “poor fit” for 12 months or has 4 “poor fit” fitness scores in a 24-month period (see AFI 36-3206 for officer discharge procedures and AFI 36-3208 for enlisted discharge procedures)

Attachment 13 of AFI 10-248 lists administrative actions available to commanders when dealing with members who are not meeting Fitness Program standards

**Reference:**

AFI 10-248, *Fitness Program*, 1 January 2004

## **OFFICER AND ENLISTED PERFORMANCE REPORTS**

The single most important element needed for successful mission accomplishment is performance. The Officer and Enlisted Evaluation Systems emphasize the importance of performance and serve a variety of purposes. First, they provide meaningful feedback to individuals on what is expected of them, advice on how well they are meeting those expectations, and advice on how to better meet those expectations. Second, they provide a reliable, long-term, cumulative record of performance and potential based on that performance. Finally, they provide officer central selection boards, senior NCO evaluation boards, the Weighted Airman Promotion System and other personnel managers sound information to assist in identifying the best qualified officer and enlisted personnel.

The following is a summary of officer performance reports (OPRs) and enlisted performance reports (EPRs). A properly prepared performance report is critical in determining who should be selected for advancement and should accurately reflect an individual's performance. As a key quality force indicator it should take into account any adverse administrative or punitive actions taken against the individual.

### **PERFORMANCE FEEDBACK**

Performance feedback is a private, formal communication a rater uses to tell a ratee what is expected regarding their duty performance and how well the ratee is meeting those expectations. The rater documents the ratee's performance on a *Performance Feedback Worksheet* (PFW) and uses the PFW format as a guide for conducting feedback sessions to discuss objectives, standards, behavior, and performance with the ratee. Providing this information encourages positive communication, improves performance and professional growth

The rater is responsible for preparing, scheduling, and conducting the feedback session. These sessions can only be productive when supervisors stay abreast of current standards and expectations. They must provide realistic feedback to improve the ratee's performance and written comments, not just marks on the form. Any behavior that may result in further administrative or punitive action should be documented in a separate document

The original PFW is provided to the ratee, with a signed and dated feedback notice forwarded to the Command Support Staff for filing. The rater may keep a copy for personal reference, but (except for limited circumstances) the PFW will not be made part of any official personnel record or be included in an individual's PIF, unless the ratee introduces it first or alleges he or she did not receive required feedback or claims the sessions were inadequate. The ratee may use the completed form for any purpose he or she desires

## **REQUIRED AND PROHIBITED COMMENTS**

Some specific comments or entries are required and must be included on OPRs and EPRs. These comments should be drafted as stated in the AFI. Slight deviations are allowed, but entries significantly deviating from the recommended format are unacceptable. These comments and entries include, but are not limited to

For a referral report or training report (TR), the evaluator must specifically detail the behavior or performance that caused the report to be referred

Explaining any significant disagreement with a previous evaluator on a performance report

Comments relating to the ratee's behavior are mandatory on the ratee's next OPR, EPR, TR, and an officer's next PRF, if the ratee has been convicted by court-martial

If performance feedback was not accomplished, comment on that fact is mandatory

Certain comments are inappropriate. Some of the common mistakes include, among others

Promotion recommendations for officers

Duty history or performance outside the current reporting period, except as allowed in AFI 36-2406, paragraphs 3.7.6. and 3.7.7

Comments referring to performance feedback sessions, except in the Performance Feedback Certification Block

Events that occur after the close out date

Any action against an individual that resulted in an acquittal or failure to implement an intended personnel action. This does not necessarily bar commenting on the underlying misconduct that formed the basis for the action, but this should only be done after consulting with the servicing staff judge advocate

Actions taken by an individual outside the chain of command that represent guaranteed rights of appeal, such as issues raised with the Inspector General

Race, ethnic origin, gender, age, or religion of the ratee

Temporary or permanent disqualification under AFI 36-2104, *Nuclear Weapons Personnel Reliability Program*

Participation in drug or rehabilitation programs

Performance as a court-martial or board member

Punishment received as a result of an administrative or judicial action (consult the servicing staff judge advocate's office)

## **REFERRAL REPORTS**

Certain comments or ratings on the OPR may result in it being "referred" to the ratee for comments. An evaluator whose ratings or comments cause a report to become a referral report must give the ratee a chance to comment on the report. Referral procedures are established to allow the ratee to respond to the items that make a report a referral before it becomes a matter of record

Refer an OPR when

An evaluator marks "Does Not Meet Standards" in any performance factor in section V of the OPR; or

Any comments in the OPR or the attachments refer to behavior incompatible with standards of personal or professional conduct, character, judgment, or integrity

The procedures involved when referring an OPR or EPR are provided in AFI 36-2406, beginning with paragraph 3.9

### **Reference:**

AFI 36-2406, *Officer and Enlisted Evaluation Systems*, 1 July 2000

## **OFFICER PROMOTION PROPRIETY ACTIONS**

Officer promotion propriety action by a commander includes presenting information to SecAF or a selection board to find an officer is not qualified for promotion, removing an officer from a promotion list, or delaying a promotion date. If an officer is not qualified to perform the duties of the next grade, the proper authority must take promotion propriety action before the effective date of promotion.

### **PRELIMINARY CONSIDERATIONS**

Before taking a promotion propriety action, the commander must determine if a preponderance of the evidence shows the officer is not mentally, physically, morally, or professionally qualified to perform duties of a higher rank

Unqualified officers should neither be selected for promotion nor allowed to remain on a promotion list if already selected. Accordingly, several tools are available to ensure that unqualified officers are not promoted--these tools are listed below

### **NOT QUALIFIED FOR PROMOTION (NQP)**

For officers meeting central selection boards, the NQP recommendation case file must arrive at HQ AFPC/DPPPO before the board convenes. This recommendation is valid for only one selection board

Before you separate a second lieutenant found NQP, an attempt should be made to retain him or her on active duty for 6 months starting on the date promotion would have occurred (unless retention is inconsistent with good order and discipline) and give him or her an opportunity to overcome any problem and qualify for promotion

### **REMOVAL FROM A PROMOTION LIST**

The action should be initiated when the preponderance of the evidence shows the officer is not mentally, physically, morally or professionally qualified to perform the duties of the higher grade.

SecAF, acting for the President, approves all removal actions

### **DELAYING A PROMOTION**

The action should be initiated when the preponderance of the evidence shows the officer is not mentally, physically, morally or professionally qualified to perform the duties of the higher grade

If an officer is unqualified to perform the duties of the higher grade, a commander should initiate a delay of promotion before the effective date of promotion. The delay is effective when the commander notifies the officer of the delay, either verbally or in writing

The MAJCOM CC approves initial promotion delays up to 6 months, although SecAF may grant extensions for up to an additional 12 months. The officer may make a written response to SecAF

## **PROPRIETY ACTION PROCEDURES**

The commander must inform the officer, verbally or in writing, of the propriety action before the effective date of promotion

Notification in writing is preferred. If written notification is not possible, confirm the action in writing as soon as possible

The action itself must contain a clear statement of reasons for the decision and must list the evidence supporting the action. It must also show that the affected officer had an opportunity to review the information

The officer should acknowledge the action and be allowed to respond. Include in the package any comment from the officer

Table 5.1 of AFI 36-2501 contains procedures for initiating propriety actions

## **LEGAL ADVICE**

If commanders or supervisors have information showing an officer is not qualified to perform the duties of the next grade, they should discuss that information with their Staff Judge Advocate to determine whether sufficient evidence exists to support a proprietary action

### **Reference:**

AFI 36-2501, *Officer Promotions and Selective Continuation*, 6 May 2004

### **Attachment:**

AFPC MSG 121300Z MAY 98, Re: CSAF NOTAM 98-2

DTG: 121300ZMAY98  
PRECEDENCE: RR  
PRECEDENCE INFO: RR  
CLASS:UUUU  
FROM: AFPC RANDOLPH AFB TX//CC//  
TO: AIG 9411//SC//  
AIG 8106//CC/DPM/DPMA/DPMP/JA//  
ALPERSCOM//DP/DPA/DPP/JA/IG//  
AIG 10607//DPM//  
AIG 7309  
INFO  
HQ USAF WASHINGTON DC//DPX/DPXPQ//  
UNCLAS  
A/157/98 B/144/98  
SUBJ: IMPLEMENTATION INSTRUCTIONS FOR ACCOUNTABILITY ENHANCEMENTS  
REF: CSAF NOTAM 98-2  
ACTION OFFICES: UNIT COMMANDERS, COMMANDER'S SUPPORT STAFFS, MILITARY PERSONNEL  
FLIGHT CAREER ENHANCEMENT AND CUSTOMER SERVICE ELEMENTS  
THIS MESSAGE IS IN 6 PARTS:  
PART 1. BACKGROUND AND OVERVIEW  
PART 2. UNFAVORABLE INFORMATION FILE (UIF) PROGRAM, AFI 36-2907  
PART 3. REMOVING DOCUMENTS FROM THE OFFICER SELECTION RECORD (OSR)  
PART 4. OFFICER EVALUATIONS/PROMOTION RECOMMENDATIONS  
PART 5. ENLISTED CHANGES  
PART 6. POINTS OF CONTACT  
PART 1. BACKGROUND AND OVERVIEW. IN FEB 96, ENHANCED ACCOUNTABILITY PROCEDURES WERE IMPLEMENTED FOR OFFICER PERSONNEL. TO PROVIDE COMMANDERS MORE FLEXIBILITY IN DISCIPLINARY MATTERS, THE CHANGES LISTED BELOW, IN PARTS 2 AND 3, ARE ADDED TO OUR CURRENT ACCOUNTABILITY PROCEDURES. THESE CHANGES ARE EFFECTIVE 1 MAY 98. USE THIS MESSAGE IN CONJUNCTION WITH THE APPROPRIATE AFI AS YOUR INTERIM OPERATING INSTRUCTIONS UNTIL SUPERSEDED BY AN AFI REVISION.  
UIFS WILL CONTINUE TO BE REVIEWED IN THE OFFICER ASSIGNMENT PROCESS. THE INFORMATION IN PART 4 RESTATES PROCEDURES PREVIOUSLY IMPLEMENTED IN FEB 96.  
PART 2. UNFAVORABLE INFORMATION FILE (UIF) PROGRAM, AFI 36-2907.  
THE CHANGES BELOW WILL BE INCORPORATED INTO THE NEXT REVISION OF THE AFI. THESE CHANGES APPLY TO BOTH ACTIVE DUTY AND RESERVE PERSONNEL.  
A. OFFICER UIFS ESTABLISHED ON OR AFTER 1 MAY 98. IF THE DOCUMENT USED TO ESTABLISH THE UIF IS:  
1) COURT-MARTIAL ORDER (OFFICERS): THE UIF IS MANDATORY. THE DISPOSITION DATE IS 4 YEARS OR PCS/TRANSFER PLUS 1 YEAR, WHICHEVER IS LATER, AND THE UIF MAY BE REMOVED EARLY BY THE WG/CC OR CONVENING AUTHORITY, WHICHEVER IS HIGHER (SEE PART 2, PARA D BELOW).  
2) ARTICLE 15: THE UIF IS MANDATORY. THE DISPOSITION DATE IS 2 YEARS, AND THE ARTICLE 15 MAY BE REMOVED EARLY BY THE WG/CC OR IMPOSING COMMANDER, WHICHEVER IS HIGHER (SEE PART 2, PARA D BELOW).  
3) LETTER OF REPRIMAND (LOR): THE UIF IS MANDATORY. THE DISPOSITION DATE IS 2 YEARS, AND THE LOR MAY BE REMOVED EARLY BY THE WG/CC OR ISSUING AUTHORITY, WHICHEVER IS HIGHER (SEE PART 2, PARA D BELOW).  
4) LETTERS OF COUNSELING OR ADMONITION (LOC/LOA): THE UIF IS OPTIONAL. THE DISPOSITION DATE IS 2 YEARS, AND THE LOC/LOA MAY BE REMOVED EARLY BY THE WG/CC OR ISSUING AUTHORITY, WHICHEVER IS HIGHER (SEE PART 2, PARA D BELOW). LOCS AND LOAS NOT FILED IN THE UIF MUST BE FILED IN THE PERSONNEL INFORMATION FILE (PIF).  
5) CONTROL ROSTER PLACEMENT: THE UIF IS MANDATORY. THE DISPOSITION DATE IS 1 YEAR (INITIAL SIX MONTHS AS CONTROL ROSTER OBSERVATION PERIOD) AND THE CONTROL ROSTER MAY BE REMOVED EARLY BY THE WG/CC OR ISSUING AUTHORITY, WHICHEVER IS HIGHER (SEE PART 2, PARA D BELOW).

B. OFFICER UIFS ESTABLISHED PRIOR TO 1 MAY 98. THE WG/CC OR IMPOSING/ISSUING AUTHORITY, WHICHEVER IS HIGHER, WILL DECIDE WHETHER TO KEEP EXISTING UIFS AT THEIR CURRENT "4"-YEAR DISPOSITION DATE OR SHORTEN THE LENGTH OF THE UIF TO THE NEW "2"-YEAR DISPOSITION DATE. (EXCEPTION: COURT-MARTIAL UIF DISPOSITIONS WILL REMAIN AT 4 YEARS OR PCS PLUS 1 YEAR, WHICHEVER IS LATER). THE DECISION AUTHORITY MUST DOCUMENT THE DISPOSITION DECISION WITHIN 60 DAYS OF THE IMPLEMENTATION DATE (1 MAY 98) VIA AF FORM 1058. PROVIDE A COPY OF THE AF FORM 1058 TO THE MEMBER CONCERNED AND FILE THE ORIGINAL IN THE UIF. IF THE DOCUMENT USED TO ESTABLISH THE UIF IS:

1) COURT-MARTIAL ORDER: THE UIF IS MANDATORY. THE DISPOSITION DATE REMAINS 4 YEARS OR PCS/TRANSFER PLUS 1 YEAR, WHICHEVER IS LATER, AND THE UIF MAY BE REMOVED EARLY BY THE WG/CC OR CONVENING AUTHORITY, WHICHEVER IS HIGHER. (SEE PART 2, PARA D BELOW)

2) ARTICLE 15: THE UIF IS MANDATORY. THE WG/CC OR IMPOSING/ISSUING AUTHORITY, WHICHEVER IS HIGHER, MAY ELECT TO RETAIN THE 4 YEAR DISPOSITION DATE OR SHORTEN THE DISPOSITION DATE TO 2 YEARS VIA AF FORM 1058. THE ARTICLE 15 MAY BE REMOVED EARLY BY THE WG/CC OR IMPOSING COMMANDER, WHICHEVER IS HIGHER (SEE PART 2, PARA D BELOW). IF THE ARTICLE 15 DISPOSITION DATE IS AT OR BEYOND THE 2-YEAR DISPOSITION DATE, AND THE DECISION AUTHORITY ELECTED THE SHORTER DURATION, SEE PARA C2 BELOW FOR DISPOSITION INSTRUCTIONS.

3) LETTER OF REPRIMAND (LOR): THE UIF IS MANDATORY. THE WG/CC OR IMPOSING/ISSUING AUTHORITY, WHICHEVER IS HIGHER, MAY ELECT TO RETAIN THE 4-YEAR DISPOSITION DATE OR SHORTEN THE DISPOSITION DATE TO 2 YEARS, VIA AF FORM 1058. THE LOR MAY BE REMOVED EARLY BY THE WG/CC OR ISSUING AUTHORITY, WHICHEVER IS HIGHER (SEE PART 2, PARA D BELOW).

IF THE LOR DISPOSITION DATE IS AT OR BEYOND THE 2-YEAR DISPOSITION DATE, AND THE DECISION AUTHORITY ELECTED THE SHORTER DURATION, SEE PARA C2 BELOW FOR DISPOSITION INSTRUCTIONS.

4) LETTERS OF COUNSELING OR ADMONITION (LOC/LOA): THE UIF IS OPTIONAL. THE WG/CC OR IMPOSING/ISSUING AUTHORITY, WHICHEVER IS HIGHER MAY ELECT TO RETAIN THE 4 YEAR DISPOSITION DATE OR SHORTEN THE DISPOSITION DATE TO 2 YEARS VIA AF FORM 1058. THE LOC/LOA MAY BE REMOVED EARLY BY THE WG/CC OR ISSUING AUTHORITY, WHICHEVER IS HIGHER (SEE PART 2, PARA D BELOW). LOCS AND LOAS NOT FILED IN THE UIF MUST

BE FILED IN THE PIF. IF THE LOC OR LOA DISPOSITION DATE IS AT OR BEYOND THE 2-YEAR DISPOSITION DATE, AND THE DECISION AUTHORITY ELECTED THE SHORTER DURATION, SEE PARA C2 BELOW FOR DISPOSITION INSTRUCTIONS.

5) CONTROL ROSTER PLACEMENT: THE UIF IS MANDATORY. THE DISPOSITION DATE REMAINS 1 YEAR (INITIAL SIX MONTHS AS CONTROL ROSTER OBSERVATION PERIOD) AND THE CONTROL ROSTER MAY BE REMOVED EARLY BY THE WG/CC OR ISSUING AUTHORITY, WHICHEVER IS HIGHER. (SEE PART 2, PARA D BELOW). IF THE CONTROL ROSTER DISPOSITION DATE IS AT OR BEYOND THE 1-YEAR

DISPOSITION DATE, SEE PARA C2 BELOW FOR DISPOSITION INSTRUCTIONS.

C. SYSTEM AND DISPOSITION INSTRUCTIONS FOR UIFS ON OFFICERS.

1) UIFS ESTABLISHED ON OR AFTER 1 MAY 98. PERSONNEL CONCEPT III (PC-III) AND PDS WILL ACCEPT DISPOSITION DATE INPUTS FROM 1 TO 4 YEARS. ENSURE WHEN UPDATING AN OFFICER'S UIF, YOU MATCH THE DISPOSITION DATE TO THE SOURCE DOCUMENT (FOR EXAMPLE: AN OFFICER RECEIVING AN LOR DATED 27 JUL 98 WILL RECEIVE A UIF WITH A DISPOSITION DATE OF 26 JUL 2000. IF THE OFFICER WAS

COURT-MARTIALED ON 27 JUL 98, THE UIF DISPOSITION DATE WOULD BE 26 JUL 2002). PDS IS NOT ABLE TO DISTINGUISH BETWEEN CERTAIN UIF CODES. EXTRA CARE MUST BE TAKEN WHEN UPDATING THE CODES AND DISPOSITION DATES TO ENSURE THE OFFICER'S UIF IS NOT IN THE SYSTEM LONGER THAN THE DOCUMENT DISPOSITION DATE CALLS FOR. (FOR EXAMPLE: IF YOU UPDATE AN OFFICER'S LOR TO REFLECT A 4-YEAR DISPOSITION DATE, THE SYSTEM WILL ACCEPT IT, ALTHOUGH WITH THE NEW RULES, THE CORRECT DISPOSITION DATE FOR AN LOR IS 2 YEARS.)

FOLLOW THE PROCEDURES IN PARA C2A BELOW IF YOU NEED TO CORRECT AN ERRONEOUS UPDATE. ENSURE

YOU INCLUDE A BRIEF DESCRIPTION OF THE PROBLEM.

2) UIFS ESTABLISHED PRIOR TO 1 MAY 98 THAT ARE AT OR BEYOND THE NEWLY ESTABLISHED DISPOSITION DATES IN PARAGRAPH B ABOVE AND THE WG/CC OR IMPOSING/ISSUING AUTHORITY, WHICHEVER IS HIGHER, ELECTED TO CONVERT THE UIF TO THE NEW SHORTER DURATION: THE CSS CONTACTS HQ AFPC/DPSFC VIA MSG, EMAIL (BARNARDS@HQ.AFPC.AF.MIL) OR CRT GRAM (CRT-ID 09DPSTS). TITLE THE CORRESPONDENCE "UIF DISPOSITION." INCLUDE THE MEMBER'S NAME AND SSAN; LIST THE DOCUMENT(S) USED TO ESTABLISH THE UIF; AND THE DATE REFLECTED ON THE AF FORM 1058, AF FORM 3070, OR COURT-MARTIAL ORDER THAT ESTABLISHED THE UIF. ALSO INCLUDE A POC AND DSN. IF THE REQUEST IS IN ORDER, HQ AFPC/DPSFC WILL DELETE THE OFFICER'S UIF FROM THE HAF SYSTEM AND THE TRANSACTION WILL FLOW TO AND UPDATE THE BASE-LEVEL PERSONNEL DATA SYSTEM (PDS). UPON RECEIPT OF RETURN CORRESPONDENCE FROM HQ AFPC/DPSFC ADVISING OF UIF DELETION ACTIONS, DESTROY THE OFFICER'S UIF.

D. REMOVING AN OFFICER'S UIF EARLY: THE REMOVAL AUTHORITY FOR THE UIF DOCUMENT MUST ACCOMPLISH AN AF FORM 1058 INDICATING EARLY REMOVAL OF THE OFFICER'S UIF IS APPROVED. THE CSS THEN CONTACTS HQ AFPC/DPSFC IN WRITING IN ACCORDANCE WITH PARA C2 ABOVE. DPSFC WILL DELETE THE OFFICER'S UIF FROM THE HAF SYSTEM AND THE TRANSACTION WILL

FLOW TO AND UPDATE BASE-LEVEL PDS. UPON RECEIPT OF RETURN CORRESPONDENCE FROM HQ AFPC/DPSFC ADVISING OF UIF DELETION ACTIONS, DESTROY THE OFFICER'S UIF. THE AF FORM 1058 REQUESTING EARLY REMOVAL ACTION IS FILED IN THE GENERAL CORRESPONDENCE FILE.

E. OFFICERS WHO BELIEVE THEY ARE THE VICTIM OF AN INJUSTICE BROUGHT ABOUT BY THE CHANGES IN THE ACCOUNTABILITY PROCEDURES MAY PETITION THE AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS (AFBCMR) VIA DD FORM 149, APPLICATION FOR CORRECTION OF MILITARY RECORD. THE FORM

IS AVAILABLE AT THE MPF OR MAY BE DOWNLOADED FROM THE WWW AT

[HTTP://AFPUBS.HQ.AF.MIL](http://AFPUBS.HQ.AF.MIL). ADVISE THE MEMBER TO MAIL THE FORM TO THE AIR FORCE ADDRESS PROVIDED ON THE REVERSE OF THE FORM. THE MEMBER MUST PROVIDE EVIDENCE SUCH AS SIGNED STATEMENTS FROM THE MEMBER AND OTHER WITNESSES OR COPIES OF RECORDS THAT SUPPORT THEIR CASE.

PART 3. REMOVING DOCUMENTS FROM THE OFFICER SELECTION RECORD (OSR).

A. AFI 36-2608, THE MILITARY PERSONNEL RECORDS SYSTEM, DETAILS THE FILING PROCEDURES FOR COURT-MARTIALS, ARTICLES 15 AND LORS FILED IN THE OSR. THOSE PROCEDURES REMAIN THE SAME. COURT-MARTIAL CONVICTIONS ARE MANDATORY FOR FILE AND ARE PERMANENTLY RETAINED IN THE OSR. THE PROCEDURES TO REMOVE AN ARTICLE 15 OR LOR FROM THE SELECTION RECORD ARE AS FOLLOWS:

B. EARLY REMOVAL OF ARTICLES 15 FROM THE OSR:

1) EFFECTIVE 1 MAY 98, THE COMMANDER OR REVIEW AUTHORITY WHO HAS AUTHORITY TO DIRECT PLACEMENT OF AN ARTICLE 15 IN THE OSR, MAY DIRECT EARLY REMOVAL OF THE ARTICLE 15 FROM THE OSR.

2) THE EARLY REMOVAL DECISION IS MADE BY THE COMMANDER OR REVIEW AUTHORITY VIA A MEMORANDUM FORWARDING THE APPROVED EARLY REMOVAL DECISION TO THE OFFICER'S IMMEDIATE COMMANDER.

3) THE COMMANDER PROVIDES THE OFFICER AN INFORMATION COPY OF THE APPROVED EARLY REMOVAL DECISION AND FORWARDS THE ORIGINAL TO THE MILITARY PERSONNEL FLIGHT CAREER ENHANCEMENT ELEMENT.

4) THE CAREER ENHANCEMENT ELEMENT FORWARDS THE ORIGINAL APPROVED EARLY REMOVAL DECISION TO HQ AFPC/DPPBR1, 550 C STREET WEST SUITE 5, RANDOLPH AFB TX 78150-4707 (HQ USAF/DPOB, 1040 AF PENTAGON, WASHINGTON DC 20330-1040, FOR COLONELS AND COLONEL SELECTS) AND A COPY TO THE MAJCOM/FOA RECORDS CUSTODIAN. HQ AFPC/DPPBR1 OR HQ USAF/DPOB, AS APPROPRIATE, REMOVES THE ARTICLE 15 FROM THE OSR, DESTROYS IT, AND FORWARDS THE APPROVED EARLY REMOVAL DECISION

MEMORANDUM TO HQ AFPC/DPSRI FOR FILE IN THE MASTER PERSONNEL RECORD GROUP. FOR IMAS AND INDIVIDUAL PARTICIPATING RESERVISTS, FORWARD TO HQ ARPC/DPJC1, 6760 EAST IRVINGTON PLACE #6340, DENVER CO 80280-6340 WITH AN INFORMATION COPY TO THE APPROPRIATE PROGRAM/ELEMENT MANAGER.

5) THE MAJCOM/FOA RECORDS CUSTODIAN REMOVES THE ARTICLE 15 FROM THE OFFICER COMMAND SELECTION RECORD GROUP (OCSRGP) UPON RECEIPT OF THEIR COPY OF THE APPROVED EARLY REMOVAL DECISION MEMORANDUM AND DESTROYS THE ARTICLE 15.

NOTE: EARLY REMOVAL OF THE ARTICLE 15 HAS NO BEARING ON THE PERMANENT FILING OF THE ARTICLE 15 IN THE MEMBER'S MASTER PERSONNEL RECORD. ALL ARTICLES 15 ARE PERMANENTLY RETAINED IN THE MASTER PERSONNEL RECORD UNLESS SET ASIDE IN THEIR ENTIRETY IN ACCORDANCE WITH AFI 51-202, NONJUDICIAL PUNISHMENT.

C. EARLY REMOVAL OF LORS FROM THE OSR:

1) EFFECTIVE 1 MAY 98, THE WG/CC OR ISSUING AUTHORITY, WHICHEVER IS HIGHER, MAY DIRECT EARLY REMOVAL OF THE LOR FROM THE OSR.

2) THE EARLY REMOVAL DECISION IS MADE BY THE WG/CC OR ISSUING AUTHORITY, WHICHEVER IS HIGHER, VIA A MEMORANDUM FORWARDING THE APPROVED EARLY REMOVAL DECISION TO THE OFFICER'S IMMEDIATE COMMANDER.

3) THE COMMANDER PROVIDES THE OFFICER AN INFORMATION COPY OF THE APPROVED EARLY REMOVAL DECISION AND FORWARDS THE ORIGINAL TO THE MILITARY PERSONNEL FLIGHT CAREER ENHANCEMENT ELEMENT.

4) THE CAREER ENHANCEMENT ELEMENT FORWARDS THE ORIGINAL APPROVED EARLY REMOVAL DECISION TO HQ AFPC/DPPBR1 (HQ USAF/DPOB FOR COLONELS AND COLONEL SELECTS) AND A COPY TO THE MAJCOM/FOA RECORDS CUSTODIAN. HQ AFPC/DPPBR1 OR HQ USAF/DPOB, AS APPROPRIATE, REMOVES THE LOR FROM THE OSR, DESTROYS IT, AND FORWARDS THE APPROVED EARLY REMOVAL DECISION MEMORANDUM TO HQ AFPC/DPSRI FOR FILE IN THE MASTER PERSONNEL RECORD GROUP. FOR IMAS AND INDIVIDUAL PARTICIPATING RESERVISTS, FORWARD TO HQ ARPC/DPJC1, 6760 EAST IRVINGTON PLACE #6340, DENVER CO, 80280-6340 WITH AN INFORMATION COPY TO THE APPROPRIATE PROGRAM/ELEMENT MANAGER.

5) THE MAJCOM/FOA RECORDS CUSTODIAN REMOVES THE LOR FROM THE OCSRGP UPON RECEIPT OF THEIR COPY OF THE APPROVED EARLY REMOVAL DECISION MEMORANDUM AND DESTROYS THE LOR.

6) EARLY REMOVAL OF THE LOR HAS NO BEARING ON THE PERMANENT FILING OF THE LOR IN THE MEMBER'S MASTER PERSONNEL RECORD. HQ AFPC/DPPBR1 FORWARDS LORS FILED IN THE OSR FOR FILE IN THE MASTER PERSONNEL RECORD. LORS FILED IN THE OSR ARE PERMANENTLY RETAINED IN THE MASTER PERSONNEL RECORD.

PART 4: OFFICER EVALUATIONS/PROMOTION RECOMMENDATIONS.

A. COMMANDERS, RATERS, AND SENIOR RATERS ARE REQUIRED TO REVIEW THE UIF AND PIF PRIOR TO COMPLETING A PRF, OPR, TR, OR LOE.

B. COMMENTS ON THE OFFICER'S BEHAVIOR/CONDUCT ARE MANDATORY IN THE NEXT OPR WHEN THE OFFICER IS CONVICTED BY A COURT-MARTIAL AND THE REPORT MUST BE REFERRED. COMMENTS ARE ALSO MANDATORY ON THAT OFFICER'S NEXT PRF FOR BELOW THE PROMOTION ZONE OR IN THE PROMOTION ZONE CONSIDERATION.

C. IN THOSE CASES WHERE THE COURT-MARTIAL OCCURS AFTER AN OFFICER IS NONSELECTED IN THE PROMOTION ZONE, COMMENTS ON THE PRF ARE MANDATORY FOR THE NEXT PROMOTION CONSIDERATION.

D. RATERS MUST CONSIDER MAKING COMMENTS ON PRFS, OPRS AND TRS WHEN AN OFFICER RECEIVES ADVERSE ACTIONS SUCH AS AN ARTICLE 15, LOR, LOA OR LOC.

E. OPR AND PRF COMMENTS ARE STRONGLY RECOMMENDED IF AN OFFICER IS PLACED ON THE CONTROL ROSTER DURING THE REPORTING PERIOD. IF OPR COMMENTS ARE MADE, THE REPORT MUST BE REFERRED.

PART 5. ENLISTED CHANGES.

A. ENLISTED UIFS: A MANDATORY UIF WILL BE ESTABLISHED FOR ENLISTED PERSONNEL CONVICTED BY A COURT-MARTIAL. THE UIF DISPOSITION DATE IS 2 YEARS AND THE DOCUMENT MAY BE REMOVED EARLY FROM THE UIF BY THE WG/CC OR CONVENING AUTHORITY, WHICHEVER IS HIGHER.

B. SENIOR NCO SELECTION RECORD: COURT-MARTIAL ORDERS ARE MANDATORY AND PERMANENTLY FILED IN THE E7/E8 PROMOTION SELECTION RECORD.

PART 6. POINTS OF CONTACT:

A. FOR UIFS: HQ AFPC/DPSFC, DSN 487-6044.

B. FOR OSRS: HQ AFPC/DPSRI, DSN 487-5706.

C. FOR IMAS: HQ ARPC/XP, DSN 926-6299.

D. FOR UNIT RESERVISTS: HQ AFRC/DPMB, DSN 497-1246

E. FOR EVALUATIONS: HQ AFPC/DPPPEB, DSN 487-4388,

EMAIL: NIID@HQ.AFPC.AF.MIL.

## **ENLISTED PROMOTION ACTIONS**

Air Force promotion policy is to select individuals (active duty or reserve) for promotion based on potential to serve in the next higher grade. Only the best should be promoted due to the limited vacancies in higher grades

The responsibility for maintaining a quality enlisted force rests with commanders who make recommendations for promotions

The following tools are available to commanders when managing enlisted promotions

### **NONRECOMMENDATION**

An enlisted member is considered ineligible for promotion when nonrecommended or *removed* from the promotion list by the promotion authority before the effective date of promotion

This is commonly referred to as “redlining,” and typical grounds for removal include poor or declining performance trends or recent serious misconduct

A promotion authority can nonrecommend A1Cs and below in monthly increments up to 6 months. All other ranks are nonrecommended for a specific promotion cycle

Airmen also become ineligible for promotion under other circumstances as outlined in AFI 36-2502, Table 1.1. Some examples include

Placement on the control roster

Serving probationary period as part of an involuntary discharge action

Under a suspended reduction in grade imposed by Article 15 of the UCMJ; and

Conviction by a civilian court, excluding minor traffic violations

### **WITHHOLDING**

The immediate commander has the authority to withhold a promotion for up to one year after an airman’s selection for the next higher grade, but before the effective date of promotion. A higher authority (wing or equivalent level commander) must approve extensions beyond a year

This action allows the commander to evaluate unique or unusual events so a sound promotion decision can be made. It is not intended to be used when there is substandard performance or behavioral problems

The basis for withholding actions can be found in AFI 36-2502, Table 1.2. For example, a promotion may be withheld when the airman is

Awaiting a decision on an application as a conscientious objector

Under court-martial or civil charges

Placed into the Alcohol and Drug Abuse Prevention and Treatment Program

Under investigation or the subject of an inquiry (formal or informal) that may result in action under the UCMJ or prosecution by civil authorities; or

When requested by the individual's commander based on other reasons with prior approval from the individual's wing commander

Airmen receive their original DOR and the effective date is the date the commander terminates withhold action and recommends promotion

### **DEFERRAL**

The promotion authority may defer promotion to SSgt or higher for up to 3 months. Enlisted members in the ranks of E-1 to E-4 are not subject to promotion deferral

A deferral action is begun to determine if the member meets acceptable behavior and performance standards. If there is clear evidence a NCO is not suited to take on the increased responsibilities of the higher grade, then nonrecommendation is the right course of action, not deferral

The date of rank and effective date is the first day of the month after the deferral period ends

### **PROCEDURES**

In all instances of nonrecommending, deferring, and withholding promotions, the commander

informs airmen of adverse actions in writing or verbally before the promotion effective date, or confirms verbal notification in writing within 5 workdays

include specific reasons, dates, occurrences, and duration of the action

The individual should acknowledge receipt of the notification or confirmation

Files the letter and the airman's acknowledgment in the Unit Personnel Record Group

## **RESERVE ENLISTED MEMBERS**

As with members of the regular components, commanders have the responsibility to ensure that reserve enlisted members have the necessary qualifications to meet the responsibilities of their new rank. If the preponderance of the evidence indicates that a reserve enlisted member does not have the qualifications to be promoted, the member's commander can disapprove the promotion using AF Form 224, *Recommendation and Authorization for Promotion of Airman as Reserve of the Air Force*. The procedures for actions involving reserve enlisted members can be found in Chapter 4 of the instruction

### **Reference:**

AFI 36-2502, *Airman Promotion Program*, 6 August 2002

## **RESERVE OFFICER PROMOTION PROPRIETY ACTIONS**

A propriety of promotion action is a delay in an officer's date of promotion, a removal of an officer's name from a promotion list, or information presented to the SecAF or a selection board that shows an officer may not be qualified for promotion. Commanders initiate a propriety action when there is cause to believe that the officer is not mentally, physically, morally or professionally qualified to perform duties in the higher grade. Early identification and proper documentation is essential.

### **NOT QUALIFIED FOR PROMOTION (NQP)**

A commander should recommend that an officer be found not qualified for promotion if, in the commander's judgment, the officer is not able to serve in the higher grade

The member must be notified of this action, verbally or in writing, before the effective date of promotion

The notice must contain a clear statement of the reasons for the action and evidence documenting the reasons

The officer must acknowledge receipt and understanding within a reasonable time after receiving notice

The member may submit any matters for the commander's consideration

The MAJCOM commander makes the final recommendation about the propriety of the action to find the officer NQP. The MAJCOM commander may also disapprove the action, ending the process

The case file must arrive at the selection board for consideration before the board finishes scoring the officer's competitive category. Such a recommendation does not itself make the officer ineligible for consideration

HQ ARPC/DPJ gives the correspondence to the board to evaluate the officer's selection folder. The promotion board decides if the officer is qualified for promotion

Second lieutenants receiving NQP recommendations are processed differently. This NQP recommendation does not go to the selection board because SecAF makes the final decision whether to approve the recommendation

Table 7.1 in AFI 36-2504 contains complete processing information for any officer receiving an NQP recommendation

## **REMOVAL FROM A PROMOTION LIST**

Initiate this action before the DOR when the preponderance of the evidence shows the officer should not be promoted. The same notification procedures should be followed as those listed above under NQP

A commander's recommendation to remove an officer automatically delays the promotion until the SecAF decides on the recommendation and either returns the package or forwards it to the President

## **DELAYING A PROMOTION**

If there is cause to believe an officer is unqualified to perform the duties of the grade for which selected, a commander can take action to delay the promotion

Permissible reasons for delaying promotion are at AFI 36-2504, para. 7.5.1

An individual's promotion is delayed as soon as the commander tells the officer, verbally or in writing, of an action. If the officer is notified verbally, that verbal notification must be followed by written notice as soon as practical

The commander must inform the officer of the delay before the DOR

The officer may respond in writing and may do so to the SecAF

The delay should last no longer than 6 months after the day the officer would have been promoted, unless SecAF extends time period. SecAF could extend the delay up to 12 additional months

## **LEGAL ADVICE**

A commander or supervisor with information indicating an officer is not qualified for promotion should discuss that with his or her Staff Judge Advocate. For IMAs, the commander should use the active duty MPF and legal office at the base of assignment

### **Reference:**

AFI 36-2504, *Officer Promotion, Continuation, and Selective Early Removal in the Reserve of the Air Force*, 9 January 2003

## **SELECTIVE REENLISTMENT**

The Selective Reenlistment Program (SRP) is designed to ensure only airmen who consistently demonstrate the capability and willingness to maintain high professional standards are afforded the privilege of continued military service.

Commanders have total SRP selection and nonselection authority

Decisions should be in line with other qualitative recommendations, such as promotion, and must be based upon “substantial evidence”

SRP applies to all enlisted personnel eligible for consideration or reconsideration

SRP nonselection makes airmen ineligible for promotion and automatically cancels projected promotion line numbers

Commanders will conduct early SRP consideration for airmen who have not previously received formal SRP consideration, are otherwise eligible to reenlist, and request early separation for the following reasons

Palace Chase

Early separation directed by HQ USAF (except Special Separation Benefit/Voluntary Separation Incentive (SSB/VSI))

Officer training program (other than AFROTC)

Early release to further education

Sole surviving son or daughter

Early release from extension

Accepting public office

Miscellaneous reasons

Pregnancy or childbirth

End of year early release

Immediate supervisors are responsible for ensuring airman meet quality standards

Provide unit commanders with recommendations of an airman's career potential

Prepare AF Form 418, *Selective Reenlistment Program Consideration*

Unit commanders consider the supervisors' recommendations, the airmen's duty performance and career force potential before making a decision

If the airman is selected for reenlistment, the commander completes the SRP roster

If the supervisor recommends nonselection or the commander nonconcurs with the supervisor's recommendation to allow the airman to reenlist, the commander must

--- Notify the airman of the specific reasons for nonselection, areas needing improvement, appeal opportunity, promotion ineligibility, and the possibility of future reconsideration and selection

Permit the airman three workdays to decide whether to appeal the decision

If the airman appeals the decision, provide the AF Form 418 to the orderly room to be forwarded back to the MPF (any written matters the airman wishes to be considered on appeal must be submitted to the MPF within 10 calendar days)

The appellate authority may be the group commander, wing commander, or Secretary of the Air Force, depending on the airman's length of service

A legal review is only required when an airman appeals SRP decisions. However, it is recommended that commanders contact their servicing legal office prior to notifying an airman of a nonselection decision. Coordination with the legal office can identify any potential problems with the package and avoid issues during the appeal process

**Reference:**

AFI 36-2606, *Reenlistment In The United States Air Force*, 21 November 2001

*Chapter 6*

***ADMINISTRATIVE SEPARATION  
FROM  
THE AIR FORCE***

## **VOLUNTARY SEPARATION OF AIRMEN PRIOR TO EXPIRATION OF TERM OF SERVICE**

There are instances when the voluntary separation of an airman prior to expiration of term of service (PETS) benefits the airman and the Air Force. An immediate commander's primary role is to recommend approval or disapproval of the action. If recommending disapproval, the commander must provide reasons for recommending disapproval of the package.

Reasons for separation PETS include

- Convenience of the government
- Entering an officer training program
- Early release to further education
- Training at an accredited school for medical education as a physician, dentist, osteopath, veterinarian, optometrist, or clinical psychologist
- Elimination from Officer Training School (OTS) if the airman enlisted specifically for OTS
- Nonfulfillment of enlistment or reenlistment agreement by the Air Force
- Becoming a sole surviving son or daughter after enlistment
- Early release from extension of service
- Acceptance of public office
- Conscientious objection
- Pregnancy or childbirth
- Early release for Christmas (if the date of separation falls on or after 9 December and before 8 January the following year)
- Medal of honor recipient; and
- Miscellaneous reasons when early separation is in the best interests of the Air Force
- Dependency or hardship: Airmen may request discharge when genuine dependency or undue hardship exists; all of the following factors must be present
  - The dependency or hardship is not temporary

--- Conditions have arisen or have been aggravated to an excessive degree since the airman entered active duty

--- The airman has made every reasonable effort to remedy the situation

--- Separation will eliminate or materially alleviate the conditions; and

--- There are no means of alleviation available other than separation

-- Undue hardship does not necessarily exist because of altered present or expected income, the family is separated, or the family suffers from the inconveniences usually incident to military service

**Reference:**

AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003, Chapter 3, incorporating through IC 2004-1, 10 June 2004

## INVOLUNTARY SEPARATION OF AIRMEN: GENERAL CONSIDERATIONS

Commanders and supervisors must identify airmen who show likelihood for early separation and make reasonable efforts to help these airmen meet Air Force standards. Airmen who do not show potential for further service should be discharged.

Prior to processing an airman for discharge for parenthood; conditions that interfere with military service; entry level performance and conduct; unsatisfactory performance; minor disciplinary infractions and a pattern of misconduct, commanders must give the airman an opportunity to overcome deficiencies

-- Efforts to rehabilitate may include counselings, reprimands, control roster action, nonjudicial punishment under Article 15 of the UCMJ, change in duty assignment, demotion, additional training, and retraining

-- Properly document rehabilitative efforts in accordance with relevant AFIs and keep copies of the documents

-- It's important that immediate supervisors are kept in the loop and properly document rehabilitative efforts in accordance with relevant AFIs and keep copies of the documents

The acts or conditions on which discharge is based must have occurred in the current enlistment, except

-- Cases involving homosexual conduct, fraudulent enlistment, erroneous enlistment, or

-- Cases in which the act or condition occurred in the immediately preceding enlistment, the commander was not aware of the facts warranting discharge until after the member reenlisted and there was no break in service

Commanders may cite more than one reason for discharge (joint processing)

The service of an airman administratively separated may be characterized as

-- Honorable

--- Appropriate when the quality of the airman's service generally has met Air Force standards of acceptable conduct and performance of duty, or

--- Appropriate when a member's service is otherwise so meritorious that any other characterization would be inappropriate

-- General (under honorable conditions)

--- Appropriate if an airman's service has been honest and faithful, but

--- Significant negative aspects of the airman's conduct or performance outweigh positive aspects of military record

-- Under other than honorable conditions (UOTHC)

--- Appropriate if based on a pattern of behavior or one or more acts or omissions constituting a significant departure from the conduct expected of airmen

--- Can be given only if the airman is offered an administrative discharge board or if a discharge is unconditionally requested in lieu of trial by court-martial

-- Separation without service characterization

--- Airmen in entry level status during the first 180 days of active military service will receive an entry level separation, unless

---A service characterization of UOTHC is authorized and warranted; or

---The Secretary of the Air Force determines that characterization as honorable is clearly warranted by unusual circumstances of personal conduct and performance

A dishonorable discharge and a bad conduct discharge are considered punitive discharges and are authorized only as a result of a court-martial sentence

Do not use administrative discharge as a substitute for disciplinary action

A commander must initiate discharge processing if the reason for discharge is homosexual conduct

A commander must initiate discharge processing or seek a waiver if the reason for discharge is

-- Fraudulent or erroneous enlistment,

-- Civil court conviction for an offense for which a punitive discharge and confinement for one year or more would be authorized under the UCMJ, or

-- Drug abuse

An airman recommended for discharge must be offered a hearing by an administrative discharge board if one of the following conditions apply

-- The airman is a NCO at the time discharge processing starts

-- The airman has six years or more total active and inactive service, including delayed enlistment time, at the time discharge processing starts

- The commander recommends an UOTHC discharge
- The reason for discharge is homosexual conduct
- Discharge in the interest of national security is recommended (ensure appropriate clearance to proceed has been received), or
- The airman is a commissioned or warrant officer of the USAFR

All other airmen may be processed for discharge by notification procedure

**Reference:**

AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003, incorporating through IC 2004-1, 10 June 2004

## **INVOLUNTARY SEPARATION OF AIRMEN: REASONS FOR DISCHARGE**

Specific reasons for involuntarily separating airmen are in Chapter 5 of AFI 36-3208, *Administrative Separation of Airmen*. Always seek advice from the staff judge advocate (SJA) prior to initiating a discharge. Although a basis for discharge may exist, the facts and circumstances are different in each case and must be considered on a case-by-case basis. An overview of the ten broad types of discharge actions follows below.

### **CONVENIENCE OF THE GOVERNMENT DISCHARGES**

Discharge is appropriate when discharge would serve the best interest of the Air Force, and discharge for cause is not warranted

Such separations may be based on

- Parenthood, if the airman fails to meet military obligations because of parental responsibilities (includes failure to certify family care plan)
- Insufficient retainability for required training, if the cost of retraining for a brief period of service may not warrant retention
- Conditions that interfere with military service, which include
  - Enuresis and sleepwalking
  - Dyslexia; severe nightmares; stammering or stuttering; incapacitating fear of flying; air sickness; and claustrophobia
  - With an explanation of adverse effect on assignment or duty performance
  - A mental disorder
    - Supported in writing by a report of evaluation by a psychiatrist or clinical psychologist that confirms a diagnosis of a disorder contained in the Diagnostic and Statistical Manual of Medical Disorders (DSM-IV)
    - Documented in a report as so severe that member's ability to function in the military environment is significantly impaired; and
    - With an explanation of adverse effect on assignment or duty performance
  - Transsexualism or gender identity disorder of adolescence or adulthood, nontranssexual type (GIDAANT) supported by a report of evaluation by a psychiatrist or clinical psychologist that confirms a diagnosis of transsexualism or GIDAANT

---- With an explanation of adverse effect on assignment or duty performance

--- Discharge for conditions that interfere with military service is not appropriate if the airman's record supports discharge for another reason, such as misconduct or unsatisfactory performance

Service is characterized as entry-level separation or honorable

Before recommending discharge, commanders must be sure:

- Preprocessing rehabilitation requirements in AFI 36-3208, paragraph 5.2, have been met
- They have complied with all requirements of the paragraph authorizing discharge; and
- Circumstances do not warrant discharge for cause

## **DEFECTIVE ENLISTMENTS**

Enlistment of minors – a person under 17 years of age is barred by law from enlisting

Void enlistments

- Enlistment was not a voluntary act by a sane, sober person of age
- A deserter from another service cannot enlist in the Air Force

Erroneous enlistment – the Air Force should not have accepted the member, but the case does not involve fraud

Fraudulent enlistment – involves deliberate deception on the part of the enlistee

A commander must initiate discharge or seek a waiver for erroneous/fraudulent enlistments

- Erroneous/fraudulent enlistments concerning alienage cannot be waived
- If a commander has knowledge of an erroneous or fraudulent enlistment and fails to act within a reasonable time, a constructive waiver may result

Airmen approved for discharge for defective enlistment are not eligible for probation and rehabilitation

Types of separation authorized (characterization) and the approval authority are listed in AFI 36-3208, Table 5.4

## **ENTRY LEVEL PERFORMANCE OR CONDUCT**

Airmen in entry level status should be discharged when unsatisfactory performance or conduct shows the airman is not a productive member of the Air Force

Discharge processing must start during the first 180 days of continuous active duty

Eligibility for discharge based on entry level performance or conduct does not preclude separation for another reason when separation for the other reason is authorized and warranted

Before processing an airman for discharge for entry level performance or conduct, a commander must complete and document efforts to rehabilitate the airman so the airman has an opportunity to overcome deficiencies

Airmen approved for discharge for entry level performance or conduct are not eligible for probation and rehabilitation

Discharge is described as entry level separation (ELS)

## **UNSATISFACTORY PERFORMANCE**

Airmen should be discharged when unsatisfactory performance or conduct shows they are not qualified for service in the Air Force

Performance includes assigned duties, military training, bearing and behavior, as well as, maintaining the high standards of personal behavior and conduct required of all military members at all times

Unsatisfactory performance may be evidenced by

- Unsatisfactory duty performance, including
  - Failure to properly perform assigned duties
  - A progressively downward trend in performance ratings
  - Failure to demonstrate the qualities of leadership required by the member's grade
- Failure to maintain standards of dress and personal appearance (other than weight and fitness standards) or military deportment
- Failure to progress in on-the-job training
- Irresponsibility in the management of personal finances
- Unsanitary habits

-- Failure in the fitness program

Before processing an airman for discharge for unsatisfactory performance, a commander must complete and document efforts to rehabilitate the airman so the airman has an opportunity to overcome deficiencies

Service is characterized as honorable or general

Airmen approved for discharge should be considered for probation and rehabilitation

### **DRUG OR ALCOHOL ABUSE REHABILITATION FAILURE**

Airmen are subject to discharge for failure in drug or alcohol abuse rehabilitation if they

-- Are in a program for rehabilitation for abuse of drugs or alcohol and fail to complete the program due to inability, refusal to participate, or unwillingness to cooperate, and

-- Lack the potential for continued military service or need long-term treatment and are transferred to a civilian medical facility for treatment

Service is characterized as honorable, general, or entry level

### **HOMOSEXUAL CONDUCT**

Homosexual orientation is not a bar to continued service unless manifested in homosexual conduct

Homosexual conduct is grounds for separation from military service

A member of the armed services shall be separated if the member engages in homosexual conduct, which includes

-- A homosexual act

--- Bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

--- Bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts

-- Homosexual statements

--- Language or behavior that a reasonable person would believe was intended to convey a statement that a person engages in, attempts to engage in, or has the propensity to engage in homosexual acts

--- Includes statements such as "I am homosexual," "I am gay," "I am lesbian," or "I have a homosexual orientation"

--- A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation, not because it reflects on the member's sexual orientation, but because it indicates a likelihood the member engages in or will engage in homosexual acts

-- Homosexual marriage or attempted homosexual marriage

Only a commander in the member's chain is authorized to initiate a fact-finding inquiry involving homosexual conduct

-- A commander initiating a fact-finding inquiry into homosexual conduct must comply with guidelines set forth in AFI 36-3208, Attachment 4 (See "Homosexual Conduct" at Chapter 7 of *The Military Commander and the Law*)

A commander must initiate discharge when a member has engaged in homosexual conduct

Ordinarily, service is characterized as honorable or general (under honorable conditions)

-- Discharge may be described as entry level separation (ELS) if applicable, and an under other than honorable conditions (UOTHC) characterization is not warranted

-- A UOTHC is authorized if aggravating circumstances are present

Preprocessing counseling and rehabilitation are not required

Airmen approved for discharge for homosexuality are not eligible for probation and rehabilitation

Consult your staff judge advocate regarding recoupment issues

## **MISCONDUCT**

Unacceptable conduct at any time adversely affects military duty and may therefore be a proper basis for discharge

UOTHC is ordinarily the appropriate service characterization for cases involving misconduct, but characterization may be honorable, general or entry level separation in appropriate cases (AFI 36-3208, para. 5.48)

-- The general court-martial convening authority will normally approve discharges for misconduct characterized as honorable or UOTHC

-- The special court-martial convening authority will approve recommendations for retention, general discharge, or entry level separation

Types of misconduct include

-- Minor disciplinary infractions during the current enlistment resulting in counselings, letters of counseling, letters of admonition, letters of reprimand, and nonjudicial punishment actions

--- Before processing an airman for discharge for misconduct consisting of minor disciplinary infractions, a commander must complete and document efforts to rehabilitate the airman so the airman has an opportunity to overcome deficiencies

-- A pattern of misconduct more serious than that consisting of minor disciplinary infractions and involving

--- Discreditable involvement with military/civil authorities

--- Conduct prejudicial to good order and discipline

--- Failure to support dependents; or

--- Dishonorable failure to pay just debts

--- Before processing an airman for discharge for misconduct consisting of a pattern of misconduct, a commander must complete and document efforts to rehabilitate the airman so the airman has an opportunity to overcome deficiencies

-- Conviction by civil authorities for an offense which would authorize a punitive discharge under the UCMJ or a sentence by civilian authorities of confinement for six months or more

--- A commander must initiate discharge or seek a waiver when the civilian conviction involves an offense for which a punitive discharge and confinement for one year or more would be authorized under the UCMJ

--- Failure by the commander to initiate discharge within a reasonable time may result in a constructive waiver

-- Commission of a serious offense (offenses for which a punitive discharge would be authorized under the UCMJ), including

--- Sexual perversion, which includes lewd and lascivious acts, sodomy, indecent acts with or assault upon a child under 16, and "other indecent acts or offenses"

--- Prolonged unauthorized absence for one year or more

--- Other serious offenses

-- Having human immunodeficiency virus (HIV) and not complying with lawfully ordered preventive medicine procedures (e.g., safe sex order)

--- Airmen approved for discharge for having HIV and not complying with lawfully ordered preventive medicine procedures are not eligible for probation and rehabilitation

-- Drug abuse, which is defined as the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug

--- This includes improper use of prescription medications, anabolic and androgenic steroids, and any intoxicating substances, other than alcohol, that are inhaled, injected, consumed or introduced into the body for purposes of altering mood or function

--- Commanders must act promptly when information indicates drug abuse and initiate discharge or seek a waiver

--- Failure by the commander to initiate discharge within a reasonable time may result in a constructive waiver

--- A member found to have abused drugs will be discharged unless the member meets all seven of the retention criteria in AFI 36-3208, paragraph 5.55.2.1

---- The airman has the burden of proving he or she meets all seven retention criteria

--- Airmen approved for discharge for drug abuse are not eligible for probation and rehabilitation

## **DISCHARGE IN THE INTEREST OF NATIONAL SECURITY**

An airman whose retention is clearly inconsistent with the interest of national security may be discharged

Discharge may only be initiated after criteria in AFI 36-3208, paragraphs 5.57.1 and 5.57.2 have been met

Discharge may be characterized as entry level, honorable, general, or UOTHC

Preprocessing counseling and rehabilitation are not required

Airmen approved for discharge in the interest of national security are not eligible for probation and rehabilitation

## **FAILURE IN PRISONER RETRAINING/REHABILITATION**

Applies to airmen in correction/rehabilitation programs

Service is ordinarily characterized as general

## **FAILURE IN THE FITNESS PROGRAM**

These discharges require that airman have failed in the fitness program prescribed in AFI10-248

Characterization of service is restricted to honorable, if failure in the program is the sole reason for discharge

Airmen approved for discharge should be considered for probation and rehabilitation

**Note:** AFI 10-248, *Fitness Program*, 1 January 2004, supersedes AFI 40-502, *The Weight and Body Fat Management Program*, and provides for separation if a member remains poor fit for 12 months or has 4 poor fit scores in a 24-month period. At the time of this publication of *The Military Commander and the Law*, AFI 36-3208, *Administrative Separation of Airman*, 28 May 2003, IC 2004-1, 10 June 2004, has been issued incorporating the changes related to failure in the fitness program.

### **Reference:**

AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003, incorporating through IC 2004-1, 10 June 2004

## **INVOLUNTARY SEPARATION OF AIRMEN PROBATION AND REHABILITATION**

The Air Force program of probation and rehabilitation (P&R) allows the Air Force to retain a trained resource while allowing airmen another opportunity to complete their service honorably. It is based on the principle of conditional suspension of an approved administrative discharge for cause. In deserving cases, it lets an airman prove he or she is able to meet Air Force standards.

Only the discharge authority can suspend the execution of the discharge for P&R

-- Airmen who have completed at least 16 but less than 20 years of active service are entitled to special consideration upon their request and their cases are forwarded to HQ AFMPC/DPMARS2 for review for P&R

Suspension of execution of a discharge can be considered for airmen

-- Who demonstrate a potential to serve satisfactorily

-- Who have the capacity to be rehabilitated for continued military service or completion of the current enlistment; and

-- Whose retention on a probationary status is consistent with the maintenance of good order and discipline

-- UNLESS the reason for discharge is

--- Failure to comply with preventive medicine counseling by an airman with human immunodeficiency virus (HIV)

--- Fraudulent entry

--- Entry level performance or conduct

--- Homosexual conduct

--- In the interest of national security

--- Drug abuse; or

--- In lieu of trial by court-martial

If the reason for discharge is unsatisfactory performance or misconduct (except failure to comply with preventive medicine counseling by an airman with HIV and drug abuse)

- Case file must show the initiating commander, board members (if a hearing is involved), and the separation authority considered P&R
- If the initiating commander does not recommend P&R, he or she must give the reason for not recommending P&R
- If the initiating commander recommended P&R and the separation authority disapproved that recommendation, the separation authority must state the reason for his or her decision

Suspension of the execution of an approved discharge is contingent on successful completion of rehabilitation

- The separation authority sets a specific period of rehabilitation, which is not less than 6 months nor more than 12 months
- The probationary period is usually served in the current unit of assignment, but reassignment to another local unit or within the MAJCOM may be authorized if the circumstances of the case warrant

If the decision is made to offer an airman P&R, the commander must

- Give the airman a letter with information about the program (AFI 36-3208, Figure 7.2)
- Counsel the airman, emphasizing
  - The importance of an honorable discharge
  - Difficulties in civilian life which the approved discharge might cause
  - The very remote chance that the type of discharge, once executed, would be changed
  - The fact that an offer of P&R does not excuse the airman's conduct
  - The airman can only prevent execution of the discharge by good conduct and duty performance
  - The commander will be the judge of performance and conduct during the period of P&R
  - The offer of P&R is not an attempt at involuntary retention
- Find out whether the airman has enough retainability to complete the P&R, and if not, try to get a voluntary request for extension
- Require airmen who accept P&R to sign statements of understanding and acceptance of the terms of probation

- Ensure the terms of probation are set out in a letter from the separation authority and countersign the letter (AFI 36-3208, Figure 7.1)
- Require airmen who refuse P&R or fail to satisfy the retention requirements to sign a statement
- Acknowledging understanding of the rehabilitation privilege
- Giving the date the commander counseled the airman; and
- Acknowledging understanding of the effects of refusal to accept P&R
- Ensure the statement and the letter from the separation authority are returned to the separation authority

The commander is the primary judge of the airman's performance

- Commanders are not required to set up a special rehabilitation program because the airman is expected to perform duties appropriate to his or her grade, skill level, and experience
- An EPR is prepared every 90 days
- Promotion consideration is according to AFI 36-2502
- Airmen are not selected for formal training while in P&R
- A commander usually should not place airman in P&R on the control roster, and the commanders should consider removing the airman from the control roster if the airman is on it when placed in P&R
- Reenlistment consideration is according to AFI 36-2606

If an airman successfully completes rehabilitation

- The approved discharge is automatically and permanently canceled
- Separation at ETS will result in an honorable discharge
- Future failure to maintain standards may be the basis for new discharge proceedings
- Eligibility for reenlistment will be according to AFI 36-2606 and none of the reasons for recommending discharge that existed before P&R began may be used as basis for denial of reenlistment

Commanders have other options during rehabilitation, including

-- Canceling the probation in whole or in part where member's good conduct clearly shows goals of P&R have been met

-- Extending the probationary period (original period plus extension may not exceed one year) where member has made progress but the commander is not sure rehabilitation is complete

If a decision is made to initiate vacation of the suspension, the commander notifies the airman by a letter, which gives

-- The reason for the action

-- The name, address and telephone number of military legal counsel (usually the ADC)

-- Instruction that the airman may secure civilian counsel at his or her own expense; and

-- Instruction to reply within seven workdays with a rebuttal or a waiver of the right to rebut

**References:**

AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003, incorporating through IC 2004-1, 10 June 2004

AFI 36-2502, *Airman Promotion Program*, 6 August 2002

AFI 36-2606, *Reenlistment in the United States Air Force*, 21 November 2001

## **INVOLUNTARY SEPARATION OF AIRMEN: PROCEDURES**

Airmen may be involuntarily separated under two different procedures. If an airman is entitled to have his or her case heard by an administrative discharge board, board procedures are used. All other cases are processed using notification procedures.

### **BOARD ENTITLEMENT**

An airman recommended for discharge must be offered a hearing by an administrative discharge board if one of the following conditions apply

- The airman is a NCO at the time discharge processing starts
- The airman has six years or more total active and inactive service, including delayed enlistment time, at the time discharge processing starts
- The commander recommends an UOTHC discharge
- The reason for discharge is homosexual conduct
- Discharge in the interest of national security is recommended (ensure appropriate clearance to proceed has been received); or
- The airman is a commissioned or warrant officer of the USAFR

Most cases are processed using notification procedures

### **PREPROCESSING CONSIDERATIONS**

Before initiating discharge, a commander must consider all the factors that make the member subject to discharge, including

- The seriousness of the circumstances that make the airman subject to discharge and how the airman's retention might affect military discipline, good order, and morale
- Whether the circumstances that are the basis for discharge action will continue or recur
- The likelihood that the member will be disruptive or an undesirable influence in present or future duty assignments
- The member's ability to perform duties effectively in the present and in the future
- The member's potential for advancement and leadership; and
- An evaluation of the member's military record, which must include, but is not limited to

- Records of nonjudicial punishment
- Records of counseling
- Letters of reprimand or admonition
- Records of conviction by courts-martial; records of involvement with civilian authorities
- Past contributions to the Air Force
- Duty assignments and EPRs
- Awards, decorations, and letters of commendation; and
- The effectiveness of preprocessing rehabilitation (when required)
- Before initiating discharge, commanders should consult with local staff judge advocate (SJA) and military personnel flight

#### NOTIFICATION PROCEDURES

Before the member may be discharged, a medical examination must document

- Any medical aspects pertaining to the reason for discharge; and
- That the member is or is not medically qualified for worldwide service and separation

An EPR or LOE must be generated for discharges based on parenthood, conditions that interfere with military service, unsatisfactory performance, or failure in the fitness program

**Note:** AFI 10-248, *Fitness Program*, 1 January 2004, supersedes AFI 40-502, *The Weight and Body Fat Management Program*, and provides for separation if a member remains poor fit for 12 months or has 4 poor fit scores in a 24-month period. AFI 36-3208, *Administrative Separation of Airman*, 9 June 2004, has now been changed to correspond to AFI 10-248

If there is sufficient documentation (evidence) supporting a basis for discharge, the commander prepares and signs a notification memorandum to the airman (AFI 36-3208, Figures 6.1 and 6.2)

The airman immediately signs a receipt of notification memorandum (AFI 36-3208, Figure 6.3)

After receiving the notification memorandum, the airman has three duty days to prepare a response (AFI 36-3208, Figure 6.4)

The commander considers the airman's response, if any, and if the commander still recommends discharge, he or she prepares a recommendation for discharge to the special court-martial convening authority (SPCMCA), who is usually the wing commander (AFI 36-3208, Figure 6.5)

The local SJA prepares a legal review of the package and forwards the package to the SPCMCA if the package is legally sufficient

The SPCMCA reviews the package and the SJA's legal review, and

-- If the SPCMCA is also the separation authority, the SPCMCA determines if there is a basis for discharge, if the airman should be discharged, how to characterize service if the member should be discharged; and whether to offer P&R if the member should be discharged

-- If the SPCMCA is not the separation authority, the SPCMCA will forward the package to the GCMCA (usually the NAF commander) with a recommendation concerning if there is a basis for discharge, if the airman should be discharged, how to characterize service if the member should be discharged; and whether to offer P&R if the member should be discharged

## BOARD HEARING PROCEDURES

Before the member may be discharged, a medical examination must document

-- Any medical aspects pertaining to the reason for discharge; and

-- That the member is or is not medically qualified for worldwide service and separation

An EPR or LOE must be generated for discharges based on parenthood, conditions that interfere with military service, unsatisfactory performance, or failure in the fitness program

**Note:** AFI 10-248, *Fitness Program*, 1 January 2004, supersedes AFI 40-502, *The Weight and Body Fat Management Program*, and provides for separation if a member remains poor fit for 12 months or has 4 poor fit scores in a 24-month period. AFI 36-3208, *Administrative Separation of Airman*, 9 June 2004, has now been changed to correspond to AFI 10-248.

If there is sufficient documentation (evidence) supporting a basis for discharge, the commander prepares and signs a notification memorandum to the airman (AFI 36-3208, Figure 6.6)

The airman immediately signs a receipt of notification memorandum (AFI 36-3208, Figure 6.7)

After receiving the notification memorandum, the airman has seven duty days to

-- Request a board hearing or to waive his or her right to a board hearing unconditionally (AFI 36-3208, Figure 6.8); or

-- Waive the board hearing contingent upon receiving a specific type of discharge, which is called a conditional waiver (AFI 36-3208, Figure 6.9)

The commander considers the airman's response, if any, and if the commander still recommends discharge, he or she prepares a recommendation for discharge to the SPCMCA, who is usually the wing commander (AFI 36-3208, Figure 6.5)

In cases where the airman requests a board hearing, the convening authority reviews the recommendation for discharge and either convenes a discharge board or sends the file back to the unit for further action (normally to withdraw the action or reinstate the action using different grounds or evidence)

The administrative board convenes, the board considers all of the evidence, and the board makes

-- Findings of fact as to whether each allegation set out in the notification memorandum is supported by a preponderance of the evidence (more likely than not)

-- A separate finding with regard to each allegation set out in the notification memorandum

-- Findings as to whether a basis for discharge exists

-- A recommendation to discharge or retain

-- A recommendation concerning the characterization of service if the board recommends discharge; and

-- A recommendation concerning P&R (if airman is eligible) if the board recommends discharge

The local SJA prepares a legal review of the package and forwards the package to the SPCMCA if the package is legally sufficient

The SPCMCA takes final action if referral to the GCMCA is not required or forwards the package to the GCMCA if referral to the GCMCA is required

Airmen with more than 16 but less than 20 years service are entitled to special processing considerations (lengthy service consideration) and may not be separated until HQ AFMPC/DPMARS2 approves disposition of the case

## **CAVEAT ON SEPARATION PROCEDURES**

Commanders should ALWAYS coordinate with the SJA on local and/or MAJCOM discharge procedures before initiating action

### **Reference:**

AFI 36-3208, *Administrative Separation of Airman*, 28 May 2003

## OFFICER SEPARATIONS

### DEFINITIONS

#### Nonprobationary officer

-- Regular officer with five or more years of active commissioned service (as determined by the officer's total active federal commissioned service date)

-- Reserve officer with five or more years of commissioned service (inactive or active) as determined by the officer's total federal commissioned service date

#### Probationary officer

-- Regular officer who has completed less than five years of active commissioned service as determined by the officer's total active federal commissioned service date

-- Reserve officer who has completed less than five years of commissioned service (inactive or active) as determined by the officer's total federal commissioned service date

### VOLUNTARY SEPARATION

Officers may apply for voluntary separation prior to the expiration of their terms of service under AFI 36-3207, Chapter 2, Section A, for a variety of reasons, which include

-- Hardship

-- Pregnancy

-- Conscientious objector status

-- Medal of honor recipient; and

-- Other miscellaneous reasons

Voluntary separations are subject to approval by the Secretary of the Air Force (SecAF); SecAF or designee may disapprove an application if, among other reasons, the officer

-- Has had charges preferred or is under investigation

-- Remains absent without leave or absent in the hands of civil authorities

-- Defaulted with respect to public property or funds

-- Has been sentenced by a court-martial to dismissal

- Is being considered for administrative discharge proceedings
- Submits an application during war, when war is imminent, or during an emergency declared by the President or Congress; or
- Has an ADSC for advanced educational assistance, government-funded education or training programs, special pay, or bonus pay

**Note:** This restriction applies even when the reason for separation is pregnancy

Voluntary discharge characterization is honorable

## **INVOLUNTARY SEPARATIONS -- NOT “FOR CAUSE” SEPARATIONS**

Officers may be separated involuntarily under AFI 36-3207, Chapter 3, Section B, for various reasons that are not “for cause”

- In those situations, only an honorable characterization is authorized
- Many involuntary separations are required by law (*e.g.*, reserve officers who reach age limit, nonselection for promotion, and officers who have reached maximum years of commissioned service or service in grade)
- Other involuntary separations include loss of ecclesiastical endorsement; failure to complete or pass medical training, nursing examinations, nursing intern programs; and officers in health care fields who do not have required licenses

## **ADMINISTRATIVE DISCHARGE FOR CAUSE**

Grounds for discharge for cause are found in AFI 36-3206, Chapter 2 (substandard performance of duty) and Chapter 3 (misconduct, moral or professional dereliction, homosexual conduct, or in the interest of national security)

Paragraph 3.16 of AFI 36-3207 is cited as the “authority” for discharging officers who are discharged under the provisions of AFI 36-3206

AFI 36-3206, Chapter 2: Substandard Performance of Duty

- Restricted to an honorable or general (under honorable conditions) discharge
- Includes very broad categories subjecting an officer to separation, including
  - Failure to show acceptable qualities of leadership or proficiency
  - Failure to achieve acceptable standards of proficiency required of an officer in her or her grade

- Failure to discharge duties equal to his or her grade and experience
- Substandard performance of duty resulting in an unacceptable record of effectiveness
- A record of marginal service over an extended time as shown by performance reports covering two or more jobs and prepared by at least two different supervisors
- Mental disorders that interfere with the officer's performance of duty and do not fall within the purview of the medical discharge process
- Apathy or defective attitude
- Failure in the Fitness Program as specified in AFI 10-248, *Fitness Program*, 1 January 2004, which superseded AFI 40-502, *The Weight and Body Fat Management Program*, and provides for separation if a member remains poor fit for 12 months or has 4 poor fit scores in a 24-month period. AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004, has been revised to incorporate the changes related to the Fitness Program
- Failure to conform to prescribed standards of dress, physical fitness, or per personal appearance

**Note:** For cause separation under AFI 36-3206, Chapter 3, is appropriate if failure is deliberate.

- Inability to perform duties because of family care responsibilities; and
- Failure to maintain satisfactory progress while in an active status student officer program
- Before discharging an officer under this chapter, there should be a documented history of problems and documented efforts to correct the officer's conduct
- If an officer is being separated for reasons under this chapter and received education assistance, special pay, or bonus money, the officer is subject to recoupment

AFI 36-3206, Chapter 3: Misconduct, Moral or Professional Dereliction, or In the Interest of National Security

- When officers engage in some form of misconduct, discharge under this chapter is often the most appropriate
- Although not necessarily considered misconduct, discharges for homosexual conduct and fear of flying fall under this chapter
- Some other specific grounds for discharge, besides homosexual conduct and fear of flying, include

- Having human immunodeficiency virus (HIV) and not complying with lawfully ordered preventive medicine procedures (i.e., safe sex order)
- Failure to meet financial obligations
- Intentional or discreditable mismanagement of personal affairs
- Drug abuse, which is defined as the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug
- Serious or recurring misconduct punishable by civilian or military authorities
- Intentional neglect or intentional failure to either perform assigned duties or complete required training
- Misconduct resulting in the loss of professional status necessary to perform duties
- Intentionally misrepresenting or omitting facts concerning official matters
- Sexual perversion, including lewd and lascivious acts, sodomy not of a homosexual nature, indecent acts with a child, etc.
- Sexual deviation, including transvestitism, exhibitionism, voyeurism, etc.
- Retention is not clearly consistent with interests of national security; and
- Sentence by a court-martial to a period of confinement for more than 6 months and not sentenced to a dismissal
- Officers separated under this chapter may receive a discharge under other than honorable conditions (UOTHC), unless the officer is being discharged for homosexual conduct (not accompanied by aggravating factors) or drug use revealed as a result of self-identification
- If an officer is being separated for reasons under this chapter, except homosexual conduct, and received education assistance, special pay, or bonus money, the officer is subject to recoupment

**Note:** Special rules apply to recoupment for homosexual conduct cases.

## **DISCHARGE PROCEDURES UNDER AFI 36-3206**

The first step is for the unit commander to evaluate information and consult with the SJA

If appropriate, the unit commander recommends discharge to the show cause authority (SCA), who is the wing commander if he or she is a general officer or the general court-martial convening authority for wings not commanded by a general officer

If appropriate, SCA initiates discharge action by signing a letter to the officer notifying him or her of the discharge action

Within 10 days of receipt of the letter of notification, the officer submits evidence in his or her own behalf, applies for voluntary retirement, if eligible, tenders a resignation, or requests a delay to respond

If SCA determines no action is warranted, the action is terminated

If SCA determines discharge action is warranted, the type of processing that occurs depends on the officer's status

-- If the officer is probationary (see definition above), the case does not involve a recommendation for a UOTHC service characterization, and the reason for discharge is not homosexual conduct, the SCA notifies the officer that the case will be reviewed by the Air Force Personnel Board (AFPB)

--- The officer is not entitled to appear in front of or present witness testimony to the AFPB

-- If the officer is nonprobationary (see definition above); the officer is probationary and a UOTHC discharge is recommended; or the officer is nonprobationary and the reason for discharge is homosexual conduct, the SCA notifies the officer that the officer will be required to show cause before a board of inquiry (BOI)

Final approval authority for separations initiated under AFI 36-3206 is the Secretary of the Air Force

## **RESIGNATIONS IN LIEU OF FURTHER ADMINISTRATIVE DISCHARGE PROCEEDINGS (AFI 36-3207, Chapter 2, Section)**

Upon being notified of discharge proceedings by the SCA and before notification of a BOI an officer may

-- Submit a resignation; or

-- Submit a resignation to enlist and retire if eligible to apply for retirement in enlisted status

These options should not be confused with resignations for the good of the service, which an officer may submit when facing a court-martial for alleged criminal conduct

The officer may be entitled to separation pay (AFI 36-3207, Attachment 2)

SecAF is the approval authority

**References:**

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004

AFI 36-3207, *Separating Commissioned Officers*, 6 July 2000

## ADMINISTRATIVE SEPARATION OF RESERVISTS

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, applies to both officer and enlisted members of the reserve components not serving on extended active duty (EAD) with the regular Air Force. Table 2.1 lists all the permissible reasons for officer separations. Similarly, Table 3.1 of this instruction lists all the permissible reasons for enlisted separations.

Reserve members on EAD or initial active duty training should be separated under the procedures set forth in AFI 36-3208, *Administrative Separation of Airmen*

-- A commander of a Category A reservist should consider removing the reservist from an EAD/AGR tour to allow the reserve unit to process the discharge under AFI 36-3209

An enlisted member may not be involuntarily retained beyond ETS for the processing of an administrative discharge action

Processing of reservist discharge actions varies depending on whether the member is a Category A (CAT A) or Category B (CAT B) reservist

-- CAT A (Unit)

--- The member's unit commander initiates the discharge action and local staff judge advocate (SJA) reviews the action for legal sufficiency

--- The unit forwards the file through the wing commander to HQ AFRC/DPML for processing to AFRC/CC or AFRC/CV, the discharge authorities for CAT A reservists

--- HQ AFRC/DPML notifies the member of the discharge recommendation by certified mail and gives the member the opportunity to respond

--- HQ AFRC/JA reviews the case file and determines if it is sufficiently documented to support the basis for discharge

**NOTE:** Letters of counseling, letters of admonition, and letters of reprimand for reservists are not legally sufficient unless they allow the member 30 days to respond, as opposed to the 3 duty days for active duty members.

--- If the case file lacks such documentation, HQ AFRC will ask the unit to get the supportive documentation

-- CAT B (IMAs)

--- The commander to whom a reservist is attached for training or the IMA program manager recommends the member be reassigned to HQ ARPC for discharge action

---AFI 36-2115, *Assignments Within the Reserve Components*, Chapter 4, describes the process for initiating reassignment action

---The member is notified of this recommendation by certified mail and given an opportunity to respond

---The case is then forwarded to the MAJCOM Reserve Affairs Office, and if that office concurs with the discharge, it forwards the file to HQ ARPC/CC, the discharge authority for IMAs

---HQ ARPC/JA reviews the case file and determines if it is sufficiently documented to support the basis for discharge

**NOTE:** Letters of counseling, letters of admonition, and letters of reprimand for reservists are not legally sufficient unless they allow the member 30 days to respond, as opposed to the 3 duty days for active duty members.

---If the case file lacks such documentation, HQ ARPC will ask the unit to get the supportive documentation

**Note:** Simply reassigning a reservist to HQ ARPC for discharge without the supporting documentation will not result in the respondent being discharged.

The following reservists are entitled to present their cases before an administrative discharge board

-- Enlisted: If the recommended characterization of service in the letter of notification is under other than honorable conditions (UOTHC), the respondent is an NCO, the respondent has six or more years total active and reserve military service, or the discharge recommended is based upon allegation of homosexual conduct

-- Officers: An officer who has completed five or more years of service as a commissioned officer in any of the armed forces as determined from the total federal combined service date; a probationary officer (an officer who has **not** completed five or more years of service as a commissioned officer in any of the armed forces as determined from the total federal combined service date) when the recommended characterization of service contained in the letter of notification is UOTHC or when the basis for discharge is homosexual conduct

All discharge boards for CAT A reservists are conducted by HQ AFRC/JA

-- The defense counsel for CAT A discharge cases is not the local ADC, but the detailed defense counsel at AFRC/JA

All discharge boards for CAT B reservists are conducted by HQ ARPC/JA

-- The defense counsel for CAT B discharge cases is the defense counsel for HQ ARPC

**References:**

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, 1 February 1998

AFI 36-2115, *Assignments Within the Reserve Components*, 1 October 1997

## LOSS OF VETERANS' BENEFITS

To become eligible for veterans' benefits, the active duty member must have been discharged or released under conditions other than dishonorable, which is broader in this context than the term as defined in Rule for Court-Martial 1003(b)(3)(B)

- The following are considered a discharge or release under conditions that are dishonorable
  - Acceptance of an under other than honorable conditions (UOTHC) discharge to avoid trial by general court-martial
  - Mutiny, aiding the enemy, or spying
  - An offense involving moral turpitude, including (generally) a conviction of a felony
  - Willful and persistent misconduct, including a UOTHC discharge if it is determined that the discharge was issued for willful and persistent misconduct, but not including a discharge because of a minor offense if service was otherwise honest, faithful and meritorious; and
  - Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty, including
    - Child molestation
    - Homosexual prostitution
    - Homosexual acts or conduct accompanied by assault or coercion; and
    - Homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status
- Benefits are also not payable where the member was discharged or released under one of the following conditions
  - As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities
  - By reason of the sentence of a general court-martial
  - Resignation by an officer for the good of the service
  - As a deserter

--- As an alien during a period of hostilities where it is shown the member requested his or her release; and

--- By reason of a UOTHC discharge as a result of an absence without leave for a continuous period of at least 180 days

A punitive discharge or UOTHC characterization does not necessarily deprive a member of benefits administered by the VA

Normally, benefits earned during an earlier period of honorable service are not voided by a punitive discharge or a UOTHC discharge during a subsequent enlistment (38 U.S.C. § 5303(a); *U.S. v. McElroy*, 40 M.J. 368, 372 (C.M.A. 1994))

Caveat: Any person may be denied VA benefits, regardless of an earlier period of honorable service, if shown by evidence satisfactory to the Secretary of Veteran's Affairs to be guilty of

- Filing a fraudulent claim for benefits
- Treason
- Mutiny
- Sabotage; or
- Rendering assistance to the enemy of the United States or its allies

**References:**

38 U.S.C. §§ 5303, 6103, 6104, 6105

38 Code of Federal Regulations (C.F.R.) § 3.12

*Chapter 7*

***PERSONNEL ISSUES  
FOR  
THE COMMANDER***

## **ADOPTION REIMBURSEMENT**

The 1993 Defense Authorization Act, authorizes a military member (including Coast Guard personnel) to be reimbursed for certain adoption expenses up to \$2,000.00 per adoption with a maximum of \$5,000.00 in any calendar year.

### **REQUIREMENTS AND PROCEDURES**

Members should contact their local Military Personnel Flight (MPF), customer service section, for guidance and copies of the application forms. Once the application is assembled, MPF forwards the package to DFAS for review, decision and payment

At the time of application, the member must be on active duty and have served at least 180 consecutive days of active duty. Further

The adoption must be final, and

The application must be filed no later than one year after the adoption

The Act limits reimbursement to "qualifying" adoption expenses incurred by active duty military members

A "qualifying" adoption includes an adoption by either married couples or a single person, of a child (under 18 years of age and not the biological offspring of the member), through a U.S. or an inter-country adoption; and, an adoption of a child with special needs (as defined by DODI 1341.9)

The adoption must have been arranged through a state or local government agency or through a nonprofit, voluntary adoption agency. Private adoptions and adoptions of stepchildren are not covered

The reimbursement is for "reasonable and necessary" adoption expenses, which include placement fees, legal fees and court costs, certain medical expenses, and temporary foster care fees (when required by the adoption process). Travel costs are not reimbursed

### **COMMANDER'S ROLE**

The unit commander certifies a claim's validity and sends it to the MPF

The MPF is the primary coordinating activity. It is responsible for assisting the member in assembling expense receipts and providing additional information on the program as well as furnishing the necessary forms and the DFAS instructions

DFAS reviews completed claims packages, determines if the adoption and associated expenses are eligible for reimbursement, and issues payment to the member

If the claim is denied, a letter stating such will be sent to the member. The claim will not be returned to the member

## **TAX CREDIT**

Since 1997, taxpayers have been able to claim a tax credit (as of 2003) of up to \$10,160 per child for qualified expenses (see IRS Publication 968)

The full tax credit is available for a taxpayer whose modified adjusted gross income (AGI) does not exceed \$152,390 and is phased out over the next \$40,000 of modified AGI

Qualified adoption expenses consist of reasonable and necessary adoption fees, court costs, attorney fees, and other expenses which are directly related to the adoption of an eligible child. The credit is not available for stepparent adoptions or for expenses that are reimbursed under an employer's program

The credit can be claimed even if the adoption is unsuccessful, except in the case of a foreign adoption. Expenses connected with a foreign adoption only qualify if the child is actually adopted

### **References:**

10 U.S.C. § 1052

14 U.S.C. § 514

DODI 1341.9, *DoD Adoption Reimbursement Policy*, 29 July 1993, change 1 issued  
4 August 1997

DFAS Instruction 1341.1, *DoD Adoption Reimbursement Policy*, 5 Nov 93

## **ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS)**

### **MEDICAL BACKGROUND**

HIV (human immunodeficiency virus) infection is a viral disease involving the breakdown of the body's immune system

AIDS is an advanced stage of HIV infection, where there is evidence of immune deficiency by illness or laboratory traits

Medical experts believe the nonsexual person-to-person contact that occurs among workers in the workplace does not pose a risk for transmitting the virus

### **AIDS AND MILITARY MEMBERS**

Testing: The Air Force tests all members for antibodies to HIV, medically evaluates all infected members, and educates members on means of prevention

All applicants for the Air Force are screened for the HIV infection. Applicants infected with HIV are ineligible to join the Air Force, with no waiver authorized

All active duty, ANG, and Reserve Component personnel are screened for HIV infection whenever they have periodic physical examinations, for clinically indicated reasons, before an overseas assignment, during pregnancy, when presenting for a sexually transmitted disease (STD), or upon entry to drug or alcohol rehabilitation programs

All active duty personnel must have routine HIV testing at no more than 2-year intervals

Air Reserve Component (ARC) personnel must have a current HIV test within 2 years of the date they are called to active duty for 30 days or more

Medical personnel are tested annually

An active-duty member testing positive for HIV is referred to Wilford Hall Medical Center (WHMC) at Lackland AFB for definitive diagnosis, treatment, and disposition. A medical evaluation board (MEB) is convened at WHMC after the initial exam

HIV-infected active duty members retained on active duty must be medically evaluated semiannually and are assigned within the United States, including Alaska, Hawaii and Puerto Rico. HIV-infected members shall not be assigned to mobility positions. HIV-infected members on flying status must be placed on Duty Not Involving Flying (DNIF) status pending medical evaluation

Waivers are considered using normal procedures established for chronic diseases

Testing Confidentiality: Air Force policy strictly safeguards results of positive HIV testing

No release to persons outside the Air Force without the member's consent

Air Force will neither confirm nor deny testing results of specific service members

Very limited release within Air Force on "need-to-know" basis only, i.e., unit commanders should NOT inform First Sergeants and/or supervisors unless a determination is made that those individuals truly need to know. The commander should consult the Director of Base Medical Services (DBMS)

Adverse Administrative Actions: Information obtained by DOD as result of epidemiological assessment (EA) with member who has been identified as having been exposed to virus associated with AIDS may not be used to support any adverse personnel action against member. (See AFI 48-135, Atch 11)

"*Adverse personnel actions*" include court-martial; nonjudicial punishment; line of duty determination; demotion; involuntary separation for other than medical reasons; denial of promotion or reenlistment; and unfavorable entry in a personnel record

"*Nonadverse personnel actions*" in which limits on use of epidemiological assessment results do *not* apply include: reassignment; disqualification (temporary or permanent) from the Personal Reliability Program; denial, suspension, or revocation of security clearance; suspension or termination of access to classified information; transfer between Reserve components; removal (temporary or permanent) from flight status or other duties requiring high degree of stability or alertness; and removal of AFSC

These nonadverse actions cannot be accompanied by unfavorable entries in service member's records

Safe Sex Orders: "Order to Follow Preventive Medicine Requirements" is issued to all HIV-positive personnel who remain on active duty

The health care provider will notify member that he or she has tested positive

The DBMS notifies unit commander

The unit commander issues order to follow preventive medicine requirements

The order should be signed and dated by the commander and member

The unit commander is responsible for safeguarding the order. To protect the member's privacy the commander should do the following

Seal the envelope and mark it "FOR THE EYES OF THE COMMANDER ONLY"

Sign across the envelope seal; and

File with unit PIF or in a classified safe

Upon reassignment, unit commander forwards the order in a sealed envelope to the gaining commander marked "TO BE OPENED BY ADDRESSEE ONLY"

Disability Evaluation and Medical Separation: Military members may not be separated merely because they are HIV positive. HIV positive members who show no evidence of illness or impairment shall not be separated solely on basis of being infected with the AIDS virus. Medical retirement is, however, a strong possibility once member develops AIDS

A member subject to separation undergoes a Medical Evaluation Board (MEB), then an Informal Physical Evaluation Board (PEB) to determine whether he or she should be retained on active duty or separated from the service because he or she is "unfit" for continued service. The member has appeal rights to appear personally before a Formal PEB and also to appeal to the Air Force Personnel Council

The member may be simply separated with a medical severance lump sum payment or temporarily or permanently medically retired with monthly medical retirement pay depending on the Board's recommendations and the final action by SecAF

Placement on the Temporary Disability Retirement List (TDRL) is termed a temporary retirement because the member is reevaluated every 18 months to determine if fit for return to active duty or unfit and to be separated or retired. Maximum time on TDRL is 5 years

The member may voluntarily separate upon request

## **MILITARY JUSTICE/POLICY ISSUES**

A service member who knows he or she is HIV positive but engages in sexual intercourse with another can be punished under the UCMJ for

Engaging in unprotected sexual intercourse with another

Violating a "safe sex" order

Failing to warn sexual partner about HIV status, despite wearing a condom (merely taking "safe sex" precautions won't remove the duty to warn); and

Having unprotected sexual intercourse even though the partner is aware of the member's HIV status, and consents

## **AIDS AND AIR FORCE CIVILIAN EMPLOYEES**

The Air Force does not test Air Force civilian employees for AIDS. An exception is with those civilian employees (appropriated or nonappropriated) selected for assignment overseas who will be screened for HIV infection pursuant to host country requirements. This screening does not apply to contractor personnel, family members or foreign nationals. Civilian employees are also tested for occupational exposures

AIDS is a disability under federal civil rights laws and these laws prohibit discrimination on the basis of physical or mental disabled. Under these laws, disabled employees could recover back pay, compensatory damages, attorney fees, costs, and expert fees against liable employers

In March 1988, the U.S. Office of Personnel Management issued the following guidelines for federal agencies on handling AIDS in the federal workplace (FPM Bulletin 792-42)

### **Extensive AIDS Information and Education Program**

HIV-positive employees may not be denied employment or fired provided they are able to continue working (their privacy and confidentiality must be protected)

Employees should be granted sick, annual leave, or leave without pay in the same way as other employees with medical conditions (accommodation of handicap)

Employees are eligible to receive disability retirement if medical condition warrants and they have the required number of years

If an employee refuses to work with infected employees, he or she will receive information and counseling. If that employee still refuses, he or she may be disciplined

### **References:**

AFI 48-135, *Human Immunodeficiency Virus Program*, 12 May 2004

AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*,  
30 September 1999

AFI 44-102, *Community Health Management*, 17 November 1999

## **ALCOHOL ABUSE**

### **INTRODUCTION**

The Air Force recognizes alcoholism as a primary, chronic disease that affects the entire family and that is both preventable and treatable. The Air Force further recognizes that alcohol abuse negatively affects public behavior, duty performance, and/or physical and mental health

Treatment is available for alcohol abusers in an effort to minimize the negative consequences of such abuse to the individual, family, and the organization

The Air Force attempts to provide treatment and restoration to unrestricted duty status whenever possible. If restoration to duty is not appropriate, transitional counseling is offered pending separation

In addition to treatment issues, there are a number of other issues surrounding the use of alcohol, including drunk driving, dramshop liability, and drinking age

The Air Force Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program attempts to identify and provide assistance to military members with alcohol problems, but the focus of the ADAPT Program is prevention and clinical treatment

The ADAPT Program replaced the Substance Abuse Reorientation and Treatment (SART) Program

### **MILITARY MEMBERS**

Commanders and supervisors have primary responsibility for prevention, early identification, treatment, and discipline of substance abusers. The commander should do the following

Observe and document the performance and conduct of subordinates, and direct the immediate supervisors to do the same

Evaluate all potential or identified abusers through the evaluation process of AFI 44-121

Provide appropriate incentives to encourage members to seek help for problems with alcohol without fear of negative consequences

Recognize their responsibility for all personnel, administrative, and disciplinary actions pertaining to any of their members involved in the ADAPT program; and

Understand that their involvement in treatment is critical, and they provide the authority to implement treatment when the member refuses to comply with treatment decisions

Alcohol abusers are identified through several channels, including

Self-Identification: The Air Force provides nonpunitive assistance to members seeking help in dealing with alcohol abuse

Commander referral

Commanders who suspect alcohol abuse shall refer members for evaluation. Some instances which could lead to referral include the following

Deteriorating duty performance

Errors in judgment

Excessive absenteeism or lateness for duty

Misconduct

Unacceptable social behavior; and

Incidents involving domestic violence or disturbances

If a commander refers an individual for an evaluation, the member must be told

The reason for the evaluation

The evaluation isn't punitive in nature; and

The member must report in uniform to the assessment appointment at the appointed date and time

Coordinate with the Staff Judge Advocate (SJA) before directing required drug testing on members involved in an alcohol-related incident, exhibiting bizarre behavior, or who are reasonably suspected of drug use. Commanders must order the test within 24 hours of the incident and should attempt to get the individual's consent prior to directing the drug test. Blood alcohol tests are encouraged when alcohol is thought to be a factor in any incident

Arrest, apprehension, and investigation

Commanders and first sergeants review DD Forms 1569, *Incident Complaint Record*, for indications of possible alcohol related problems. Commanders must refer the member for an evaluation if alcohol is, or is suspected to be, a contributing factor in any incident

The commander ensures the member is referred within 7 calendar days after notification of the suspected alcohol incident

Incident to medical care

Health care providers should be alert for potential indicators of alcohol related problems

Medical personnel must notify the unit commander and the ADAPT program manager when a member

Is observed, identified, or suspected to be under the influence of drugs or alcohol

Receives treatment for an injury or illness that may be the result of substance abuse

Is suspected of abusing substances; or

Is admitted as a patient for alcohol (or drug) detoxification.

Substance abuse assessment

ADAPT staff members evaluate all members suspected of alcohol abuse in order to help the commander understand the extent of the alcohol abuse problem and to determine the patient's need for treatment and the level of care required

Except in cases of self-identification, personal information provided by the member in response to assessment questions may be used against the member in a trial by court-martial or considered on the issue of service characterization in an administrative discharge proceeding. (AFI 44-121, para 3.11.2)

Before the assessment, the patient is advised of, among other things, the nature of the ADAPT Program, the limits of confidentiality, Privacy Act provisions, and the consequences of refusing treatment

Upon completion of the assessment, the information gathered will form the basis for patient diagnosis, treatment planning, and delivery of substance abuse services

In cases of DUI/DWI, the ADAPT provider will give the assessment results to the patient's commander for consideration prior to any decisions by the commander regarding the disposition of such a case

The information is presented to the Treatment Team (TT) so that the TT may develop and guide the clinical course of treatment. The TT decides the proper course of action for the client after examining all the facts presented. In particular, the TT develops the treatment plan  
The TT is made up of

The commander and/or first sergeant (who must be involved at program entry, termination, and any time there are problems treating the patient)

The patient's immediate supervisor

The ADAPT Program Manager (who chairs the TT meetings)

A certified substance abuse counselor

The therapist currently involved with the care of the patient, and

Any other individuals deemed necessary

In some cases, the patient may also be on the TT

The treatment plan, developed by the TT, is used to establish a framework for the patient's treatment and recovery. The plan is individual specific and it documents the nature and extent of the treatment and the goals of treatment. The plan is reviewed at least every quarter to ensure effectiveness

The ADAPT Program Manager makes the treatment decision after consulting with the TT. The decision must be made within 15 days after referral to the ADAPT Office

Substance abuse treatment falls into two categories (Tracks 1 through 5 of the SART program no longer apply)

NonClinical services, the first category of treatment, is for those patients not meeting the diagnostic criteria for alcohol abuse or dependence

At a minimum, they are provided 6 hours of awareness education and additional counseling can be prescribed. Length of involvement is flexible

Substance abuse awareness education includes, among other things, information on individual responsibility, Air Force standards, and the legal and administrative consequences of abuse

Members being separated are entitled to appropriate medical care, but separation action will not be postponed because of participation in the ADAPT Program

Clinical services, the second category of treatment, is used for patients meeting the Diagnostic and Statistical Manual (DSM)-IV diagnostic criteria for alcohol abuse or alcohol dependence

The ADAPT Program Manager, using criteria developed by the American Society of Addiction Medicine (ASAM), determines the level and intensity of the treatment. The local ADAPT Program develops procedures to evaluate the effectiveness of the program

Patients are treated in the least restrictive setting possible and the length and duration of the treatment will vary according to the needs of the patient. Program requirements will be tailored to the individual and will include awareness education (minimum of 6 hours). Family involvement is encouraged

Patients must adhere to the treatment plan developed by the TT

In appropriate cases, patients may be referred for in-patient treatment to one of several Substance Abuse Recovery Centers (SARC) which are located on several different installations

Total abstinence is a critical treatment goal, but relapses into drinking behavior are not uncommon and are to be anticipated. Drinking, by itself, is not grounds for program failure

Patients meeting this diagnostic criteria are put on a duty-limiting profile for 6 months to give them an opportunity to adapt to the treatment program. The profile limits their ability to go TDY or PCS

Patients successfully complete the program when they meet DSM-IV criteria for early full remission

The TT makes the determination whether the patient successfully completes the program or fails

Failure in the program is based on a demonstrated pattern of unacceptable behavior, inability or unwillingness to comply with the treatment plan, or involvement in an alcohol related incident after initial treatment

Individuals who fail the ADAPT Program shall be separated from the service

#### Management of Alcohol Abusers

Commanders have a variety of tools available to assist in managing alcohol abusers. These include: line of duty determination, if appropriate; action related to security clearances, access to classified information, and access to restricted areas (AFI 31-501); Personnel Reliability Program (AFI 36-2104); unfavorable information file or control roster action (AFI 36-2907); separation from service (AFI 36-3208 and 36-3206); withholding of promotion (AFI 36-2501 and 36-2406); administrative demotion (AFI 36-2503) and denial of reenlistment (AFI 36-2606)

Orders not to consume alcohol will be valid only if there is a reasonable connection between the order and military duties. Therefore, such orders must be carefully tailored. Always consult with your SJA before issuing an order not to consume alcohol

#### **CIVILIAN EMPLOYEES**

The Air Force attempts to prevent, reduce, and control alcoholism and drinking problems through education and training of employees and supervisors. The Air Force assists employees in finding rehabilitative services and treatment in an effort to restore civilian employees to full effectiveness

AFI 36-810 and provides policy guidance and outline procedures to identify and rehabilitate civilian employees who abuse alcohol

Indicators of possible alcohol related problems include: absenteeism, late for work, extended lunch periods, unexcused absences, deteriorating job performance, marked changes in personal appearance, chronic lying, behavioral changes, and misconduct

The responsibilities of civilian employee supervisors and procedures for disciplinary actions are discussed in Chapter 13, Civilian Personnel and Federal Labor Law

Under the Rehabilitation Act, alcohol abuse may be a physical handicap that entitles the employee to special protection (*i.e.* reasonable accommodation). Consult with your SJA and Civilian Personnel Officer

## **LEGAL ASPECTS OF ALCOHOL RELATED ISSUES**

### **Drunk Driving**

Operation of a motor vehicle while under the influence of alcohol, on or off the installation, is a serious offense and is incompatible with Air Force standards

Military members are subject to nonjudicial punishment under Article 15 or a court-martial for a violation of Article 111, UCMJ

Civilian employees apprehended for DWI on exclusive or concurrent federal jurisdiction installations are subject to prosecution in U.S. Magistrate Court

A DWI conviction, in either state or federal court, will subject the individual to revocation of on-base driving privileges. (*See article, Driving Privileges, Chapter 9, this Deskbook*)

Individuals identified as alcohol abusers as a result of a DUI/DWI will receive a minimum of 6 hours of awareness education before base driving privileges are reinstated

### **Minimum Age**

The minimum age for purchasing, possessing, or consuming alcoholic beverages on Air Force installations will be consistent with the law of the state, territory, possession, or foreign country in which the installation is located. Adults may only furnish alcohol to minors in accordance with applicable state law

Air Force members who violate these restrictions may be punished under Article 92, UCMJ, for a violation of AFI 34-219

At Air Force installations located within approximately 50 miles from a neighboring state that has a lower drinking age, the minimum base drinking age may be lowered to match that of the neighboring state to reduce the likelihood that members will drive while intoxicated

When an entire unit marks a unique or nonroutine military occasion on a military installation, the minimum drinking age for attendees at a particular unit gathering may be lowered

Military personnel 18 years old or older may purchase, serve, sell, possess, and consume alcoholic beverages outside the United States, its territories, and possessions unless a higher drinking-age requirement exists in accordance with applicable status of forces or country-to-country agreements. A higher drinking age requirement may also be imposed based on the local situation as determined by the installation commander or the senior on-site unit commander when there is no installation commander. Coordination with any host commander is required

### Dramshop Liability

Under the dramshop theory of liability (which is generally a matter of state law), a server of alcoholic beverages (an individual, activity, or facility) has a duty to refuse to serve anyone who is or appears to be intoxicated

Liability may extend to damage the intoxicated person causes to property, others, and himself

Installations must, among other things

Publish operating instructions (OIs) prohibiting serving alcohol to intoxicated persons

Ensure each server annotates an AF Form 971, *Supervisor's Record*, stating the server is aware of the OI and agrees to enforce its provisions

Establish controls to protect intoxicated persons and Air Force assets

Report alcohol related incidents that may lead to claims (for or against the government) to the SJA

Not permit personal supplies of alcohol in buildings or grounds that serve alcohol (*i.e.* golf course)

Not provide coupons for reduced prices on alcoholic beverages

May serve complimentary nonalcoholic beverages to designated drivers

Private Organizations may not sell or serve alcoholic beverages on Air Force installations

### **References:**

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, 26 September 2001

AFI 34-219, *Alcoholic Beverage Program*, 9 September 1998

AFI 36-810, *Substance Abuse Prevention and Control*, 22 July 1994

AFI 36-2406, *Officer And Enlisted Evaluation Systems*, 1 July 2000

AFI 36-2501, *Officer Promotions and Selective Continuation*, 6 May 2004

AFI 36-2503, *Administrative Demotion of Airmen*, 20 July 1994

AFI 36-2606, *Reenlistment in the United States Air Force*, 21 Nov 2001

AFI 36-2907, *Unfavorable Information File (UIF) Program*, 1 May 1997  
AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004  
AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003  
AFI 31-501, *Personnel Security Program Management*, 1 August 2000  
UCMJ art. 111  
UCMJ art. 15

## **ANTHRAX IMMUNIZATIONS**

The DoD has implemented a program to immunize all military personnel against anthrax -- including active duty, reserve and guard personnel, and certain civilian employees, contract personnel, and family members. Air Force Joint Instruction (AFJI) 48-110 sets forth the requirements and procedures for this program. Commanders are responsible for ensuring that all military and nonmilitary personnel under their jurisdiction receive all required immunizations.

### **PROGRAM**

Anthrax is 99% lethal to unprotected individuals; inhalation of the disease causes severe pneumonia and death within a week; at least 10 countries are believed to possess the biological agent

The anthrax vaccine has been FDA approved since 1970

Immunization consists of three injections given two weeks apart, followed by three injections given at the 6, 12, and 18 month point; thereafter booster shots are required ever year

### **IMMUNIZATION WAIVERS**

Waivers can be given for certain medical conditions (e.g., pregnancy and hypersensitivity to injections) and for religious objections

Authority to grant temporary medical waivers is exercised by the MAJCOM commanders; only the Air Force Surgeon General may grant a permanent medical waiver

Immunization waiver for religious objections is the only nonmedical reason for a waiver and will be accommodated when possible, but will be revoked if necessary to ensure the accomplishment of the military mission

The factors to be considered in determining whether to grant a waiver are

The religious importance of the accommodation to the requester

The cumulative impact of repeated accommodations of a similar nature

Alternative means available to meet the requested accommodation

Previous treatment of the same or similar requests, including treatment of similar requests made for other than religious reasons

Administrative action should be considered when accommodation is not in the best interest of the unit and conflict between the unit's requirements and the individual's religious beliefs is apparent

### **FAILURE TO OBTAIN REQUIRED IMMUNIZATIONS**

AFJI 48-110 is not punitive, but failure to obtain immunization must be handled by the individual's commander

If there is no valid basis for requesting a waiver, the member's commander may give a direct order to submit to the immunization

If the member refuses to obey the order the commander may

Take no action at all

Take administrative action (LOC, LOR, referral OPR/EPR)

Take punitive action under the Uniform Code of Military Justice

Administrative Action

Active duty members may be medically discharged pursuant to guidance found in AFI 48-123 if they have any of the following "disqualifying conditions," one of which may apply to cases involving the refusal to obtain a mandatory immunization

Member refuses required medical, surgical, or dental treatment or diagnostic procedures

Condition which precludes member from fulfilling his duties in a reasonable manner

Member's retention in the service is not in the best interest of the Air Force

Active duty officers may be discharged under 36-3206 for misconduct or moral or professional dereliction

Active duty enlisted may be discharged under AFI 36-3208 for unsatisfactory performance (failure to meet minimum fitness standards) or misconduct (conduct prejudicial to good order and discipline)

Reserve and guard members who fail to complete any medical requirements, including immunizations, are placed on a physical profile and the member's commander is notified for appropriate administrative action

Both reserve officers and enlisted members may be separated pursuant to AFI 36-3209 on the basis of either a physical disqualification or misconduct

Punitive Action under the UCMJ would likely be handled in one of three ways

If the member disobeys an order from his commander, action under Article 90, willfully disobeying a superior commissioned officer, may be appropriate

If the member disobeys an order from someone other than the commander, action under Article 92(2), failure to obey a lawful order, may be appropriate

The member could also possibly be disciplined for violating Article 92(3), dereliction of duty, for failure to get the immunization

#### IMMUNIZATION OF OTHER DOD PERSONNEL

Federal Civilian employees subject to rapid deployment and others having similar status to deployable forces are subject to the same immunization requirements as active duty personnel. Failure to submit to a required immunization could result in an adverse personnel action

For contract employees, the Air Force needs to ensure the contract requires the contractor to provide employees with all specified immunizations. Contract employees who fail to comply would answer to their employer who is obligated to provide a qualified replacement

#### **References:**

AFJI 48-110, *Immunizations and Chemoprophylaxis*, 12 May 2004

AFI 48-123, *Medical Examination and Standards*, 22 May 2001

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004

AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, 1 February 1998

DoDD 1300.17, *Accommodation of Religious Practices within the Military Services*, 3 February 1988, change 1 issued 17 October 1988

## ARREST BY CIVIL AUTHORITIES

When a commander receives notice from any source (e.g., a unit member, Security Forces (SF), or the Office of Special Investigations (OSI)) that a member of his or her command is being held by civilian authorities and is charged with a criminal offense, Air Force directives require certain actions.

The commander or a representative of the unit should contact the civilian authorities, inform them the person is a military member, and gather the following information

The charge(s) against the member

The facts and circumstances surrounding the charged offense(s); and

The maximum punishment the member faces

If possible, make arrangements for the member's return to military control

Do not state or imply the AF will guarantee the member's presence at subsequent hearings

Do not post bond for the member or personally guarantee any action by the member (unless you are willing to accept personal responsibility and liability)

The commander may make a statement as to the member's character and prior record of reliability, but do not make slanderous statements concerning the member

Off-base offenses committed by a military member on active duty may be tried by court-martial. The question of personal jurisdiction turns on the status of the offender at the time of the offense, not where the offense occurred

The court-martial convening authority may request that the civilian authorities waive jurisdiction and permit the Air Force to prosecute the offender. The staff judge advocate (SJA) will assist in coordinating with the local authorities

As a general rule, military status will not be used to avoid civilian court jurisdiction or court orders

AF policy is to deliver a member to federal authorities upon request if the request is accompanied by a warrant

AF policy is to deliver a member to state authorities upon request, if the member is physically present in the state and state procedural rules have been followed

The AF will not transfer a member from one base to another to make the member present in the jurisdiction. The state seeking the member must proceed through normal civilian extradition channels

The AF will return a member from an overseas assignment upon request, if the member is charged with a felony (an offense that carries a potential punishment of confinement for one year or more), or if the offense involves taking a child out of the jurisdiction of a court or from the lawful custody of another person

The Judge Advocate General can approve a request to return a member from overseas and the Undersecretary of Defense, Personnel & Readiness, can deny such a request. The AF Legal Services Agency, Military Justice Division, processes requests for return from overseas

A commander can subject a member to restraint pending delivery to civilian authorities, provided there is probable cause to believe the member committed an offense and is a flight risk

An AF Form 2098 reflecting a duty status change must be prepared and forwarded to the Military Personnel Flight (MPF) when a member is in civilian custody

If a member is held for trial, the commander should advise the member to

Consult with the Area Defense Counsel (ADC). The ADC cannot represent the member in civilian proceedings, but may advise the member of the potential military consequences

Retain a civilian attorney or request a court-appointed attorney

If the member is convicted of an offense which would, if tried by court-martial, subject the member to a punitive discharge, the member is subject to involuntary administrative separation from the AF with a less than honorable service characterization (general or under other than honorable conditions discharge)

If the member is convicted of an offense (or one closely related to an offense under the UCMJ) that would, if tried by court-martial, subject the member to a punitive discharge and confinement for one year or more, the commander must recommend involuntary separation or waive discharge processing. In either case, the decision should be made promptly. An extended period of inaction may waive the right to process the member for separation

It is the maximum allowable punishment, not the actual sentence imposed, that determines if separation is an option

The member's absence due to confinement in a civilian facility does not bar processing the member for separation

The commander must obtain information from the civilian authorities concerning the final disposition of the case. The SJA, with the SF or OSI, will assist

If a member is charged with or convicted of a less serious offense (one that would not warrant separation) various disciplinary actions that may be appropriate (consult with the SJA)

Placing documents concerning the incident into an unfavorable information file

Placing the member on the control roster; and

Issuing an administrative reprimand to the member

**References:**

UCMJ art. 14

AFPD 51-10, *Making Military Personnel, Employees, and Dependents Available to Civilian Authorities*, 8 September 1993

AFI 51-1001, *Delivery of Personnel to United States Civilian Authorities for Trial*, 21 July 1994

AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003

AFI 36-3207, *Separating Commissioned Officers*, 6 July 2000

## **ARTICLE 138 COMPLAINTS**

Article 138 of the Uniform Code of Military Justice (UCMJ) gives every member of the Armed Forces the right to complain that he or she was “wronged” by his or her commanding officer. The right even extends to those subject to the UCMJ on inactive duty for training.

Matters appropriate to address under Article 138 include discretionary acts or omissions by a commander that adversely affects the member personally and are

In violation of law or regulation

Beyond the legitimate authority of that commander

Arbitrary, capricious, or an abuse of discretion; or

Clearly unfair (e.g., selective application of administrative standards/actions)

Matters NOT appropriate for Article 138 action are

Acts not under the control of the commander

Complaints relating to UCMJ or Article 15 actions

Complaints filed to seek disciplinary action against another

Procedures for filing complaint

Within 180 days of the alleged wrong, the member submits his or her complaint in writing, along with supporting evidence, to the commander alleged to have committed the wrong

The commander receiving the complaint must promptly notify the complainant in writing whether the demand for redress is granted or denied

The reply must state the basis for denying the requested relief

The commander may consider additional evidence and must attach a copy of the additional evidence to the file

If the commander refuses to grant the requested relief, the member may submit the complaint, along with the commander’s response, to the officer exercising General Court-Martial Convening Authority (GCMCA) over the commander

Must be submitted within 90 days from the notice of denial

May be submitted directly to the GCMCA or forwarded through any superior commissioned officer

An intermediate commander or any other superior commissioned officer receiving such a complaint will immediately forward the file to the GCMCA. The officer may attach additional pertinent documentary evidence and comment on availability of witnesses or evidence, but may not comment on the merits of the complaint

#### GCMCA's Responsibilities

Conduct or direct further investigation of the matter, as appropriate

Notify the complainant, in writing, of the action taken on the complaint and the reasons for such action

Refer the complainant to appropriate channels that exist specifically to address the alleged wrongs (i.e., performance reports, suspension from flying status, assessment of pecuniary liability). This referral constitutes final action

Retain two complete copies of the file, and return the originals to the complainant

After taking final action, forward a copy of the complete file to HQ USAF/JAG for review and disposition by the SecAF

The GCMCA is prohibited from delegating his or her responsibilities to act on complaints submitted pursuant to Article 138

Matters outside the scope of the Article 138 complaint process

Acts or omissions affecting the member which were not initiated or ratified by the commander

Disciplinary action under the UCMJ, including nonjudicial punishment under Article 15 (however, deferral of post-trial confinement is within scope of Article 138)

Actions initiated against the member where the governing directive requires final action by SecAF

Complaints against the GCMCA related to the resolution of an Article 138 complaint (except for alleging the GCMCA failed to forward a copy of the file to the SecAF)

Complaints seeking disciplinary action against another; and

Complaints based on a commander's actions implementing the recommendations of a board authorized by Air Force regulations and governed by AFI 51-602, *Boards of Officers*

**References:**

UCMJ art. 138

AFI 51-904, *Complaint of Wrongs Under Article 138, UCMJ*, 30 June 1994

## **BAD CHECKS**

Every check, draft, or money order carries with it the representation of payment in full when presented. When a military member writes a check that fails to clear for payment, it may be necessary to take administrative or disciplinary action to correct the behavior.

Consult with the legal office to determine if administrative or disciplinary action is appropriate

Dishonored checks are evidence of personal indebtedness until redeemed

If the incident is the first, or if it is relatively minor, counseling the member regarding Air Force policy and referral for professional counseling may be an appropriate first step to correct the behavior

Every base has programs in place that can help teach financial management to Air Force members experiencing difficulty in this area

Two such programs are the Personal Financial Management Program and the Budget Restructuring Program (Comptroller and/or Family Support Center)

Repeated cases of dishonored checks, or a single instance involving a large amount of money, may be the basis for administrative action, such as letters of reprimand, UIF, control roster, administrative separation, and/or involuntary deductions by Defense Finance and Accounting Service for personal indebtedness to the federal government

Writing bad checks can also qualify as criminal conduct under the right circumstances. Criminal conduct prohibited by Articles 123a and 134, UCMJ, may be evident if the individual was

Procuring or making payment by check with intent to defraud

Dishonorably failing to maintain sufficient funds to cover checks

Making or delivering a check knowing that sufficient funds did not exist

Evidence of knowledge and intent can be shown by proof of notice of a dishonored check(s) and failure to make payment within 5 days after such notice

### **References:**

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004

AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003

UCMJ arts. 123a and 134

## **CHILD ABUSE AND NEGLECT AND SPOUSAL ABUSE**

It is Air Force policy to prevent or minimize the impact of child abuse, child neglect, and spousal abuse and their attendant problems. To further this policy, the Air Force attempts to identify abuse and neglect, document such cases, assess the situation, and treat the family. Commanders should take administrative or judicial action in appropriate cases.

The Family Advocacy Program (FAP) is responsible for implementing this policy. The FAP's mission is to promote mission effectiveness by enhancing the health, welfare, and morale of Air Force families. The FAP consists of three components: prevention services, maltreatment intervention, and special needs identification and assignment coordination.

### **REPORTING MALTREATMENT**

All Air Force personnel, military or civilian, have a duty to report all incidents of suspected child abuse. The identity of the person making the notification is kept confidential AND is not released to the family allegedly involved

Report suspected cases to the Family Advocacy Officer (FAO), who will notify AFOSI

AFOSI is responsible for investigating all but minor incidents of maltreatment

AFOSI accesses the Defense Central Index of Investigations (DCII), which serves as a register of substantiated and suspected cases of abuse

AFOSI investigation preserves command prerogatives to take appropriate administrative or judicial actions

Notice of suspected abuse cases come from many sources: Security Forces blotter, commanders, co-workers, medical care providers, childcare providers, and anonymous calls

### **THE FAMILY ADVOCACY COMMITTEE (FAC)**

The Medical Treatment Facility (MTF) commander or deputy MTF commander, who is responsible for each of the three FAP components, chairs the FAC. The ultimate responsibility to implement the FAP, however, rests with the installation commander

Members of the FAC normally include: Installation Commander (or designee), MTF Commander, Family Advocacy Officer, Family Advocacy Outreach Manager, Family Support Center Director, Staff Judge Advocate (or designee), Chief of the Military Personnel Flight, Chief of Security Forces, AFOSI Detachment Commander, Chaplain, Family Member Support Flight Chief, Senior Enlisted Advisor, Directors of the Child Development Center and Youth Activities, and representatives of local child protection agencies (optional)

The Family Advocacy Officer (FAO) is the action officer for the FAP and chairs the Family Maltreatment Case Management Team (FMCMT)

#### THE FAMILY MALTREATMENT CASE MANAGEMENT TEAM

The FMCMT is a working group of the FAC and directs provision and management of services designed to identify, report, assess, and treat all types of maltreatment cases

FMCMT meets at the call of the FAO, but at least monthly

Membership is determined by the FAC, but should include: installation commander (or deputy commander), DBMS (or Chief of Hospital and Clinical Services), pediatrician, AFOSI, SJA, SF, chaplain, and other relevant agencies

Duties of the FMCMT include

Ensure assessment of all reported cases and prompt clinical evaluation of victims

Documentation of cases of abuse or neglect after investigation

Establish unit commander's assistance in treatment plans for both the victim and the abuser

Review all open cases at least quarterly to ensure the case management plan is current and correct (review sex abuse cases at least monthly)

Coordinate with local human service agencies for treatment and services that are beyond the capabilities of available Air Force resources; and

Ensure that service members currently in treatment are not reassigned or placed on extended TDY during the treatment program. (Note -- enrollment in the program is not a bar to promotion or promotion consideration)

The unit commander of any member whose case will be discussed at the FMCMT should attend the FMCMT meeting

#### **CHILD NEGLECT AND ABANDONMENT**

Most Air Force installations will have several cases each year of alleged child abuse or neglect through parental abandonment (i.e., leaving children alone in military family housing without adult supervision)

Some installations have attempted to address this issue by having the FAC draft guidelines to assist parents in assessing whether a child is mature enough to be left unattended

The FAC only proposes guidelines. Individual children and situations are unique and must be evaluated in that light

(For more information on this subject, *see* article, *Uniformed Services Former Spouses' Protection Act*, this Chapter, explaining benefits for victims of spousal and child abuse)

**References:**

AFPD 40-3, *Family Advocacy Program*, 7 September 1993

AFI 40-301, *Family Advocacy*, 1 May 2002

## COMMANDER DIRECTED MENTAL HEALTH EVALUATIONS

### PURPOSE

Commanders who have concerns that a member under their command may be suffering from a legitimate mental health problem that may affect that member's ability to carry out the mission, may refer the member to the Life Skills Center for a mental health evaluation (MHE).

AFI 44-109 establishes the uses of and procedures for commander directed MHEs

Provides commanders guidance on making a referral

Establishes the rights of Air Force members referred for mental health evaluations

Establishes procedures for outpatient and inpatient mental health evaluations

Establishes the Limited Privilege Suicide Prevention (LPSP) Program for members facing potential disciplinary action under the UCMJ who may be at risk of suicide. This is encompassed in Military Rule of Evidence (M.R.E. 513)

Mil. R. Evid. 513 offers a limited privilege to persons subject to the U.C.M.J. and psychotherapists. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, *in a case arising under the U.C.M.J.*, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. Mil. R. Evid. 513(a)

"MRE 513 has no application outside U.C.M.J. proceedings." AFLSA/JAJM policy letter, 8 Mar 00. *See, also*, Mil R. Evid 513 Analysis. However, disclosure should be limited to "persons or agencies with a proper and legitimate need for the information and authorized by law or regulation to receive them." SJA's resolve disputes and determine whether disclosure should be made

*Who may claim the privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary. Mil. R. Evid. 513(c)

Exceptions: (1) the patient is dead; (2) crimes of spouse/child abuse or a proceeding in which one spouse is charged with a crime against the other spouse or a child of either spouse; when federal or state law, or service regulation, imposes a duty to report; (4) when the patient is a danger to any person, including the patient; (5) if the communication contemplates, or the services of the psychotherapist are sought to commit, a future fraud/crime (6) when necessary to ensure the

safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; (7) when an accused offers evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302; and, (8) when admission or disclosure of a communication is constitutionally required

## **COMMANDER'S RESPONSIBILITIES**

A commander who wishes to refer a member for a MHE must

Refer a member only if he or she believes the individual has a legitimate mental health problem

A commander cannot refer a member simply to buy time or as a disciplinary tool

A commander cannot refer a member as a reprisal for the individual's attempt or intent to make a protected communication

Consult with a mental health provider (MHP) concerning the need for an MHE prior to referring the member for an MHE

Provide the member with written notice of the MHE. The notice must include

The date and time of the MHE

A brief factual description of the behavior that gave rise to the need for a referral

The name of the MHP the commander consulted with prior to the referral

Contact information as to the authorities that can assist the member who wants to question the referral; and

A listing of the member's rights under DoDD 6490.4

Consult the legal office for assistance in preparing the notification letter

In an emergency situation, refer the individual for a MHE as soon as possible without regard to waiting periods or other things that might delay the evaluation

## **MEMBER'S RIGHTS**

When referred for a nonemergency MHE the member has the following rights

To consult an Air Force attorney (*i.e.*, the Area Defense Counsel) upon request

To a waiting period of two workdays (*i.e.*, the member's normal duty day) between the notification and the MHE. To the extent military necessity does not allow for the waiting period,

the notification letter must explain the reasons why. (NOTE: The waiting period does not apply to emergency referrals)

To complain to the Inspector General that the referral violated the instruction. (NOTE: Such a complaint will not delay processing)

To request a second MHE by another MHP

To make a lawful communication to the IG, his/her attorney, or other appropriate authority, including the chaplain (as soon after admission as the Service member's condition permits in emergency referrals)

If the member is involuntarily hospitalized for treatment, that treatment must take place in a setting no more restrictive than necessary for effective treatment

### **INVOLUNTARY INPATIENT ADMISSIONS**

A member should be admitted for inpatient treatment only when outpatient treatment and evaluation is not appropriate

The member must be admitted by a qualified MHP

A qualified reviewing official (normally a neutral and detached MHP) must review the admission within 72 hours to determine whether the referral and admission were appropriate

The reviewing official will review the case file, interview the authorities involved and interview the member, if possible

In addition, members involuntarily admitted for treatment are afforded the following rights

To be informed of the reasons for the MHE and of the nature and consequences of the MHE and any treatment -- to the extent his/her condition permits

To contact a friend, relative, or anyone else the member wishes -- to the extent the member's condition permits such communication

The MHP who conducts the initial MHE must

Determine within two workdays (i.e., the MHP's normal duty day) whether continued treatment or hospitalization is necessary; and

Notify the member orally and in writing the reasons for continued hospitalization or treatment

### **PROHIBITED PRACTICES**

The commander may not

Refer a member for an MHE as a reprisal for making a protected communication, or

Restrict the member from lawfully communicating with his/her attorney, the IG, or other authority about the referral

Either act by the commander could constitute a violation of Article 92, UCMJ, and result in disciplinary action

NOTE: Commander directed MHEs should not be confused with referrals under the Alcohol and Drug Abuse Prevention and Treatment Program (AFI 44-121), the Family Advocacy Program (AFI 40-301), or those referrals made pursuant to a ruling from a military judge concerning the administration of a sanity board.

**References:**

AFI 44-109, *Mental Health, Confidentiality, and Military Law*, 1 March 2000

AFPD 44-1, *Medical Operations*, 1 September 1999

DoDD 6490.1, *Mental Health Evaluations of Members of the Armed Forces*, 1 October 1997

DODI 6490.4, *Requirements for Mental Health Evaluations of Members of the Armed Forces*, 28 August 1997

## **CONSCIENTIOUS OBJECTION TO MILITARY SERVICE**

Although military service is generally viewed as an obligation of citizenship, Congress recognized early that certain individuals and groups hold convictions against the use of force in any form.

### **GENERAL POLICIES**

A conscientious objector (CO) is a person who is opposed to participation in war in any form or the bearing of arms, by virtue of a firm, fixed and sincere belief as a result of religious training or similar belief system. Moral or ethical beliefs, even if not characterized by the holder as "religious," may provide sufficient grounds for CO status

The objection to war must be all-inclusive, not to specific wars or conflicts

COs are classified as either Class 1-0 (a person who sincerely objects to participation in war in any form), or as Class 1-A-0 (a person who sincerely objects to participation as a combatant in war in any form, but whose convictions will permit him/her to serve in noncombatant status)

Administrative discharge by the Secretary of the Air Force (SecAF) prior to completion of term of service is discretionary based on the facts of each case

Applicants for CO status who are awaiting disposition of their case should be assigned to duties that conflict as little as possible with their beliefs

Applicants must comply with the normal requirements of military life and perform duties they are assigned

Applicants must comply with active duty or transfer orders in effect at the time of the application or subsequently issued

Those awaiting promotion after selection are put on withhold status and once their application is approved, they become ineligible for promotion

### **APPLICATION PROCEDURES**

Applicant has the burden of proof to show he/she is a CO

He/she must establish by clear and convincing evidence that

He/she objects to participation in war in any form or the bearing of arms

The applicant's belief is honest, sincere, and deeply held

The applicant's belief is by virtue of religious training or other belief system akin to religion; and

The nature or basis of the claim falls under the definition of conscientious objection in AFI 36-3204, Attachment 1

Clear and convincing evidence is a standard of proof that does not require proof beyond a reasonable doubt but does require proof more substantial than a mere preponderance of the evidence

The applicant submits the application to the servicing Military Personnel Flight (MPF) / Personnel Relocation Element, or to the immediate commander if serving in USAFR or ANG and not serving on extended active duty

The application contains information requested in AFI 36-3204, Attachment 2, and any other information deemed relevant by the applicant

The information includes an extensive description of the individual's personal background, a thorough description of the individual's beliefs, and a listing of the private organizations to which the individual belongs

MPF notifies the unit commander, reviews the personnel records of the applicant for pertinent information, and counsels the member about the effect of a CO determination on VA entitlements. MPF also schedules a chaplain and psychiatrist interview

The chaplain personally interviews the applicant to determine sincerity and depth of conviction against war

The chaplain submits a written report detailing conclusions and the reasons therefore, but does not make any recommendation concerning the application

A psychiatrist interviews the applicant to determine the presence of any mental disorder warranting medical or administrative disposition. Again, no recommendation on the application is made

The commander appoints a judge advocate as an Investigating Officer (IO) to interview the applicant under oath, assemble all the relevant material and interview other witnesses

The instruction contains procedures that permit the IO to hold a hearing on the matter, which the applicant may attend with counsel

The IO prepares a report that states his/her conclusions concerning the applicant's beliefs and the reasons therefore, and recommendations concerning disposition of the case

The IO must give the applicant a copy of the final report and allow the applicant to submit rebuttal material within 15 calendar days after receiving the report

Guidelines for approving or disapproving applications are found in Chapter 4 of AFI 36-3204

Generally, the reviewing authorities must find that an applicant's moral and ethical beliefs oppose participation in war in any form and that the applicant holds these beliefs with the strength of traditional religious convictions. The primary consideration is the sincerity with which the applicant holds these beliefs

In evaluating applications, carefully examine and weigh the conduct of applicants, in particular their outward manifestation of their beliefs

The commander who appoints the IO (as well as the MAJCOM or FOA) makes a recommendation before forwarding the file up the chain

SecAF or a designated representative makes the decision regarding CO status for officer applicants

The final approval decision for enlisted personnel is by HQ AFMPC/DPMARS (active duty airmen), ANG/DPP (ANG airmen), HQ AFRES/DPAA (reserve unit airmen), or HQ ARPC/DPA (all other reserve airmen)

**References:**

AFI 36-3204, *Procedures for Applying as a Conscientious Objector*, 15 July 1994

AFI 36-3207, *Separating Commissioned Officers*, 6 July 2000

AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003

## **DRUG ABUSE**

### **AIR FORCE POLICY**

Military and civilian personnel are expected to refrain from drug abuse and maintain standards of behavior, performance, and discipline consistent with the UCMJ, public law, and Air Force policy

The illegal use of drugs by Air Force members is a serious breach of discipline that is incompatible with Air Force standards. This misconduct places the member's continued service in jeopardy and could lead to action resulting in a punitive discharge or an administrative discharge under other than honorable conditions

Civilian employee abusers are given the same consideration and help as employees with other health problems

### **DRUG ABUSE AND MILITARY MEMBERS**

Unit commanders and supervisor responsibilities

Observe and document the performance and conduct of subordinates, and direct immediate supervisors to do the same

Evaluate potential or identified abusers through the evaluation process of AFI 44-121

Provide appropriate incentives to encourage members to seek help for problems with drugs without fear of negative consequences

The commander is responsible for and has control of all personnel, administrative, and disciplinary actions pertaining to members involved in the Air Force Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program

Commander involvement in treatment is critical. The commander provides the authority for treatment when the member refuses to comply with treatment decisions

Abuser identification

Self-identification: Members who voluntarily disclose prior drug use or possession are granted limited protections. Such disclosure may not be used against the member in UCMJ actions or in characterizing an administrative discharge as long as he or she

Is seeking treatment and voluntarily reveals nature and extent of drug involvement to Commander, First Sergeant, Military Equal Opportunity (MEO) personnel, or medical authority; and

Has NOT previously been apprehended for drug involvement; placed under investigation for drug abuse; ordered to give a urine sample; advised he or she was recommended for discharge for drug abuse; or entered into drug abuse treatment

The limited protection for self-identification also does not apply to disciplinary or other action based on independently derived evidence (other than commander-directed drug testing), including evidence of continued drug abuse after the member initially entered the treatment program

Commander referral: Commanders shall refer a member for assessment when drugs are thought to be a contributing factor in any incident, such as deteriorating duty performance, excessive tardiness or absenteeism, misconduct, unacceptable social behavior; or domestic disturbances/family violence

As a result of arrest, apprehension and investigation: Commanders who receive information of this nature must refer the member for a substance abuse assessment if substance abuse is, or is suspected to be, a contributing factor in any incident

Incident to medical care: Medical personnel must notify the commander and the ADAPT Program Manager (ADAPTPM) if their treatment of a patient reveals proof of drug use

Random drug testing: Positive results mandate a substance abuse evaluation

## **THE SUBSTANCE ABUSE ASSESSMENT**

The ADAPT Program attempts to identify and provide assistance to military members with drug problems, but the focus of the ADAPT program is prevention and clinical treatment

The ADAPT staff members evaluate all members suspected of drug abuse in order to help the commander understand the extent of the drug abuse problem and to determine the patient's need for treatment and the level of care required

Except in cases of self-identification, personal information provided by the member in response to assessment questions may be used against the member in a court-martial or considered for characterizing service in an administrative discharge proceeding. (AFI 44-121, para. 3.11.2)

Before the assessment, the patient is advised of the ADAPT program's nature, the limits of confidentiality, Privacy Act provisions, and the consequences of refusing treatment

Upon completion of the assessment, the information gathered will form the basis for patient diagnosis, treatment planning, and delivery of substance abuse services

The information is presented to the Treatment Team (TT) so that the TT may develop and guide the clinical course of treatment. The TT decides the proper course of action and treatment plan for the client after examining all the facts presented

The TT is generally comprised of

The commander and/or first sergeant (who must be involved at program entry, termination, and any time there are problems treating the patient)

The patient's immediate supervisor

The ADAPTPM (who chairs the TT meetings); and

A certified substance abuse counselor and the therapist currently involved in patient care

The treatment plan establishes a framework for the patient's treatment and recovery. The plan documents the treatment's nature, extent, and goals and is reviewed at least quarterly

The ADAPTPM makes the treatment decision after consulting with the TT. The decision must be made within 15 days after referral to the ADAPT Office

Although treatment is available for drug abusers and members' dependent family members on drugs, as a practical matter, military members will be processed for separation and treatment may not be completed

Members being separated are entitled to appropriate medical care, but separation action will not be postponed because of participation in the ADAPT program

For drug dependent members, at a minimum, the Air Force will provide medical care and treatment to detoxify them and refer them for continued treatment

Substance abuse treatment falls into two categories (tracks 1 - 5 of the Substance Abuse Reorientation and Treatment program no longer apply)

Non-Clinical Services, the first category of treatment, is for those patients not meeting the diagnostic criteria for drug abuse or dependence

At a minimum, they are provided 6 hours of awareness education and additional counseling can be prescribed. The length of involvement is flexible

Substance abuse awareness training includes information on Air Force standards, individual responsibility, and the legal and administrative consequences of abuse

Clinical Services, the second category of treatment, is used for patients meeting the Diagnostic and Statistical Manual (DSM)-IV diagnostic criteria for drug abuse or dependence

The level and intensity of the treatment are determined by the ADAPTPM using criteria developed by the American Society of Addiction Medicine. The ADAPT program develops procedures to evaluate program effectiveness

Patients are treated in the least restrictive setting possible and the length and duration of the treatment will vary according to the patient's needs. Program requirements will be tailored to the individual and will include awareness education. Family involvement is encouraged

Patients must adhere to the treatment plan developed by the TT

In appropriate cases, patients may be referred for in-patient treatment to a Substance Abuse Recovery Center located on several installations. Patients who are drug dependent may be referred to private institutions

Patients meeting this diagnostic criteria are put on a duty limiting profile for 6 months to give them an opportunity to adapt to the treatment program. The profile limits their ability to go TDY or PCS

Patients successfully complete the program when they meet DSM-IV criteria for early full remission

The TT determines if the patient successfully completes the program or fails

Failure in the program is based on a demonstrated pattern of unacceptable behavior, inability or unwillingness to comply with the treatment plan, or involvement in a substance abuse related incident after initial treatment

Individuals who fail the ADAPT program shall be separated from the service

## **MANAGEMENT OF DRUG ABUSERS**

Tools available to the unit commander to manage drug abusers include

Line of Duty Determinations, when appropriate (AFI 36-2910)

Action involving security clearance, access to classified information, access to restricted areas (AFI 31-501)

Personnel Reliability Program (AFI 36-2104)

Duty assignment review to determine if member should continue in current duties

UIF or control roster action based on drug related misconduct or substandard duty performance (AFI 36-2907)

Separation under AFI 36-3208 and 36-3206 for documented failure to meet standards (members who fail the ADAPT program due to refusal to cooperate may be separated)

Administrative demotion, withholding of promotion, and denial of reenlistment

Drug abuse is incompatible with military service and airmen who abuse drugs one or more times are subject to discharge for misconduct under AFI 36-3208

Drug abuse under AFI 36-3208 is the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug. This includes

Improper use of prescription medication

Any controlled substance in schedules I, II, III, IV, and V of 21 U.S.C., Section 812; and

Any intoxicating substance, other than alcohol, introduced into the body in any manner to alter mood

Evidence gotten through urinalysis or from the member in connection with initial entry in rehabilitation and treatment may be used to establish a basis for discharge

Generally, a member found to have abused drugs will be discharged unless the member meets all seven of the following criteria

Drug abuse is a departure from the member's usual and customary behavior

Drug abuse occurred as the result of drug experimentation

Drug abuse does not involve recurring incidents, other than drug experimentation

The member does not desire to engage in or intend to engage in drug abuse in the future

Drug abuse under all the circumstances is not likely to recur

Member's continued presence in the Air Force is consistent with the interest of the Air Force in maintaining good order and discipline; and

Drug abuse did not involve drug distribution

It is the member's burden to prove retention is warranted under these limited criteria

## **DRUG ABUSE AND CIVILIAN EMPLOYEES**

The civilian drug abuse prevention and control program is intended to prevent, reduce, and control substance abuse; refer employees to appropriate assistance resources; restore employees to full effectiveness; and train managers, supervisors and employees on how best to address substance abuse issues

AFI 36-810 provides policy and procedures to identify and rehabilitate civilian drug abusers

All supervisors and personnel must attend training sessions concerning drug abuse, be alert to the signs of abuse in subordinates, and report actual or suspected drug activity. (Local unions and shop stewards are aware of the regulatory program.)

The unit commander consults the Civilian Personnel Office or the legal office regarding civilian employees whose poor performance, discipline, or conduct may be caused by drug abuse

**References:**

- AFI 31-501, *Personnel Security Program Management*, 1 August 2000
- AFI 34-301, *Nonappropriated Fund Personnel Management and Administration*, 25 July 1994
- AFI 36-704, *Discipline and Adverse Actions*, 22 July 1994
- AFI 36-810, *Substance Abuse Prevention and Control*, 22 July 1994
- AFI 36-2104, *Nuclear Weapons Personnel Reliability Program*, 29 May 2003
- AFI 36-2907, *Unfavorable Information File (UIF) Program*, 1 May 1997
- AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003
- AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004
- AFI 36-2910, *Line of Duty (Misconduct) Determinations*, 4 October 2002
- AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment Program*, 26 September 2001

## **EQUAL OPPORTUNITY AND TREATMENT**

### **INTRODUCTION**

Many statutes have been enacted by the federal government to assure equal opportunity and treatment (EOT). Almost all of these apply to civilian employees as victims. They do not cover military members as victims, but DoD and Air Force anti-discriminatory policies protect both military members and civilian employees through a bifurcated system. The primary difference in this bifurcated system is that military members are limited to presenting their complaints to forums within the executive department. Civilian employees, on the other hand, usually have the right to file a complaint before an independent federal court after exhausting administrative remedies within the executive department (see Chapter 13, *The Military Commander and the Law*, "CIVILIAN PERSONNEL AND FEDERAL LABOR LAW"). The following are key EOT statutes:

Title VII of the Civil Rights Act of 1964

Equal Opportunity Act of 1972

The Rehabilitation Act of 1973

The Age Discrimination Act of 1978

The Civil Rights Act of 1991

### **CIVIL RIGHTS ACT OF 1964**

The Civil Rights Act of 1964 is the most important single source of anti-discrimination law in this country

Title VII of the act forbids illegal employment discrimination on the basis of race, creed, color, religion, national origin, and gender

The federal government was originally excluded from coverage of Title VII, but in 1972, Congress passed the Equal Employment Opportunity Act that made Title VII applicable to federal agencies

### **EQUAL OPPORTUNITY ACT OF 1972**

The Equal Opportunity Act of 1972 made Title VII of the Civil Rights Act of 1964 applicable to the federal work force; however, the term "employee" only applies to federal civilian employees as victims

The law does not apply to military members as victims

## **REHABILITATION ACT OF 1973**

The Rehabilitation Act of 1973 prohibits employment discrimination against handicapped individuals within the federal government

The law does not apply to military members as victims

The Americans With Disabilities Act (ADA) of 1990 is the private sector counterpart to the Rehabilitation Act, but it does not apply to the federal government

## **AGE DISCRIMINATION ACT OF 1978**

The Age Discrimination Act of 1978 forbids illegal discrimination on the basis of age for people over 40 years old

The law does apply to civilian employees as victims

The law does not apply to military members as victims

## **CIVIL RIGHTS ACT OF 1991**

The Civil Rights Act of 1991 amended Title VII of the Civil Rights Act of 1964 to expand remedies available to discrimination victims

Compensatory damages (i.e., pain and suffering; emotional distress; etc.) awards up to \$300,000 are allowed for a violation of Title VII

The law does apply to civilian employees as victims

The law does not apply to military members as victims

Monetary judgments or settlements made during the “administrative phase” are payable from the local base O&M funds

## **AIR FORCE POLICY**

The Air Force is to conduct its affairs free from unlawful, arbitrary discrimination and to provide equal opportunity and treatment irrespective of race, creed, color, religion, national origin, gender, physical handicap, or age

Harassment, threats or ridicule based on sexual orientation are prohibited

Commanders must take appropriate administrative or disciplinary action to eliminate or neutralize discrimination and its effects

## **AIR FORCE EQUAL OPPORTUNITY AND TREATMENT PROGRAM**

AFI 36-2706, Chapter 4, sets out the Air Force Equal Opportunity and Treatment (EOT) Program for processing discrimination complaints made by military members

**Note:** This portion of *The Military Commander and the Law* focuses on the processing of complaints made by military members. Processing procedures for complaints brought by civilian employees are set forth in AFI 36-1201, *Discrimination Complaints*, 25 July 1994, which is addressed in Chapter 12, *The Military Commander and the Law*.

-- Military members are limited to presenting administrative complaints of discrimination, which when substantiated, are addressed through command action; they cannot bring a civil action against the government for employment discrimination and they cannot receive any kind of monetary damages normally available for civilians in the same situation

-- Air Force policy is clear: “Zero tolerance” of any kind of unlawful discrimination against military members on the basis of race, creed, color, religion, national origin or gender

-- Discrimination can be generally defined as any action that unlawfully or unjustly results in unequal treatment on the basis of race, creed, color, religion, national origin or gender and the distinctions are not supported by legal or rational considerations

-- Such discrimination includes, but is not limited to

--- Insults, printed materials, visual materials, signs, symbols, posters, or insignias that infer negative statements pertaining to protected status (*e.g.*, race, religion, etc.)

--- Personal discrimination to bar or deprive a person of a right or benefit

--- Sexual harassment; and

--- Institutional practices that deprive a person or group of a right or benefit

-- Military Equal Opportunity (MEO) Office, formerly Social Actions, is the OPR for the Air Force EOT Program and handles almost all informal and formal complaints of discrimination brought by military members

--- Exceptions include instances involving criminal misconduct (investigated by base law enforcement authorities), instances concerning homosexual conduct (which will generally involve an inquiry by the commander), and complaints against senior officials, colonels and colonel selects (investigated by the inspector general (IG))

## **INSTALLATION COMMANDER’S RESPONSIBILITIES**

Provide an environment free from unlawful discrimination and sexual harassment

Develop policies to prevent unlawful discrimination and sexual harassment and ensure those policies are prominently posted in locations and areas frequented by the base population

Ensure personnel attend human relations education as required

Direct the assessment of the base human relations climate

Ensure appropriate disciplinary and corrective actions are taken if unlawful discrimination or reprisal is substantiated

Review all closed EOT cases on a monthly basis

Ensure rating and reviewing officials evaluate compliance with directives prohibiting unlawful discrimination and sexual harassment and document serious or repeated deviations

Decide first-level appeals of formal complaints of discrimination

## **UNIT COMMANDER'S RESPONSIBILITIES**

Inform unit members of the right to file EOT complaints without fear of reprisal

Inform members through briefings and EOT policy memoranda that unlawful discrimination and sexual harassment will not be tolerated and that appropriate disciplinary and corrective action will be taken if unlawful discrimination or reprisal is substantiated

At a minimum, provide MEO the demographics of participants and action taken on all EOT allegations investigated within the unit

Investigate allegations of unlawful discrimination

Take action to end unlawful discrimination

Enforce EOT policy in a fair, impartial, and prompt manner

Ensure rating and evaluating officials evaluate compliance with EOT directives and document repeated or serious violations

Conduct periodic climate assessments

## **COMPLAINT PROCESSING PROCEDURES**

MEO serves as the focal point for complaints of discrimination brought by military members, but the nature of the complaint will determine which agency conducts the investigation

- Complaints against senior officials, colonels and colonel selects must be immediately referred to SAF/IGS; commanders must notify MAJCOM IGQs and DP SAF/IGQ of EOT complaints involving colonels or colonel selects
  - Complaints involving allegations of homosexual conduct must be immediately referred to the subject's military commander (see "HOMOSEXUAL CONDUCT" in this chapter of *The Military Commander and the Law*)
  - Complaints involving criminal activity such as assault, rape or child abuse must be immediately coordinated with the staff judge advocate (SJA) for a determination of whether the matter should be referred for criminal investigation
  - Complainants may elect to use informal complaint process, which may include mediation
  - When MEO investigates a complaint of discrimination, it is called a clarification and the allegation is called an EOT incident
  - Base-level EOT technicians (MEO personnel) conduct clarifications of formal EOT complaints
  - The purpose of clarification is to determine whether a formal complaint is supported by a preponderance of the credible evidence
  - A preponderance of the credible evidence means more likely than not
  - If a complaint clarification is inconclusive, MEO may request the installation commander (or appointing authority) to direct an IG investigation into the unresolved allegations
  - All such requests must be coordinated with the appointing authority's SJA
  - If a clarification results in a determination that an alleged EOT violation has occurred, the case must be forwarded through the servicing SJA to the commander concerned for appropriate action
- Both the complainant and the subject of a formal EOT complaint may appeal the findings upon completion of complaint clarification
- Only the finding that resulted from the clarification, whether it is a finding of discrimination or of no discrimination, can be appealed
  - All appeals must be in writing
  - There is no right to a personal hearing
  - Commanders are not required to withhold command action pending an appeal

-- Installation commanders, MAJCOM/DPs, AF/DP and SAF/MIB are authorized to decide appeals of formal complaints of discrimination

--- First level of appeal is to the lowest level of command authorized to decide the appeal (usually the installation commander)

--- The appellate authorities may sustain or overrule any finding rendered below or remand the matter for further fact finding

--- SAF/MIB is the final review and appeal level for findings of formal complaints of unlawful discrimination

Findings rendered pursuant to command action under the UCMJ are not subject to appeal through MEO channels

## **PERFORMANCE EVALUATION REPORTS**

Rating and reviewing officials must consider membership in groups espousing supremacist causes or advocating unlawful discrimination in evaluating and assigning military members

While mere membership in such groups is not prohibited, members who join groups espousing supremacist causes or advocating unlawful discrimination may not be suited to hold supervisory or other responsible positions if their personal views would be in conflict with EOT guidelines they would be required to support

Rating and reviewing officials must document serious or repeated deviations from DoD and Air Force directives prohibiting discrimination

## **REPRISAL/WHISTLEBLOWER**

Air Force members are protected from reprisal for making, preparing, or attempting to make, a complaint of unlawful discrimination or sexual harassment to EOT personnel (MEO), an IG, members of Congress, DoD law enforcement organizations, or any other person or organization in the member's chain of command designated pursuant to AFI 90-301 or other established administrative procedures to receive such communications

Reprisal complaints are referred by MEO to the IG for investigation

### **References:**

AFI 36-2706, *Military Equal Opportunity and Treatment Program*, 1 December 1996

AFI 36-1201, *Discrimination Complaints*, 25 July 1994

AFI 90-301, *Inspector General Complaints*, 30 January 2001

SAF Memo, *Air Force Policy on Harassment*, 10 January 2000

## **FINANCIAL RESPONSIBILITY**

Air Force personnel are expected to satisfy their financial obligations in a proper and timely manner. Failure to do so can result in administrative or disciplinary action being taken against the member and/or the debt being paid involuntarily via Air Force channels.

In all cases involving allegations of financial irresponsibility, the commander is responsible for

Reviewing and assessing the basis of the complainant's allegation

Providing a copy of any pertinent "fact sheet," (AFI attachment) to the parties

Monitoring the processing of a complaint, attempting to respond within 15 days

Advising the military member and the complainant that the Air Force has no authority to arbitrate disputed cases of nonsupport or personal indebtedness

Ensuring information on contemplated or completed action is not disclosed to 3<sup>rd</sup> parties

Referring members with demonstrated financial irresponsibility to the appropriate base agency for assistance, normally through the Family Support Center

Considering whether an administrative or a disciplinary action is appropriate

Coordinating the action with the appropriate base agencies (SJA, MPF, IG, etc.)

Responding to inquiries from HQ AFPC High Level Inquiries Division (MSH)

Members are expected to provide adequate financial support to their dependants

The amount of support should be based on the family and the member's ability to pay

Support may be "in kind," such as paying mortgage, car payments, or joint debts

Members may not receive BAQ at the with-dependent rate if they do not provide financial support to their spouse or children

Commanders cannot force a member to provide support or act as intermediaries

The AF can terminate allowances and recoup "with dependant" rate allowances for those periods of nonsupport of dependants

Falsifying support documentation can result in disciplinary or administrative action

Personal debts to the Air Force, federal agencies, or nonappropriated fund activities (including the BX, Enlisted Club, MWR, etc.) may be involuntarily deducted from pay

State courts with jurisdiction over dependant children, or a state agency with the proper authority, can order child support payments

Complainant obtains the garnishment order from a state court over the military member and serves it on the Defense Finance and Accounting Service (DFAS)

DFAS notifies the military member of the garnishment order

Military member may provide DFAS with additional information concerning their cases or status of arrearages

AF has no authority to dispute an order and, if it appears valid, normally must honor it

Alimony payments can also be satisfied through a garnishment order

Child support can additionally be secured through a statutory allotment

Statutory allotments are initiated by a complainant or a state agency/attorney, who can establish a support obligation and arrearages greater or equal to two months

DFAS is responsible for notifying the commander or the military member

The commander should ensure the military member has access to legal assistance

Allotment goes into effect 30 days after the notice was sent to the military member

DFAS can decline to act if the member can demonstrate the request is inaccurate

A third party can secure an involuntary allotment from a military member to satisfy a final judgment from a court with jurisdiction over the parties

DFAS notifies the commander, who provides a copy of the package to the member

The commander apprises the member on their rights and obligations, including the right to speak with counsel

The military member is provided 15 days to respond, which can be extended by the commander for good cause (normally not to exceed 30 days)

If the military member consents to the allotment, the commander returns the completed forms to DFAS

If the allotment is contested, the member must fully explain and support the reasons contesting the allotment

In some cases a member may assert that military exigencies prevented them from adequately responding during the legal proceeding

The commander makes this determination and the decision is binding on DFAS

Before making this decision, the commander should contact the legal office

If the member contests the allotment on any basis other than military exigencies, DFAS will review the case and make a final decision

**References:**

AFI 36-2906, *Personal Financial Responsibility*, 1 January 1998

AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003

DoDD 1344.9, *Indebtedness of Military Personnel*, 27 October 1994

Servicemembers Civil Relief Act, 50 U.S.C. App. Secs. 501-594 (2003)

## HATE GROUPS

Air Force members must reject active participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in the effort to deprive individuals of their civil rights

-- Active participation in these organizations, such as publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations, or otherwise engaging in activities or acting in the furtherance of the objectives of such organizations that the commander finds to be detrimental to good order, discipline, or mission accomplishment, is prohibited

--- Members who violate this prohibition are subject to disciplinary action under Article 92 of the UCMJ

--- Commanders are authorized the full range of administrative and disciplinary actions, including separation, against those who actively participate in these organizations

-- Mere membership in these organizations is not prohibited, but must be considered in evaluating and assigning military members

The Military Equal Opportunity Office (MEO) (formerly Social Actions) is responsible for assisting commanders in ensuring that the Air Force equal opportunity policy against discrimination and sexual harassment is fulfilled through the Equal Opportunity and Treatment (EOT) Program

-- Commanders are responsible for ensuring members are free to present EOT complaints, protecting individuals from retaliation, and investigating allegations of hate group activities involving members within their organizations

-- Activities of groups that support supremacist causes; advocate unlawful discrimination, or advocate the use of force or violence to deprive individuals of their civil rights that constitute an immediate danger to the loyalty, discipline or morale of Air Force personnel are considered major incidents, which trigger reporting requirements and priority notification according to AFI 36-2706, para. 4.8

### **References:**

AFI 51-903, *Dissident and Protest Activities*, 1 February 1998

AFI 36-2706, *Military Equal Opportunity and Treatment Program*, 1 December 1996

## **HAZING**

Department of Defense policy prohibits hazing, recognizing its potential adverse effects on morale, operational readiness, and mission accomplishment. Hazing should never be tolerated.

### **DEFINITION**

Hazing is defined as any conduct whereby a military member without proper authority causes another military member, regardless of service or rank, to suffer or be exposed to any activity which is cruel, abusive, humiliating, oppressive, demeaning, or harmful

- Physical contact is not necessary – verbal or psychological abuse will suffice
- Soliciting or encouraging another to engage in such activity is also considered hazing
- Hazing is typically associated with “rites of passage” or initiations

Some examples include hitting or striking, tattooing, branding, shaving, “blood pinning,” and forcing alcohol consumption

Hazing does not include authorized training of any sort, administrative corrective measures, or additional military instruction

Actual or implied consent to hazing does not eliminate the perpetrator’s culpability

### **COMMAND ACTION**

Commanders and senior NCOs must promptly and thoroughly investigate all allegations of hazing and take appropriate action if hazing is substantiated

A commander’s options begin with counseling and reprimands and extend to court-martial for serious cases that involve assault, aggravated assault, maltreatment of subordinates, etc.

Commanders must evaluate all activities that appear to be an initiation or a “rite of passage” to ensure that the dignity and respect of all members are maintained

### **PUNITIVE REGULATIONS AND THE UCMJ**

Although the Secretary of Defense has authorized all services to incorporate this policy into a punitive regulation, the Air Force does not have such a regulation and there are no plans to incorporate the policy into such a regulation; however, the Air Force may pursue disciplinary action under the UCMJ for dereliction of duty or for the underlying misconduct, such as assault, battery, maltreatment of subordinates, etc.

**References:**

SECDEF Memo, *Hazing*, 28 August 1997

HQ USAF/CC Memo, *Hazing*, 30 October 1997

## **HOMOSEXUAL CONDUCT**

### **DoD POLICY**

Congress has determined homosexual conduct is incompatible with military service

Homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct

Homosexual conduct is the focus of the DoD policy

Bi-sexual conduct is treated the same way as homosexual conduct

### **DEFINITIONS**

Homosexual conduct is

- A homosexual act
- Bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
- Bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts
- Homosexual statements
- Language or behavior that a reasonable person would believe was intended to convey a statement that a person engages in, attempts to engage in, or has the propensity to engage in homosexual acts
- Includes statements such as "I am homosexual," "I am gay," "I am lesbian," or "I have a homosexual orientation"
- A statement by member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation, not because it reflects on the member's sexual orientation, but because it indicates a likelihood the member engages in or will engage in homosexual acts
- Homosexual marriage or attempted homosexual marriage

Propensity 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

## **INQUIRIES**

Only a commander can initiate a fact-finding inquiry into alleged homosexual conduct by an Air Force member

-- First sergeants, supervisors and administrative officers do not have the authority to conduct an inquiry except at the direction of a commander

Commanders may personally perform an inquiry or appoint an inquiry officer (IO)

Before initiating an inquiry, the commander must have (1) credible information (2) that a basis for discharge exists (i.e., the member has engaged in homosexual conduct)

-- Credible information exists when the information supports a reasonable belief that a member has engaged in homosexual conduct

--- Credible information is analogous to “probable cause” in a search situation

---- It must be based on a credible source and be sufficiently specific so that a commander can make a reasonable determination that the member engaged in homosexual conduct

---- The motives of the person making the report to the commander and the surrounding circumstances are relevant to the determination

-- A commander makes the determination based on facts, not just a belief or suspicion

-- If a member reports being threatened or harassed because he or she is labeled or perceived to be a homosexual, such information alone does not justify an inquiry into alleged homosexual conduct by the member reporting the threats or harassment

-- Associational activities, such as frequenting gay bars, gay parades, and gay web-sites, do not support that the member has engaged in homosexual conduct and cannot be the basis for an inquiry

Inquiries solely to determine a member's sexual orientation are prohibited

Commanders are responsible for ensuring that inquiries are conducted properly

Prior to the initiation of any inquiry into homosexual conduct, the commander must consult through the chain of command the general court-martial convening authority (GCMCA)

-- Single base GCMCAs, NAFs, or higher level GCMCAs may, but are not required to, coordinate with the next higher level of command

Prior to the initiation of any inquiry into homosexual conduct, the SJA of the initiating commander must consult the SJA of the GCMCA

Before interviewing the member whose conduct is in question, the member must be advised of the DoD policy on homosexual conduct and of Article 31, UCMJ, rights in appropriate cases

Inquiries are not required in every case and may be unnecessary

A commander may initiate an inquiry if the commander believes the member has engaged in homosexual conduct to avoid a military service obligation (service commitment, reassignment, deployment, etc.)

-- The focus of the inquiry is the motivation for the conduct

Informal fact-finding inquires and administrative separation procedures are the preferred method of addressing homosexual conduct

-- Informal fact-finding inquiry is limited to interviewing the member, persons reporting homosexual conduct by the member, individuals suggested by the member to be interviewed, and the member's immediate supervisory chain of command (supervisor through the supervisory chain of command to the commander)

Substantial fact-finding inquiries

-- Extend beyond questioning the member, persons who report the homosexual conduct, individuals suggested by the member to be interviewed and the member's immediate supervisory chain of command

-- Are broader than informal fact-findings; and

-- Are only initiated, if required, after informal fact-finding

-- Limitations apply to substantial inquiries into whether a statement was made for the purpose of seeking separation and are discussed below

-- The need to conduct a substantial inquiry will be infrequent

The scope of any inquiry cannot be expanded by the commander or appointed IO beyond the specific conduct and individual or individuals about whom the IO is specifically tasked to inquire

-- Conduct forming the basis for separation of other members that comes to the attention of an IO cannot be used to expand the scope of an inquiry, but must be referred to the appropriate commander for consideration of initiation of a separate inquiry

A commander can only initiate a substantial inquiry to determine whether a statement of homosexuality was made for the purpose of seeking separation from military service only after a request through the chain of command and the Vice Chief of Staff of the Air Force has been approved by the Under Secretary of the Air Force

-- The request must include the following

--- An explanation of why it is expected that the expanded inquiry will result in additional relevant evidence; and

--- Why the Air Force benefit in expanding the inquiry outweighs any foreseeable disadvantage of expanding the inquiry

## **INVESTIGATIONS**

Criminal investigations cannot be initiated solely to determine sexual orientation

A prerequisite to initiation of an investigation is that a violation of the UCMJ has been committed

-- A statement of homosexuality does not violate the UCMJ nor do all homosexual acts (holding hands, touching, caressing, etc.)

Upon determining that there is credible information that a violation of the UCMJ has occurred, commanders may request an OSI or SFS investigation

-- DoDI 5505.8 states that OSI commanders may decline to open an investigation if they determine the request lacks credible information that a violation has occurred or is not in keeping with established policy

## **SEPARATIONS**

When a commander determines that a member has engaged in homosexual conduct, the commander must initiate separation

-- Even if the commander believes an individual might meet the retention criteria for individuals who engage in homosexual acts (discussed below), the commander must initiate discharge action

The commander may refuse to initiate separation action for homosexual conduct only if the commander determines

-- The member engaged in homosexual conduct for the purpose of avoiding or terminating military service and separation is not in the best interest of the Air Force

-- This exception is best suited for exigent circumstances where the member's skills are critical to mission accomplishment

Any member processed for separation for homosexual conduct is entitled to present his or her case to an administrative discharge board or to waive a board hearing and leave the determination to the separation authority

- The board has an independent obligation to review the evidence presented by both the government and the member
- The board uses a “preponderance of the evidence” standard to arrive at its conclusions and make its recommendations
- The member is entitled to representation by a military defense counsel at no expense and/or to representation by a civilian counsel at his or her own expense
- The member can present evidence and call witnesses to show that he or she did not engage in homosexual conduct, or even if he or she did, to establish that he or she should be retained
- The separation authority makes the final decision

A member will be separated for homosexual acts unless he or she can demonstrate by a preponderance of the evidence all of the following

- Such acts are a departure from the member’s usual and customary behavior
- Such acts under all the circumstances are unlikely to recur
- Such acts were not accompanied by use of force, coercion, or intimidation
- Under the particular circumstances, the member’s continued presence in the Air Force is consistent with the interests of the Air Force, and
- The member does not have a propensity or intent to engage in homosexual acts

A statement of homosexuality creates a rebuttable presumption that the member engages in, attempts to engage in, or intends to or has a propensity to engage in homosexual acts

- To avoid separation, the member must rebut by a preponderance of the evidence the presumption
- Some or all of the following may be considered
- Whether the member has engaged in homosexual acts
- The member's credibility
- Testimony from others about the member's past conduct, character, and credibility

---- The nature and circumstances of the member's statement; and

---- Any other evidence relevant to whether the member is likely to engage in homosexual acts

### **CHARACTERIZATION OF DISCHARGE/SERVICE**

The discharge will be deemed an entry level separation if the member is in entry level status and an under other than honorable conditions (UOTHC) characterization is not warranted

The member's service will be characterized as under honorable conditions (general) or honorable if the member is not in entry level status and a UOTHC is not warranted

UOTHC is authorized only when the homosexual act was performed

- By using force, coercion, or intimidation
- With a person under 16 years of age
- With a subordinate in circumstances that violate customary military superior-subordinate relationships
- Openly in public view
- For compensation
- Aboard a military vessel or aircraft; or
- In another location subject to military control under aggravating circumstances

### **RECOUPMENT**

A member separated for homosexual conduct may be subject to a recoupment of special pay, bonuses, and educational assistance if

- A UOTHC characterization is authorized or the conduct is punishable under the UCMJ; or
- The member made a homosexual statement, engaged in a homosexual act, or married/attempted to marry someone of the same sex for the purpose of avoiding service
- The administrative discharge board or separation authority when the board is waived must make a specific written finding that recoupment is authorized under the facts of the case and then a separate written recommendation that recoupment should be effected

### **SECURITY CLEARANCE**

Sexual orientation alone is not a security concern

Sexual behavior may be a security concern if it involves criminal offenses, indicates a personality or emotional disorder, subjects the individual to undue influence or coercion (blackmail), or reflects lack of judgment or discretion (DoD 5200.2-R, January 1987, Incorporating Through Change 3, 23 February 1996)

Information of criminal homosexual acts disclosed during a security background investigation may not be provided to military authorities for administrative or judicial actions, unless such acts were performed

- By force, coercion or intimidation
- With a person under 17 years
- Openly in public view
- For compensation or with an offer of compensation to another
- While on active duty or in a reserve component aboard a military aircraft or vessel or with a subordinate in violation of the customary military superior-subordinate relationship

Information of noncriminal homosexual conduct may not be provided to military authorities for any purpose

## **REPORTING REQUIREMENTS**

Consult with your MAJCOM and SJA for special reporting requirements for homosexual conduct inquiries or investigations

## **HARASSMENT**

All individuals must be treated with dignity and respect, free of threats and harassment

Even though homosexual conduct is a bar to military service, harassment or threats are not acceptable responses to homosexual conduct

Commanders must promptly investigate allegations of harassment or threats

-- If a member reports being threatened or harassed because he or she is labeled or perceived to be a homosexual, such information alone does not justify an inquiry into alleged homosexual conduct by the member reporting the threats or harassment

-- If a commander initiates an investigation into harassment or threats and information concerning homosexual conduct surfaces, the commander must carefully consider the source of information and the surrounding circumstances prior to initiating an inquiry into the homosexual conduct (i.e., credible evidence must exist)

**References:**

10 U.S.C. § 654

DoDD 1304.26, *Qualification Standards for Enlistment, Appointment and Induction*,  
21 December 1993, Incorporating Through Change 1, 4 March 1994

DoDI 5505.8, *Investigations of Sexual Misconduct by the Defense Criminal Investigative  
Organizations and Other DoD Law Enforcement Organizations*, 6 June 2000

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004

AFI 36-3208, *Administrative Separation of Airmen*, 23 May 2003

AFPAM 36-3210, *Procedural Guide for Enlisted Administrative Discharge Boards*,  
1 November 1995

AFI 51-602, *Boards of Officers*, 2 March 1994

OUSD Memo, *Guidelines for Investigating Threats Against or Harassment of Services Members  
Based on Alleged Homosexuality*, 12 August 1999

OUSD Memo, *Implementation of Recommendations Concerning Homosexuality Conduct*,  
12 August 1999

SAF Memo, *Air Force Policy on Harassment*, 10 January 2000

AF/CC Memo, *Homosexual Policy Guidance*, 10 March 2000

## **HUMANITARIAN REASSIGNMENTS / DEFERMENTS**

When Air Force members incur substantial and continuing personal or family problems that can be relieved by reassigning them to a particular geographical area or allowing them to stay in a current assignment instead of being moved, the member may apply for a humanitarian reassignment or deferment under the provisions of AFI 36-2110. This instruction applies to both officer and enlisted members.

The service member must be effectively used in the duty (officer) or control (enlisted) AFSC because a move may not be made at government expense when it is based solely on humanitarian reasons. There must be a valid vacant authorization at the gaining base

To be eligible for a humanitarian action, several conditions must be met, including

A vacancy must exist at the new duty station

The problem must be more severe than those normally encountered by comparable Air Force members

The member's presence is absolutely essential to alleviate the problem, and

The problem can be resolved within a reasonable period of time (normally 12 months)

Some common examples that may warrant humanitarian reassignment/deferment are

Recent death (within 6 months) of member's spouse or child/stepchild

Serious financial problems not caused by member

Terminal illness of family member when death is imminent within 2 years

State law requires presence to complete adoption procedures

Successful establishment or operation of an effective family advocacy program

Spouse abandons dependents while the service member is serving an unaccompanied overseas tour, or

Sexual abuse or assault of a dependent when it would be detrimental to stay in the area

If the problem can be solved by the member taking ordinary or emergency leave, humanitarian deferment or reassignment will ordinarily not be granted

When the commander learns of a member with personal hardships who may be interested in applying for a humanitarian reassignment or deferment, he or she should first direct the member

to AFI 36-2110. Following that, the member receives additional counseling from the local MPF assignments section, which will provide the member with the information needed to submit a formal application

The commander or staff may help secure adequate documentation to support the request. As with most other administrative actions, the burden is on the applicant to provide sufficient justification for the requested action

**Reference:**

AFI 36-2110, *Assignments*, 9 June 2003

## JURY SERVICE

When an Air Force member on active duty receives a summons to state or local jury duty, the member should inform his or her immediate commander. The commander determines whether the member should perform jury service pursuant to AFI 51-301. Not every military member is exempt from jury service

For the purpose of jury service, “active duty” includes full-time duty in the active military service, full-time training duty, annual training duty, active duty for training, and attending a service school while on active military service

## EXEMPTION FROM JURY SERVICE

Categorical Exemption: All general officers, commanders, operating forces (forces whose primary missions are participating in and supporting combat), personnel in training, and personnel stationed outside the US are categorically exempt from serving on a state or local jury

General Exemption (Not Categorical): For all other personnel, the commander determines whether jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity. This authority to determine such exemptions is pursuant to 10 U.S.C. 982 and delegated to the special court-martial convening authority (SPCMCA) by the SecAF

## PROCEDURES

If the member is categorically exempt, the immediate commander or designee notifies the issuing state or local official by written notice (complying with the format in AFI 51-301)

If the member is generally (but not categorically) exempt, the immediate commander decides whether jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity

If jury duty would not unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity, the member must serve jury duty

If the immediate commander decides jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity, the immediate commander obtains a final exemption from the SPCMCA using the criteria in AFI 51-301

The SPCMCA may then decide whether

Exemption is inappropriate and instruct the member to comply with the jury summons

Exemption is appropriate, and direct the immediate commander to send a written notice of exemption to the issuing state or local official complying with AFI 51-301

The SPCMCA's determination is final

Time spent by military members on jury duty service should not be charged against leave

Pay or entitlements should not be deducted for the period of service

Fees and reimbursement

Military members are not entitled to keep any fees for jury service; those fees should be made payable to the U.S. Treasury and turned in at Accounting and Finance

Military members may receive and keep reimbursement from the state or local jury authority for expenses incurred in the performance of jury duty, such as transportation costs or parking fees

**References:**

10 U.S.C. 982

DoDD 5525.8, *Service by Members of the Armed Forces on State and Local Juries*,  
13 June 1988

AFI 51-301, *Civil Litigation*, 1 July 2002

## **LIMITED PRIVILEGE FOR SUICIDE PREVENTION**

### **PURPOSE**

Commanders who have concerns that a member under their command who is facing disciplinary action may be at risk of suicide, can refer the member to the Life Skills Center for a mental health evaluation (MHE). Under limited circumstances, confidences revealed during such consultations may be kept confidential between the patient and the mental health provider

The objective of the program is to identify and treat those members who pose a genuine risk of suicide by providing limited confidentiality with respect to their discussions with a mental health provider (MHP)

The instruction governing the procedures for the program is AFI 44-109. This instruction

Provides guidance for commanders who wish to make a referral

Establishes the rights of Air Force members referred by their commanders for mental health evaluations; and

Establishes a limited confidential privilege between the MHP and the patient

This program operates in conjunction with the guidance on commander-directed MHEs

### **APPLICATION AND PROCEDURES**

#### **Eligible Members**

The Limited Privilege for Suicide Prevention (LPSP) applies to those military members who have been officially notified (written or oral) that they are under investigation or suspected of violating the UCMJ

#### **Initiation**

After official notification, if an individual involved in the processing of the disciplinary action has a “good faith belief” the member being disciplined may present a risk of suicide, the individual shall communicate that fact to the member’s immediate commander along with a recommendation for a MHE and treatment in the LPSP program

Individuals involved in the processing of the disciplinary action who would be in a position to make this assessment include, but are not limited to, the defense counsel, the trial counsel, law enforcement officials, the staff judge advocate or any assistant staff judge advocate, the first sergeant, or the squadron executive officer

Based on the information provided by such an individual and upon any other relevant information and after consultation with an MHP, the commander may refer the member for an MHE

The procedures and rights associated with MHEs apply to such a referral. (For a more detailed discussion of the rights and procedures of an MHE, see article, Commander Directed Mental Health Evaluations, this chapter)

The MHP conducting the evaluation determines if the member poses a risk of suicide and, if so, initiates treatment

#### Duration

The limited protection offered by this program lasts only so long as the MHP believes there is a continuing risk of suicide

The MHP must notify the commander when the member no longer poses a risk of suicide

The limited protection offered under the program ends at that time

Though the instruction does not make this clear, as a practical matter, it appears the initial evaluation would be subject to that privilege even if the MHP determines afterward that the member does not pose a risk of suicide

#### LIMITED PROTECTION

Members in the program are granted limited protection with respect to the information revealed during or generated by their clinical relationship with the MHP

Any such information may not be used in any existing or future UCMJ action or when weighing the characterization of the member's service in a separation

Commanders, judge advocates, first sergeants, or any other authority with a need to know this information for official reasons, may have access to this information and use it for any other purpose authorized by law, directive, or instruction (including use as the basis for administrative discharge)

The limited protection does not apply to

The use of the information as evidence for impeachment or rebuttal purposes in any proceeding in which the information generated by and during the LPSP relationship was first introduced by the member concerned

Disciplinary or other action based on independently derived evidence; or

Any information gathered by the MHP or other provider prior to placement in the program or after release from the program (except for later created summaries/documents which pertain to treatment under the LPSP program)

#### RELATED ISSUE

Any confidential communication which a military member has with a psychotherapist may be privileged regardless of whether the member has been enrolled in the LPSP program according to Military Rule of Evidence 513

Confidential communications will be disclosed to persons or agencies with a proper and legitimate need for the information who are authorized by law to receive it (except as provided by MRE 513)

In cases not arising under the UCMJ, psychotherapists may appeal requests for confidential information to the installation Staff Judge Advocate (SJA)

When applying MRE 513, the installation SJA will resolve any questions of whether an exception to MRE 513 requires or allows disclosure. Even so, admissibility at trial will be determined by the military judge

Before inquiring with care providers, commanders should consult with their servicing SJA

#### **References:**

AFI 44-109, *Mental Health, Confidentiality, and Military Law*, 1 March 2000

DoDD 6490.1, *Mental Health Evaluations of Members of the Armed Forces*, 1 October 1997

MANUAL FOR COURTS-MARTIAL, UNITED STATES M.R.E. 513 (2002)

## **LINE OF DUTY DETERMINATIONS**

A Line of Duty (LOD) determination is an administrative tool for determining a member's duty status at the time an injury, illness, disability, or death is incurred. On the basis of the LOD determination, the member may be entitled to benefits administered by the Air Force, or exposed to liabilities. The key is the nexus between the injury, illness, disability, or death and the member's duty status.

## **LIMITS ON USE OF LOD DETERMINATION**

An LOD Determination shall not be used as disciplinary action against a member

An active duty member cannot be denied medical treatment based on an LOD determination. Moreover, an LOD determination does not authorize the United States to recoup the cost of medical care from the active duty member

An LOD determination may impact the following

Disability retirement and severance pay

Extension of enlistment

Veteran benefits

Survivor Benefit Plan

Medical benefits and incapacitation pay for members of the Air Reserve Component (ARC)

Basic Educational Assistance Death Benefit

## **WHEN LOD DETERMINATIONS ARE REQUIRED**

The LOD process must be initiated when a member, whether hospitalized or not, has an illness, injury or disease that results in

Inability to perform military duties for more than 24 hours

Likelihood of permanent disability

Death of a member (in every case where a member dies on active duty, at a minimum, an AF Form 348 must be completed; an administrative determination is not sufficient in a case of death)

Medical treatment of an ARC member regardless of the member's ability to perform military duties

The likelihood of an ARC member applying for incapacitation pay

## POSSIBLE LOD DETERMINATIONS

Existed Prior to Service (EPTS), LOD Not Applicable: Medical diagnosis determined that the death, illness, injury or disease, or the underlying condition causing it, existed before the member's entry into military service or between periods of service and was not aggravated by service

In Line of Duty: Presumed unless disease, death, illness, or injury occurred while member was absent without authority (AWOA) or as a result of member's misconduct

Not In Line of Duty, Due to Own Misconduct: A formal investigation determined that the member's illness, injury, disease, or death was proximately caused by the member's own misconduct (regardless of whether member was absent without authority)

Not In Line of Duty, Not Due To Own Misconduct: A formal investigation determined that the member's illness, injury, disease, or death occurred while the member was absent from duty

## PRESUMPTION OF LOD STATUS

An illness, injury, disease or death sustained by a member in an active duty status or in inactive duty training (IDT) status is presumed to have occurred in the line of duty. However, this presumption can be rebutted

## TYPES OF LOD DETERMINATIONS

Administrative determinations are made by a medical officer. If the medical officer determines that the condition existed prior to service, the medical officer simply annotates the member's medical record with an entry of "EPTS, LOD Not Applicable." If the illness, injury, disease or death falls into one of the following conditions, the medical officer makes an administrative determination by finding the member's condition to be "in the line of duty": incurred as a passenger in a common carrier or military aircraft; characterized as a hostile casualty; an illness or disease clearly not involving misconduct or caused by abuse of drugs or alcohol; or a simple injury which is not likely to result in permanent disability

Informal determinations are processed on AF Form 348 and initiated when an administrative determination is not appropriate. The commander investigates the circumstances of the case to determine if the member's illness, injury, disease or death occurred while the member was absent without authority, or is due to the member's own misconduct

Formal determinations are initiated with an AF Form 348, but also include an investigation report and a DD Form 261

Required to support a determination of "Not in Line of Duty"

Immediate commander will recommend a formal determination when the illness, injury, disease, or death occurred

Under strange or doubtful circumstances, or due to member's misconduct or willful negligence

While the member was absent without authority

Under circumstances the commander believes should be fully investigated

The commander forwards AF Form 348 to the SJA for review for legal sufficiency

#### LOD AND MISCONDUCT DETERMINATIONS FOR VARIOUS SITUATIONS

See Attachment 5, AFI 36-2910, for appropriate guidance and rules. Some of these rules are based on historic precedents. For more in-depth research, check the Digest of Opinions of The Judge Advocate Generals of the Armed Forces

#### **References:**

AFI 36-2910, *Line of Duty (Misconduct) Determination*, 4 October 2002

AFI 36-3002, *Casualty Services*, 26 August 1994

## **OFFICER GRADE DETERMINATIONS**

While the grade at which an officer retires after serving at least twenty years is normally the highest grade held, federal law permits the SecAF to retire both active and reserve officers in a lower grade if their service has not been “satisfactory.” This authority has been delegated to the Director, Air Force Review Boards Agency. In those cases where an officer’s conduct or record raises questions as to the quality of his/her service in a particular grade, an officer grade determination (OGD) is required.

When an officer applies for retirement, any commander in the officer’s chain may initiate an OGD if there is evidence the officer’s service in the higher grade has been less than satisfactory

A commander must submit an OGD request through the MAJCOM if the officer has had a

Conviction by court-martial

Conviction by a civilian court for a crime involving moral turpitude; and

Nonjudicial Punishment within two years of the application for retirement

A commander may submit an OGD request through MAJCOM in other cases if he or she believes an OGD is appropriate. Factors to consider include, but are not limited to, the following

Misconduct which has fallen short of a criminal conviction or Article 15 punishment

Letters of Reprimand

Unfavorable Information File

Control Roster Actions

Referral Officer Performance Report

At the time an officer applies for retirement, the commander will review the officer’s record to determine if any of the above conditions exist. If based on that review, the commander initiates an OGD

The commander must notify the officer the OGD is being initiated and why

The officer is given ten calendar days to respond

The commander then will make a recommendation regarding the officer’s retirement grade. That recommendation must accompany the retirement application as it is forwarded to the MPF

For retirement in lieu of administrative or punitive action, notification must indicate that retirement in a lower grade may result

OGD packages, including matters and documents submitted by the member, are forwarded through command channels to AFPC who sends the case file to the Air Force Review Boards Agency. It is reviewed by the Air Force Personnel Board (AFPB) with a recommendation given to the Air Force Review Boards Agency Director

Any questions concerning officer misconduct, reporting requirements, or the appropriate administrative or judicial response to misconduct should be addressed through the servicing staff judge advocate or the military personnel flight

**References:**

10 USC 1370, Satisfactory Service for Active Duty Officers

10 USC 12771, Satisfactory Service for Reserve Officers

AFI 36-3203, *Service Retirements*, 12 September 2003

Message, R 011700Z, June 1995, Officer Grade Determinations in Conjunction with Retirement

AFI 36-2023, 14 Oct 1994, *The Air Force Personnel Council and the Air Force Personnel Board*

SAF Order 240.8, 17 Dec 99

## **PATERNITY CLAIMS**

- If an individual claims an active duty member is the father of an illegitimate child, the commander should

Counsel the member about the allegations, and

Advise the member about the entitlement to legal assistance on legal rights and obligations

If the member denies paternity, inform the claimant accordingly and advise them the Air Force does not have authority to adjudicate paternity claims

--- If the member acknowledges paternity, advise the member of financial support obligations. See Financial Responsibility, this chapter. Also, refer the member to the MPF, Customer Service Element, for guidance about the child's eligibility for an ID card and to the finance office for guidance about "with dependent" rates

If the member does not establish paternity by his own admission, paternity can be established through a judicial order or a decree of paternity or child support order from a United States or foreign court of competent jurisdiction. If paternity is established, the commander should counsel the individual on his support obligations

### **References:**

AFI 36-2906, *Personal Financial Responsibility*, 1 January 1998

DoDD 1344.3, *Paternity Claims and Adoption Proceedings Involving Members and Former Members of the Armed Forces*, 1 February 1978, Ch 1, November 16, 1994

## **PERSONNEL RELIABILITY PROGRAM**

The Personnel Reliability Program (PRP) is a program designed to ensure the highest possible standards of individual reliability in personnel performing duties associated with nuclear weapons systems and critical components. It is intended to prevent the unauthorized launch of a missile or aircraft armed with a nuclear weapon, or the unauthorized detonation of a nuclear weapon. Personnel in the PRP must be certified.

### **RESPONSIBILITIES**

Wing commanders are responsible for the wing PRP. They serve as the reviewing official for all permanent decertification case files started by subordinate units. They also approve or disapprove requests for removal or permanent decertification for subordinate units

Group and unit commanders who control nuclear weapons, weapon systems, or critical components, are certifying officials (COs) who certify and initiate decertification for their personnel. They may delegate this duty to a deputy or assistant. Certifying officials and their delegates must be certified in a PRP category equal to, or higher than the personnel they are certifying

Individuals in the PRP must monitor their own reliability. They must also notify the CO of any potentially disqualifying information (PDI) (either their own or that of co-workers)

### **CATEGORIES OF PRP POSITIONS**

**Critical position:** requires a person to be in close physical proximity to a nuclear weapon. This person controls access to or uses technical data on the electrical or mechanical parts, or has access to unlock and or authenticate values of a nuclear weapon or weapons system that launch, release, or detonate the weapon

**Controlled position:** requires the assigned person to enter a “no-lone” zone or to control entry into a “no-lone” zone. This person has access, but no technical knowledge pertaining to the launching, releasing, or detonating of a nuclear weapon or critical component

### **PRP MANDATORY SELECTION CRITERIA**

Individuals selected and certified for the PRP must meet the following minimum criteria at all times

Have an S-1 (no psychiatric disorder) profile (or civilian equivalent)

Are technically competent

Have the required security investigation and security clearance

Have a positive attitude toward nuclear weapons duty and the PRP objectives

Are not under consideration for separation for cause, under court-martial charges, or awaiting civilian trial for felony or misdemeanor charges

Are U.S. citizens or U.S. nationals

## CERTIFICATIONS

A formal certification occurs when an individual is placed in PRP and possesses the required security investigation

An interim certification occurs when an individual is placed in PRP and does not possess the required security investigation for formal certification, but does have a security investigation adequate for interim clearance

An administrative certification is granted when an individual is not currently formally or interim certified for PRP duties and is identified for an assignment to a PRP position

## REMOVAL FROM PRP

Members may be removed from PRP duties in one of three ways: by suspension, by temporary decertification, or by permanent decertification

### Suspension

Suspension is used to immediately remove an individual from PRP-related duties (for a maximum of 30 days) without decertification

The individual is still considered reliable with regard to the PRP, but because of the circumstances, cannot perform the nuclear related duties requiring PRP certification. The certifying official can use this time to research the facts to determine if an individual's reliability is impaired. However, a suspension should not be used in place of decertification when the facts and circumstances indicate unreliable behavior

The certifying official makes the final decision

### Temporary Decertification

Temporary decertification is used to keep an individual from performing nuclear related duties for up to 180 days when an individual's job performance or reliability is in question or impaired and neither suspension nor permanent decertification is appropriate. The temporary decertification may be extended in 30-day increments up to 270 days if more time is needed to make a decision

A temporary decertification should not be used in place of a permanent decertification if the facts indicate a permanent decertification is more appropriate

### Permanent Decertification

Permanent decertifications are used to remove an individual from the PRP in situations that will not allow for suspension or temporary decertification

Permanent decertification indicates the individual has questionable reliability or long-term impaired capability

Permanent decertification is appropriate when

The individual's drug abuse has been confirmed

The individual is diagnosed as an alcohol dependent

The individual is being involuntarily discharged or removed for cause

The individual no longer meets the mandatory selection criteria (see list of criteria above)

The individual is not qualified for administrative certification for PCS or training; or

The individual's security clearance eligibility has been revoked

### **References:**

AFI 36-2104, *Nuclear Weapons Personnel Reliability Program*, 29 May 2003

AFI 31-501, *Personnel Security Program Management*, 1 August 2000

AFI 91-101, *Air Force Nuclear Weapons Surety Program*, 24 February 2000

## **POLITICAL ACTIVITIES BY AIR FORCE MEMBERS**

Political activities by Air Force members may be restricted in order to reach the goal of a politically neutral military establishment through avoidance of partisan politics. The Air Force provides guidance on permissible and impermissible political activities in AFI-51-902, *Political Activities by Members of the US Air Force*. Violations of AFI 51-902 are punishable under Article 92, UCMJ, Failure to Obey a Lawful Regulation.

### **PERMITTED POLITICAL ACTIVITIES**

Air Force members may

- Register to vote, vote, and express a personal opinion on political candidates and issues, but not as a representative of the Air Force
- Make monetary contributions to a political organization or political committee favoring a particular candidate or slate of candidates, subject to limitations under federal election laws
- Attend political meetings or rallies as a spectator when not in uniform
- Join a political club and attend its meetings when not in uniform
- Serve as an election official, if such service is not as a representative of a partisan political party, does not interfere with military duties, is performed while out of uniform, and has the prior approval of the major command commander or equivalent authority (approval authority may be delegated to the installation commander)
- Sign a petition for specific legislative action or a petition to place a candidate's name on an official election ballot if the signing does not obligate the member to engage in partisan political activity and is done as a private citizen
- Write a letter to the editor of a newspaper expressing the member's personal views concerning public issues, if those views do not attempt to promote a partisan political cause
- Display a political sticker on the member's private vehicle or wear a political button when not in uniform and not on duty
- Write a personal letter, not for publication, expressing preference for a specific political candidate or cause, if the action is not part of an organized letter-writing campaign on behalf of a partisan political cause or candidate

### **PROHIBITED POLITICAL ACTIVITIES**

Air Force members may not

- Use official authority or influence to interfere with an election, to affect its course or outcome, to solicit votes for a particular candidate or issue, or to require or solicit political contributions from others
- Be a candidate for civil office or hold civil office, except as authorized by AFI 51-902, paragraphs 5 and 6 (see "CAMPAIGNING AND HOLDING PUBLIC OFFICE" below)
- Participate in partisan political management, campaigns, or conventions, or make public speeches in the course of such activity
- Allow, or cause to be published, partisan political articles signed or authorized by the member for soliciting votes for or against a partisan political party or candidate
- Serve in any official capacity or be listed as a sponsor of a partisan political club
- Speak before a partisan political gathering of any kind for promoting a partisan political party or candidate
- Participate in any radio, television, or other program or group discussion as an advocate of a partisan political party or candidate
- Conduct a political opinion survey under the auspices of a partisan political group or distribute partisan political literature
- Perform clerical or other duties for a partisan political committee during a campaign or on election day
- Solicit or otherwise engage in fund-raising activities in federal offices or facilities, including military installations, for a partisan political cause or candidate
- March or ride in a partisan political parade
- Participate in any organized effort to provide voters with transportation to the polls if the effort is organized by or associated with a partisan political party or candidate
- Attend, as an official representative of the Armed Forces, partisan political events, even without actively participating
- Engage in the public or organized recruitment of others to become partisan candidates for nomination or election to a civil office
- Make campaign contributions to a partisan political candidate
- Make campaign contributions to another member of the Armed Forces or an officer or employee of the federal government for promoting a political objective or cause

-- Solicit or receive a campaign contribution from another member of the Armed Forces or from a civilian officer or employee of the United States for promoting a political objective or cause

-- Use contemptuous words against the office holders described in Article 88, UCMJ (for officers) and AFI 51-902 (for officers and enlisted members)

-- Display a large political sign, banner, or poster on the top or side of a member's private vehicle (as distinguished from a political sticker)

-- Sell tickets for, or otherwise actively promote, political dinners and other such fund-raising events

### **CAMPAIGNING AND HOLDING PUBLIC OFFICE**

Air Force members may not campaign as a candidate for nomination or as a nominee for civil office except

-- With proper approval, a member may be permitted to file evidence of nomination or candidacy for nomination as required by law

-- Such a request will normally not be approved unless the member is likely to separate from active duty/active duty training at least 30 days before the scheduled election

Air Force members may not become a candidate for any civil office while serving an initial tour of extended active duty or a tour of extended active duty that the member agreed to perform as a condition to receiving schooling or training wholly or partly at U.S. expense

Except as authorized by law, regular officers on the active duty list and members on active or full-time National Guard duty under a call or order for a period of more than 180 days may not hold or exercise the functions of a civil office, including

-- Federal elective, appointed, or senior executive service offices; or

-- Any office in the government of a state; the District of Columbia; a territory, possession, or commonwealth of the United States; or in any political subdivision of the foregoing

-- Such members may hold or exercise the functions of other federal civil offices when assigned or detailed to that office to perform those functions

Enlisted members may seek and hold nonpartisan civil office on a local school board, neighborhood planning commission, and similar agencies

Officers on active duty may seek and hold nonpartisan civil office on an independent school board that is located exclusively on a military reservation, but such offices must be held in a private capacity and may not interfere with military duties

Air Force members may serve as a regular or reserve civilian law enforcement officer or member of a civilian fire or rescue squad when such service

- Is approved by the member's commander
- Is in the member's personal capacity
- Does not involve the exercise of military authority; and
- Does not interfere with performance of military duties

**References:**

DoDD 1344.10, *Political Activities by Members of the Armed Forces on Active Duty*,  
15 June 1990, Incorporating Through Change 2, 17 February 2000

DoD 5500.7-R, *Joint Ethics Regulation*, 30 August 93, Incorporating Through Change 4,  
6 August 1998

AFI 51-902, *Political Activities by Members of the US Air Force*, 1 January 1996

AFI 51-903, *Dissident and Protest Activities*, 1 February 1998

## **RELIGIOUS ACCOMMODATION**

DoD policy requires commanders to approve requests for religious accommodation when approval will not have an adverse impact on military readiness, unit cohesion, standards, or discipline. For guidance on handling religious accommodation requests regarding conscientious objectors, dress and personal appearance, or immunizations, refer to the AFIs specifically covering these areas. For all other religious accommodation requests, follow the guidance in DoDD 1300.17, *Accommodation of Religious Practices Within the Military Services* and AFI 36-2706, *Military Equal Opportunity and Treatment Program*. Actions that significantly burden an individual's practice of religion are further regulated by the Religious Freedom Restoration Act (42 U.S.C. § 2000bb).

## **RELIGIOUS PRACTICES**

Factors to consider in deciding whether to accommodate religious practices include

The importance of the military requirement, in terms of individual unit readiness, health and safety, discipline, morale, and cohesion

The religious importance of the accommodation to the requester

The cumulative impact of repeated accommodations of a similar nature

Alternative means available to meet the requested accommodation; and

Previous treatment of the same or similar requests, including requests made for other than religious reasons

When accommodation is not possible, the member must conform to military requirements or face disciplinary action, administrative separation, or reassignment/reclassification

## **RELIGIOUS APPAREL**

Religious apparel is defined as articles of clothing worn as part of the doctrinal or traditional observance of the religious faith practiced by the member. Hair and grooming practices required or observed by religious groups are not included within the meaning of religious apparel. The wear of jewelry bearing religious inscriptions or otherwise indicating religious affiliation or belief is subject to AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*

AFI 36-2903, table 2.5, specifically allows the installation commander and chaplain to approve a religious head covering indoors so long as it is plain and dark blue or black. Outdoors, the installation commander and chaplain may approve a religious head covering concealed under headgear

Other religious apparel must be concealed or worn only during religious services. Otherwise the member must process a religious apparel waiver request in accordance with AFI 36-2903, table 2.8

**References:**

42 U.S.C. § 2000bb, *The Religious Freedom Restoration Act*

DoDD 1300.17, *Accommodation of Religious Practices Within the Military*, 3 February 1988,  
Ch 1, 17 October 1988

AFI 36-2706, *Military Equal Opportunity and Treatment Program*, 1 December 1996

AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, 29 September 2002

AFJI 48-110, *Immunizations and Chemoprophylaxis*, 12 May 2004

AFI 36-3204, *Procedures for Applying as a Conscientious Objector*, 15 July 1994

## **ALLEGATIONS AGAINST SENIOR OFFICIALS AND COLONELS (OR EQUIVALENTS)**

AFI 90-301 establishes strict standards for reporting and investigating allegations against senior officials and colonels (or equivalents).

### **SENIOR OFFICIALS**

Senior officials are active duty, retired, Reserve, and ANG officers in the grade of O-7 select and above, and current and former civilian employees above the grade of GS/GM-15, including former and current Senior Executive Service (SES) employees and Air Force Civilian Presidential appointees

The senior official reporting requirements focus on "any allegations or adverse information of any kind" against Senior Officials

Adverse information is a violation of criminal law, the UCMJ, the Joint Ethics Regulation, the Anti-Deficiency Act, or military or civilian personnel policies; an abuse of authority; fraud, waste, and abuse or mismanagement; reprisal; misconduct by a medical provider requiring an evaluation of clinical privileges; prohibited discrimination or sexual harassment; or any other matter which may reflect adversely on the individual's judgment or exercise of authority (See AFI 90-301, Attachment 1)

Reporting policy: When a commander or an IG official receives an allegation or adverse information involving a senior official, it must be reported to SAF/IGS immediately. The reporting format is set out in AFI 90-301, Figure 1.1

IG officials who receive allegations against an Air Force senior official may inform their commanders only of the general nature of the allegations and the identity of the person against whom the allegations were made. They must not reveal the source of the allegations or the specific nature of the allegations (See AFI 90-301, paragraph 3.2.2.1)

Investigative policy: Unless otherwise specified by SAF/IG, all investigations into allegations against senior officials will be conducted by SAF/IGS

### **COLONELS (OR EQUIVALENTS)**

A colonel (or equivalent) is any Air Force active duty, Reserve, or Air National Guard officer in the grade of O-6; an officer who has been selected for promotion to the grade of O-6, but has not yet assumed that grade; or an Air Force civil service employee in the grade of GM/GS-15

Reporting policy: When an IG becomes aware of any adverse information (see definition above) or allegation against a colonel (or equivalent) which are not obviously frivolous and which, if true, would constitute misconduct, or improper or inappropriate conduct as defined in AFI 90-

301, they must notify SAF/IGQ immediately through their MAJCOM, FOA, or DRU channels. The reporting format is set out in AFI 90-301, Figure 1.2

Investigative policy: IGs at all levels must immediately conduct a complaint analysis when allegations against a colonel (or equivalent) are received. If, after the complaint analysis, it is determined that an IG investigation is not warranted, the IG will notify SAF/IGQ through MAJCOM, FOA, or DRU channels

**Reference:**

AFI 90-301, *Inspector General Complaints*, 30 January 2001

## **RETURN OF MILITARY PERSONNEL, EMPLOYEES, AND FAMILY MEMBERS FROM OVERSEAS FOR TRIAL**

Congress requires the Armed Services to have uniform regulations for delivering military members accused of a crime to civil authorities. The implementing regulation requires cooperation with federal and state officials who request assistance to enforce court orders, that are the subject of a felony charge, felony conviction, or contempt or show cause order. Air Force policy is as follows:

Air Force members, civilian employees, and family members are expected to comply with orders issued by a federal or state court of competent jurisdiction unless noncompliance is legally justified

Members and employees who persist in noncompliance are subject to adverse administrative action, including separation for cause

Air Force officials will ensure that members, employees, and family members, do not use assignments or officially sponsored residences outside the United States to avoid complying with valid court orders

### **PROCEDURE: REQUEST FOR MILITARY MEMBERS WHO ARE OVERSEAS**

When federal, state, or local authorities request delivery of an Air Force member who is stationed outside the United States and who is convicted of, or charged with, a felony or other serious offense punishable by confinement for more than one year, or who is sought for the unlawful taking of a child, will normally be expeditiously returned to the United States for delivery to the requesting authorities. The OPR for this process is the Air Force Legal Services Agency (AFLSA/JAJM)

Before taking action to return a member under the above-mentioned circumstances, the member must be afforded an opportunity to show legitimate cause for noncompliance

The Air Force Judge Advocate General may direct return for less serious offenses when deemed appropriate under the facts and circumstances of the particular case

Return is not required if the controversy can be resolved without returning the member to the United States

If approved, member receives PCS orders from AFPC with assignment to an installation as close to requesting jurisdiction as possible

Requesting authorities will be notified of member's new assignment, port of entry, and estimated time of arrival

A request for return of a member to the United States by civilian authorities may be denied when: (Note, commanders send recommendations for denial through their legal office, HQ AFLSA/JAJM, SAF/GC, and SAF/MI. The Under Secretary of Defense for Personnel and Readiness (USD/P&R) is the decision authority

The member's return would have an adverse impact on operational readiness or mission requirements

An international agreement precludes the member's return

The member is subject to foreign judicial or court-martial proceedings or a military department investigation

The member shows satisfactory evidence of legal efforts to resist the request or other legitimate causes for noncompliance; or

Other unusual facts or circumstances warrant a denial

Requests must be processed expeditiously. A delay of up to 90 days may be granted by The Air Force Judge Advocate General when

Efforts are in progress to resolve the controversy without the member's return

Additional time is required to permit the member to provide satisfactory evidence of legal efforts to resist the request or show legitimate cause for noncompliance

Additional time is needed to determine the mission impact of the member's loss or impact on any international agreement, foreign judicial proceeding or ongoing military department investigation or court-martial; or

Other unusual facts or circumstances warrant delay

#### **PROCEDURE: EMPLOYEES OR FAMILY MEMBERS WHO ARE OVERSEAS**

Upon receipt of a request for assistance from federal, state, or local authorities for custody involving noncompliance with a court order (arrest warrant, indictment, information, or contempt violation involving the unlawful removing of a child), after exhausting all reasonable efforts to resolve the matter without the employee or family member returning to the United States, the commanders shall strongly encourage the employee or family member to comply

If an employee does not comply, the commander shall consider imposing disciplinary action (including removal) against the employee. If a family member does not comply, the commander shall consider withdrawing command sponsorship of the family member

**References:**

UCMJ art. 14

DoDD 5525.9, *Compliance of DoD Members, Employees, and Family Members Outside the United States with Court Orders*, 27 December 1988, incorporating through Change 1, 17 August 1990

AFI 51-1001, *Delivery of Personnel to United States Civilian Authorities for Trial*, 21 July 1994

AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003

AFI 34-301, *Nonappropriated Fund Personnel Management and Administration*, 25 July 1994

AFI 36-704, *Discipline and Adverse Actions*, 22 July 1994

## SEXUAL HARASSMENT

### HISTORICAL BACKGROUND

No federal statute explicitly defines or outlaws sexual harassment in the workplace; however, several federal court decisions in the 1970s established sexual harassment as illegal sex discrimination in violation of Title VII of the Civil Rights Act of 1964

-- Title VII's prohibitions were made applicable to federal civilian employees as victims through the Equal Employment Opportunity Act of 1972

-- The protections of Title VII do not specifically apply to military members as victims

-- The Department of Defense's response to the issue of sexual harassment was the promulgation of DODD 1350.2, *Department of Defense Military Equal Opportunity (MEO) Program*, which establishes policy for DoD and provides guidance to the military services for the implementation of their own equal opportunity and treatment programs to combat sexual harassment

-- The Air Force's equal opportunity and treatment program is set forth in AFPAM 36-2705, *Discrimination and Sexual Harassment*, and AFI 36-2706, *Military Equal Opportunity and Treatment Program*

The Civil Rights Act of 1991 allows for recovery against an employer (which can include the Air Force) of compensatory damages (pain and suffering; emotional harm; etc.) up to \$300,000 per individual in cases of intentional discrimination brought by *civilian employees*

-- Such damages would likely have to be paid out of local base O&M funds

### DEFINITIONS

The Air Force defines sexual harassment as a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when

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

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

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

Workplace conduct may be actionable as “abusive work environment” harassment even if it does not result in concrete psychological harm to the victim; rather, it need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive

-- “Workplace” is an expansive term for military members and may include conduct on or off duty, 24 hours a day

Any person in a supervisory or command position who uses or condones any form of sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment

Any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature in the workplace is also engaging in sexual harassment

Although sexual harassment is generally perpetrated by men against women, any form of unwelcome sexual advance against employees of either gender may constitute unlawful sexual harassment

## **TYPES OF SEXUAL HARASSMENT**

Judicial decisions have recognized two basic kinds of sexual harassment, both of which are reflected in the Air Force’s definition -- *quid pro quo* sexual harassment and hostile environment sexual harassment

*Quid pro quo* (meaning “this for that”) sexual harassment occurs when an employee suffers or is threatened with some kind of employment injury for refusing to grant sexual favors or is promised some sort of tangible job benefit in exchange for sexual favors

-- Generally, it involves a supervisor/subordinate relationship where the victim is told to submit to sexual requests or be fired, demoted, or denied a promotion, an award, training opportunity, objective appraisal, etc.

-- A single incident may be enough to qualify as *quid pro quo* sexual harassment

-- A threat to take action that changes a victim’s employment situation in exchange for sexual favors without an actual job benefit or detriment is sufficient to constitute *quid pro quo* sexual harassment under Air Force regulations

Hostile environment occurs when a supervisor, co-worker, or someone else with whom the victim comes in contact on the job creates an abusive work environment or interferes with the employee’s work performance through words, actions, or conduct that is perceived as sexual in nature

-- Some examples include

- Discussing sexual activities
- Unnecessary touching
- Commenting on physical attributes
- Displaying sexually suggestive pictures or pornography
- Using demeaning or inappropriate terms, such as "Babe"
- Using unseemly or profane gestures
- Granting job favors to those who participate in consensual sexual activity; or
- Using sexually crude, profane, or offensive language
- A single act, if severe enough, may support a cause of action for hostile environment sexual harassment
- The nature, severity, frequency, and duration of the conduct are some factors the courts consider when evaluating whether certain conduct constitutes sexual harassment
- How severe or pervasive the harassment must be to constitute sexual harassment depends upon the specific facts
- Conduct that constitutes harassment in one situation may not in another; however, the commander who demands professional, civil conduct from members of the organization will prevent most of the problems that arise in this area
- An isolated epithet does not usually support a cause of action for hostile environment discrimination
- That does not mean that commanders are in any way restricted from taking disciplinary action based upon a single incident
- In fact, commanders are required to act to stop sexual harassment no matter how minor the conduct may be
- Because the legal boundaries involved in this type of sexual harassment are so foggy, supervisors and subordinates alike should avoid ANY sexual conduct in the workplace or any behavior that is in any way demeaning to members of the opposite sex
- All complaints, regardless of whether they do appear meet the legal test of hostile environment sexual harassment, should be quickly investigated and appropriate action taken to stop offensive conduct

--- Hostile environment sexual harassment is the most difficult type to recognize, and the particular facts of each situation determine whether offensive conduct has crossed the line from simply inappropriate behavior to sexual harassment

Under Title VII of the Civil Rights Act, civilian victims may sue the Air Force for monetary damages for sexual harassment in either form

-- An employer (i.e., the Air Force) will almost always have no defense in a case of sexual harassment if the facts show conduct that resulted in an actual tangible employment action (firing, demotion, etc.)

-- Provided no tangible employment action occurred, an employer (i.e., the Air Force) may be able to establish a defense to either limit or avoid liability if the employer has a formal, published policy against sexual harassment; provides training to its employees and supervisors about sexual harassment (and how to stop it); has a grievance and complaint system in place; and takes prompt effective corrective action to remedy a complaint of sexual harassment

-- If a commander finds out about an incident of sexual harassment (or an incident that could be sexual harassment), the commander should not wait for a complaint to be filed; rather, the commander should use his or her inherent authority to begin an inquiry into the matter in an effort to determine whether the conduct constituted sexual harassment and to remedy the problem

-- Command attention to sexual harassment must include the following actions

--- Publish clearly the Air Force's policy on sexual harassment, i.e., zero tolerance

--- Ensure that civilian employee/military member avenues of communication and complaint are well publicized throughout the unit

--- Provide appropriate training on sexual harassment

--- Act quickly to investigate all complaints of sexual harassment in a fair and impartial manner; and

--- Seek advice from the Military Equal Employment (MEO) Office (formerly Social Actions), the staff judge advocate (SJA) and the civilian personnel office (as appropriate) before taking action against offenders

#### COMMANDER'S INQUIRY UNDER 10 U.S.C. § 1561 (SEXUAL HARASSMENT INVESTIGATIONS AND REPORTS)—MILITARY OR CIVILIAN COMPLAINANT

10 U.S.C. § 1561 was passed in 1998 by Congress to ensure that complainants in sexual harassment cases receive a timely investigation and response to their complaints

It is important to remember that a complainant (either military or civilian) may elect the commander's inquiry and/or the EOT process for military complainant/EEO process for civilian complainant

The process is dual-tracked in that the commander's inquiry, if elected by the complainant, is conducted even if the EOT/EEO process has not been completed

When the commander receives a complaint, 10 U.S.C. § 1561 requires several actions (commanders should consult the local SJA office for assistance)

- Within 72 hours after receipt of the complaint, the commander must
  - forward the complaint or a detailed description of the allegation to the general court-martial convening authority (GCMCA)
  - begin the investigation; and
  - advise the complainant of the beginning of the investigation

The commander is responsible for ensuring the investigation is completed not later than 14 days after it was commenced

The commander shall also

- within 20 days after the investigation began, submit a final report on the results of the investigation, including any action taken as a result of the investigation, to the GCMCA; or
- submit a report on the progress made in completing the investigation to the GCMCA within 20 days after the investigation began and every 14 days thereafter until the investigation is completed, and upon completion of the investigation, then submit a final report on the results of the investigation, including any action taken as a result of the investigation

#### COMPLAINT PROCESSING--MILITARY COMPLAINANT

The MEO Office (formerly Social Actions) is the OPR for the Air Force Equal Opportunity and Treatment (EOT) Program and has primary responsibility for the maintenance of the program and for handling complaints of sexual harassment

- If a complaint (formal or informal) is filed with MEO, it will be handled by the EOT officer and the alleged occurrence of harassment will be called an EOT incident
- Generally, a formal complaint filed with MEO will generate an investigation by MEO personnel called a clarification

-- The clarification is designed to determine the facts and cause of the EOT incident, assess the severity of the incident and the effect on morale and good order and discipline, and develop recommendations concerning the classification of the incident and appropriate corrective action

--- A clarification will include witness interviews, taking statements, reviewing records and documents, and will ultimately conclude with a report by an investigating officer

--- The standard of proof used in a clarification is a preponderance of the credible evidence (i.e., more likely than not)

--- At the conclusion of the investigation, the EOT incident will be classified as minor, serious, or major and a recommendation will be made

--- Strict time standards exist for completion of the clarification

-- If the EOT incident is substantiated, a legal review is required before the report is forwarded to the concerned commander for appropriate action

-- The complaint process allows for an appeal of the findings of the clarification of formal complaints of sexual harassment

--- Findings concerning an informal complaint may be appealed by filing a formal complaint

--- Either the complainant or the subject may appeal to the next higher commander

--- Command action may continue regardless of the existence of an appeal

--- The appropriate legal office will conduct a legal review if the matter is appealed to the next level of command

--- SAF/MRB is the final review and appeal level

MEO will not investigate a complaint that involves criminal conduct or homosexual conduct

-- Criminal conduct will be handled by the base law enforcement community

-- Homosexual conduct must be handled by the commander consistent with the guidance for enforcing the military's homosexual conduct policy

-- Complaints against senior officials, colonels and colonel selects are investigated by the IG

-- If the result of a clarification is inconclusive, the IG may institute an investigation

MEO will not investigate a complaint filed by a civil service employee, but rather will document the complaint and refer it to the Equal Employment Opportunity (EEO) Office regardless of the status of the alleged offender

## COMPLAINT PROCESSING—CIVILIAN EMPLOYEE COMPLAINANT

The equal employment opportunity (EEO) counselor is the OPR for complaints of sexual harassment brought by civilian employees

PRE-COMPLAINT -- After a complainant has made initial contact with the EEO Office, an EEO counselor will advise the complainant of certain rights and obligations, place all allegations in the pre-complaint process regardless of merit or timeliness, and attempt to resolve the situation between the parties

-- The EEO counselor has 30 days to complete this process (60 days upon agreement by the complainant)

If the EEO counselor is unable to resolve the situation during pre-complaint processing, the complainant is advised that he/she may file a formal complaint of discrimination

FORMAL COMPLAINT -- The chief EEO counselor (CCD) will, among other things, advise the complainant of further rights

-- During this time, the complaint is evaluated by civilian personnel and the SJA's office for soundness and possible settlement

-- The CCD requests a complaint investigator from the Office of Complaint Investigations (OCI) within 30 days of the date the formal complaint was filed

-- OCI will investigate the complaint and send a copy of the report of investigation and complaint file to the CCD, Air Force Civilian Appellate Review Office (AFCARO), and the complainant or complainant's designated representative

-- The complainant must then elect whether an EEOC hearing is desired or whether he or she prefers the Air Force to issue a final decision

-- The complainant and the commander can meet and discuss possible resolution of the complaint during the period of time the complainant is deciding which route to pursue

-- The complainant has 30 days from receipt of the report of investigation to request an EEOC hearing

After the formal complaint process, it is possible for the complainant to make various appeals and eventually file suit in federal court; consult your SJA's office and see AFI 36-1201, *Discrimination Complaints*, 25 July 1994, for further information

## COMMAND OPTIONS TO ADDRESS SUBSTANTIATED COMPLAINTS OF SEXUAL HARASSMENT

Commanders who find military personnel to have engaged in sexual harassment have the usual disciplinary and administrative options, including counseling, admonishment, reprimand, nonjudicial punishment, administrative discharge, and court-martial

Commanders who find civilian personnel to have engaged in sexual harassment should normally focus any disciplinary action on the offensive act or acts involved (e.g., unwelcome touching, offensive comments, etc.) rather than alleging sexual harassment, and may deal with the misconduct pursuant to AFI 36-704 in the following manner

-- Reprimand to removal depending on the conduct and circumstances

--- Any disciplinary action which includes punishment greater than suspension for more than fourteen days can be appealed to the U.S. Merit Systems Protection Board (MSPB)

--- At an MSPB proceeding, the Air Force must prove by a preponderance of the evidence that the misconduct (e.g., offensive touching, offensive comments, etc.), took place and that the punishment imposed serves to promote the efficiency of the service

**References:**

10 U.S.C. § 1561

DoDD 1350.2, *Department of Defense Military Equal Opportunity (MEO) Program*, 18 August 1995, change 1, 7 May 1997

AFI 36-701, *Labor Management Relations*, 27 July 1994

AFI 36-704, *Discipline and Adverse Actions*, 22 July 1994

AFI 36-1201, *Discrimination Complaints*, 25 July 1994

AFPAM 36-2705, *Discrimination and Sexual Harassment*, 28 February 1995, Incorporating Through Change 1, 7 May 1997

AFI 36-2706, *Military Equal Opportunity and Treatment Program*, 1 December 1996

AFI 90-301, *Inspector General Complaints*, 30 January 2001

## SERVICEMEMBERS CIVIL RELIEF ACT

The Servicemembers Civil Relief Act (SCRA) provides a wide range of protection for individuals in the military service. The SCRA is intended to postpone or suspend certain *civil* obligations to enable service members to devote full attention to duty.

The Act applies to active duty members in civil matters (not criminal matters)

Reservists and the members of the National Guard are protected by the SCRA while on active duty

The protections generally begin on the date of entering active duty and generally terminate on the date of the person's release from active duty. However, exceptions may apply, depending on which provision of the Act is sought. Members who face problems in the areas listed below should be referred to the base legal office

The following paragraphs provide a synopsis of the most common and relevant provisions in the SCRA

Rent: The SCRA prohibits eviction, without a court order, of a service member and dependents from rented housing where the rent does not exceed \$2,400.00\* per month (\*this amount may be adjusted upward in years after 2003 using the inflationary formula found in the Act). Unless in the opinion of the court, the ability of the tenant to pay the agreed rent is not materially affected by the tenant's military service, the court may delay eviction proceedings for up to three months

Lease Termination: A military member may unilaterally cancel a lease of premises if they receive orders (PCS or deployment for more than 90 days). In addition, a military member may cancel a pre-service lease for a motor vehicle if they receive orders bringing them onto active duty. A military member may cancel any motor vehicle lease (pre-service or signed during service) for deployment orders for more than 180 days

Installment Contracts: A service member who enters into an installment contract before entering active duty is protected if his or her ability to make payments is materially affected by military service. Here, the courts will compare the service member's pre-service income and military income to determine his or her financial condition. The creditor cannot exercise rights of rescission, termination, or repossession without a court order

Maximum Rates of Interest: The interest rate on a member's pre-service obligation must be capped at 6% unless the creditor shows that the ability of the service member to pay interest above 6% is not materially affected by reason of their military service. This relief applies during the entire period of active duty service and must be applied retroactively if the member does not request the cap at the outset of military service

Stay of Proceedings: Courts have the discretion to delay a civil court proceeding when the requirements of military service prevent the member from either asserting or protecting a legal

right. The courts will look to whether military service materially affected the service member's ability to take or defend an action in court

Default Judgments: Before a court can enter a default judgment (for failure to respond to a lawsuit or failure to appear at trial) against a military member, the person suing the member must provide the court with an affidavit stating the defendant is not in the military. If the defendant is in the military, the court will appoint an attorney to represent the defendant's interests (usually by seeking a delay of proceedings). If a default judgment is entered against a service member, the judgment may be reopened if the member makes an application within 90 days after leaving active duty, shows he/she was prejudiced, and shows he/she had a legal defense

Insurance: A service member's private life insurance policy is protected against lapse, termination, or forfeiture for nonpayment of premiums for a period of military service plus two years. The insured or beneficiary must apply to the Veterans' Administration for protection. In addition, professional liability (malpractice) insurance must "freeze" when the member enters military service and then resume (exactly where it left off) after release from military service

Taxation: A service member's state of legal residence may tax military income. A member does not lose legal residence solely because of a transfer pursuant to military orders. For example, if a member is a Virginia resident and is moved to a base in California, the member does not lose Virginia residency nor will he or she be subject to pay California state income tax on his or her *military* pay

Adverse Actions: Creditors and insurers may not use a service member's exercise of rights under the SCRA as the sole basis for taking an adverse action (i.e., denial of credit, refusal of insurance, etc.) against the service member

**Reference:**

Servicemembers Civil Relief Act, 50 App. U.S.C. §§ 501-596 (2003)\*

\* The SCRA was enacted in 2003 and completely replaced the Soldiers' and Sailors' Civil Relief Act.

## SUMMARY COURT OFFICERS

For deceased active-duty Air Force members (and other entitled individuals), the Air Force collects, safeguards, and promptly disposes of their “personal property” and “personal effects.” The installation commander appoints a “summary court officer” (SCO) to perform these duties in accordance with AFI 34-244, *Disposition of Personal Property and Effects*. For deceased DoD civilians, see AFI 34-244, para. 4.4 and AFI 36-809, *Survivor Assistance*.

Personal effects: any personal item, organizational clothing or equipment physically located on or with the remains. Some examples of personal effects include, eyeglasses, jewelry, wallets, insignia, and clothing

Personal property: all of the other personal possessions of the decedent. Some examples of personal property include, household goods, mail and personal papers, and privately owned vehicles. Personal property does not include real property except for any debts associated with real property

Prioritized list of recipients to receive personal property and personal effects

Surviving spouse or person designated by spouse

Children in order of age. If the recipient is a minor, forward the property as instructed by the minor’s surviving parent or guardian

Parents in order of age. If parents divorced while the deceased was a minor, then the recipient is the custodial parent

Siblings in order of age

Next of kin of the deceased

A beneficiary named in the will of the deceased

Handling and Disposing of Personal Effects

The mortuary officer (MO) inventories, cleans, and secures the personal effects

The SCO collects and disposes of any organizational clothing and equipment

Once the MO ensures the authorized recipient has been officially notified of the death, the MO requests the authorized recipient provide instructions for disposing the personal effects

The MO may only destroy personal effects after receiving written authorization by the authorized recipient

## Handling and Disposing of Personal Property

### The SCO

Obtains property disposition instructions and the name and contact information of the authorized recipient(s) from the MO (para. 3.1.1)

Corresponds with the authorized recipient(s) (para. 3.1.2)

Places at least two death announcements in the base bulletin and/or newspaper asking for anyone with a claim for or against the estate to step forward (para. 3.1.5)

Inventories all property on AF Forms 1122 and 1122A (para. 3.2.1)

Promptly gathers the uniform/clothes needed for burial and gives to the MO (para. 3.2.2)

Removes any questionable items and determines the disposition of this property based on criteria in AFI 34-244 (para. 3.2.4)

Properly disposes of military ID cards and documents and mail and personal papers (para. 3.3 and 3.4)

Properly disposes of funds and negotiable instruments (para. 3.5)

Properly ships and stores items (para. 3.6-3.8)

Properly disposes of property in situations when an authorized recipient is not found (para. 3.10)

Closes the summary court file (para. 3.11)

### **References:**

AFI 34-244, *Disposition of Personal Property and Effects*, 2 March 2001

AFI 36-809, *Survivor Assistance*, 1 July 2003

AFI 36-3002, *Casualty Services*, 14 April 2000

## TATTOOS/BRANDS, BODY PIERCING, AND BODY ALTERATION

The Air Force policy on tattoos/brands, body piercing, and body alteration is found in AFI 36-2903, Table 2.5

Failure to comply with the standards concerning tattoos/brands, body piercing, and body alteration is punishable under Article 92, UCMJ

-- Members not complying with these provisions are subject to disciplinary action and may be involuntarily separated

### TATTOOS/BRANDS

The following tattoos/brands are prohibited

-- Unauthorized – tattoos/brands that are:

--- Obscene or advocate sexual, racial, ethnic or religious discrimination

--- Prejudicial to good order and discipline; or

--- Of a nature to bring discredit upon the Air Force

--- These tattoos are prohibited anywhere on the body, in or out of uniform, regardless of whether they can be covered by uniform items or not

-- Inappropriate – tattoos/brands that

--- Exceed one-fourth of the exposed body part; or

--- Are above the collarbone and readily visible when wearing an open-collar uniform

--- These tattoos/brands must be covered using current uniform items (e.g., long-sleeved shirt/blouse, pants/slacks, dark hosiery, etc.) or removed

### Tattoo removal

-- Members with an unauthorized tattoo/brand will have the tattoo removed at the member's expense (covering the tattoo is not an option)

-- Members with an inappropriate tattoo/brand will cover it with a current uniform item or remove it

-- Depending on the circumstances, commanders may seek Air Force medical support for voluntary removal of inappropriate tattoos

The member's commander determines on a case-by-case basis whether or not a tattoo/brand is unauthorized or inappropriate

-- Installation or higher commanders may impose more restrictive standards for tattoos/brands and body ornaments, on or off duty, in those locations where Air Force-wide standards may not be adequate because of cultural sensitivities or mission requirements

--- For example, in a foreign country where tattoos/brands or body ornaments are objectionable to host country citizens or at installations where members are undergoing basic military training, a commander may impose more restrictive rules for military members, even off duty and off the installation

## **BODY PIERCING**

Members are prohibited from attaching, affixing, or displaying objects, articles, jewelry or ornamentation through the ear, nose, tongue, or other exposed body part (which includes visible through the clothing), when

- Wearing a military uniform
- Performing official duty in civilian attire; or
- Wearing civilian attire on a military installation

Females in uniform or in civilian clothes while on duty, may wear one small, spherical, conservative, diamond, gold, white pearl, silver pierced or clip earring per earlobe; the earrings in both earlobes must match and the earrings must fit tightly without extending below the earlobes

In civilian clothes while off duty but on a military installation, females may wear conservative earrings within sensible limits

By implication, the policy allows males to wear earrings when in civilian clothes while off duty and off the military installation, but not on the military installation

Installation or higher commanders may impose more restrictive standards for tattoos/brands and body ornaments, on or off duty, in those locations where Air Force-wide standards may not be adequate because of cultural sensitivities or mission requirements

-- For example, in a foreign country where tattoos/brands or body ornaments are objectionable to host country citizens or at installations where members are undergoing basic military training, a commander may impose more restrictive rules for military members, even off duty and off the installation

Situations may arise where a commander may restrict the wear of even nonvisible body ornaments

-- These situations include any ornamentation that may interfere with the performance of the member's military duties

-- The factors to consider when making this determination include (but are not limited to) impairing the safe and effective operation of weapons, military equipment or machinery; posing a health or safety hazard to the wearer or others; and interfering with the proper wear of special or protective clothing or equipment

Commanders should consult with their servicing staff judge advocate prior to taking action

## **BODY ALTERATION/MODIFICATION**

Members are prohibited from altering or modifying their bodies if the alteration or alteration

-- Is intentional; and

-- Results in a visible, physical effect that detracts from a professional military image

-- Examples include, but are not limited to, tongue splitting or forking; tooth filing; and acquiring visible, disfiguring skin implants

### **References:**

AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, 29 September 2002

AFI 36-2002, *Regular Air Force and Special Category Accessions*, 7 April 1999, Attachment 2

## **UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT**

The Uniformed Services Employment and Reemployment Rights Act (USERRA) encourages noncareer military service by minimizing civilian employment problems resulting from such service. USERRA prohibits discrimination and acts of reprisal against members who serve in the uniformed services.

### **OVERVIEW**

An employer may not deny a person initial employment, promotion, or any benefit of employment because the person performed or is obliged to perform service in an uniformed service

Uniformed services means the Air Force, Army, Navy, Coast Guard, Marine Corps, and the commissioned corps of the Public Health Service

Service in the uniformed services means performing duty on a voluntary or involuntary basis in a uniformed service. It includes active duty, active and inactive duty for training, initial active duty for training, full-time National Guard duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty

The Act applies to any Federal executive agency, state and local governments, and private employers, regardless of size

### **ELIGIBILITY CRITERIA**

To have reemployment rights following service in an uniformed service, a person must meet the following eligibility criteria

Must have held a civilian job (may include temporary jobs)

Must have given advance notice to the employer that they were leaving the job for service in a uniformed service, unless such notice is impossible or unreasonable

The period of service does not exceed five years

The period of service is cumulative as long as the person is employed by or seeking reemployment with the same employer. A person starting a new job with a new employer receives a new five-year entitlement

Some categories of military service do not count toward the five-year limit such as most periodic and special reserve and National Guard training, most service in time of war or emergency, and involuntary extensions on active duty

Must have been released from service under honorable conditions; and

Must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment

## ENTITLEMENTS

People who meet the eligibility criteria under USERRA have seven basic entitlements

Prompt reinstatement

Accrued seniority, as if the person had been continuously employed

This is the “escalator principle,” meaning the returning veteran does not step back on the seniority escalator at the point he stepped off, but at the point he would have occupied had he kept his position continuously during his military service

The "status" the person would have attained if continuously employed includes, for example, location, opportunity to work during the day instead of at night, and the opportunity to work in a department or at such times when there are better opportunities to earn commissions or to be promoted

Immediate reinstatement of civilian health insurance coverage

There must be no waiting period and no exclusions of pre-existing conditions, other than those conditions which the Department of Veterans Affairs has determined to be service-connected

USERRA gives a person departing a civilian job for service in a uniformed service the right to elect continued employer-related health insurance coverage for him or herself, and his or her, family during the period of service

Other nonseniority benefits, as if the person had been on a furlough or leave of absence (such as holiday pay or bonuses)

Training or retraining and other accommodations

USERRA requires an employer to make reasonable efforts to qualify the returning person for work, including training on new equipment or methods

An employer must also make a reasonable effort to accommodate a returning disabled service member otherwise entitled to reemployment

Disability need not be permanent in order to confer rights (e.g., a broken leg)

If disability is such that it cannot be accommodated and disqualifies the person from their pre-service job, the employer is required to reemploy the person in some other position which is

most similar to the position to which they are otherwise entitled in terms of seniority, status, and pay

A person reemployed by an employer shall not be discharged, except for cause

Within one year from being reemployed, if continuous service in the uniformed services was more than 180 days

Within 180 days from being reemployed, if continuous service was 31-180 days

No special protection exists for service of 30 days or less

Prohibition of discrimination or reprisal

An employer cannot deny initial employment, reemployment, retention, promotion, or any benefit of employment because of a person's service or application to serve in the uniformed services

An employer also may not take adverse employment action against a person because they either take enforcement action under USERRA, testify or assist in an USERRA investigation, or exercise any right under USERRA

#### ASSISTANCE AND ENFORCEMENT

The Veterans' Employment and Training Service within the United States Department of Labor will assist persons claiming rights under USERRA, including persons claiming rights with respect to the Federal Government as a civilian employer

The Office of Employer Support for the Guard and Reserve (ESGR) will also assist service members in enforcing USERRA, 1-800-336-4590

#### **References:**

38 U.S.C. §§ 4301-4333

32 CFR Part 104

DoDI 1205.12, *Civilian Employment and Reemployment Rights of Applicants For, and Service Members and Former Service Members of the Uniformed Services*, 4 April 1996, incorporating through Change 1, 16 April 1997

# *Chapter 8*

## ***ETHICS ISSUES***

## **FINANCIAL DISCLOSURE FORMS**

The DoD currently uses two different financial disclosure forms, the OGE 450 and the SF 278. The *Joint Ethics Regulation* (JER) lists who must file, outlines the required contents in these reports, and specifies filing times. Although the JER contains sample forms, these forms are outdated and as with all issues involving the JER, commanders should contact their servicing SJA for assistance and guidance. Which form an individual must use depends on the rank or grade and responsibilities of that individual.

### **CONFIDENTIAL FINANCIAL DISCLOSURE REPORT (OGE 450)**

Persons required to file this form include

Commanding officers, heads and deputy heads of all installations or activities. A person who must file a SF 278 does not file an OGE 450 -- only the SF 278 is required from General Officers and Senior Executive employees

All military members (O-6 and below) and all civilian employees (GS/GM-15 and below) when the official position of such employees or members requires them to participate personally and substantially in taking an official action for contracting or procurement, or if the supervisor of such employee or member determines the position requires such a report to avoid an actual or apparent conflict of interest

If any questions exist as to whether an individual should file such a report, contact the servicing SJA

The specific requirements for the content of this report are set forth at Appendix C of the JER; several of these requirements are worth highlighting

A complete report is required for each filing period if changes have occurred since the last submission. A short version of the OGE 450 (form 450-A) may be used by filers who have not had reportable changes in their financial status since their last report

The report must provide sufficient information about the individual, as well as the individual's spouse and dependent children, that an informed judgment can be made regarding compliance with conflict of interest laws

No disclosure of amounts or values is required

This report must be filed within 30 days after assuming a covered position and annually thereafter

The annual report should be submitted to the servicing staff judge advocate no later than 31 October for preceding fiscal year [example: for FY04, the annual report must be submitted by 31 Oct 2004 for the time period 1 Oct 2003 to 30 Sep 2004]

## PUBLIC FINANCIAL DISCLOSURE REPORT (SF 278)

Persons required to file this form include

Regular and Reserve officers whose grade is O-7 or above

Members of the Senior Executive Service; and

Civilian employees whose positions are classified above GS/GM-15 or whose rate of basic pay is fixed at or above 120% of the minimum rate of basic pay for a GS/GM-15

The specific requirements for the content of this report are also set forth in Chapter 7 and Appendix C of the JER

Generally, this report is far more detailed in content than the OGE 450

For annual reports, a new report is required even if no changes have occurred since the last submission

Although specific amounts are not required on the report, individuals must indicate the value of assets within both a given range and type of asset

This report must be filed within 30 days after assuming a covered position

Annual reports must be filed between January 1 and May 15 and cover the preceding calendar year

An individual must also file a Termination Report between 15 and 30 days after terminating a covered position unless, within 30 days, the individual assumes another covered position

OGE has published a 2000 edition of the SF 278 Public Financial Disclosure Report. The new version has been updated to incorporate the category of assets over \$1 million, higher reporting thresholds for gifts over \$260, a continuation page for transactions listed on Schedule B, and a check-off box on the front of the form to indicate a filing extension

### **References:**

DoDD 5500.7-R, *Joint Ethics Regulation*, 30 August 1993 through; Change 4, 6 August 1998

<https://www.asc.wpafb.af.mil/base/legal/jac/ethics.htm>

[http://www.defenselink.mil/dodgc/defense\\_ethics/ethics\\_regulation/dir.htm](http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/dir.htm)

### **Forms:**

SF 278: [http://www.usoge.gov/pages/forms\\_pubs\\_otherdocs/fpo\\_files/forms/fr278fill\\_00.pdf](http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/forms/fr278fill_00.pdf)

OGE 450: [http://www.usoge.gov/pages/forms\\_pubs\\_otherdocs/fpo\\_files/forms/fr450fill\\_03.pdf](http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/forms/fr450fill_03.pdf)

## **FOREIGN GIFTS**

The United States Constitution prohibits persons holding an “office of profit or trust” for the United States from accepting gifts from foreign “personages or governments” without consent of Congress. Congress has consented to retaining and accepting gifts under certain conditions and when following certain procedures.

5 U.S.C. 7342 applies to military members, civilian employees, consultants, and their spouses or other dependents. This includes retired and reserve component members, regardless of duty, Air National Guard members, when federally recognized, and their spouses and dependents

No DoD employee may request, or otherwise encourage, the offer of a gift from a foreign government

Table favors, mementos, remembrances, or other tokens bestowed at official functions, and other gifts of minimal value received as souvenirs or marks of courtesy from a foreign government (e.g., plaques or paper certificates) may be accepted and retained by the recipient

“Minimal value,” is defined as not exceeding \$285 in retail value (“minimal value” is based on the Consumer Price Index and is subject to change)

The Government Services Agency (GSA) periodically adjusts the amount

The value of the gift is determined by U.S. retail value

Must aggregate the value if more than one gift is given at the same occasion

DoD employees must refuse offers of gifts of more than minimal value if practical to do so

Advise donor that United States law prohibits persons in service of the United States or their dependents from accepting the gift

Exceptions to the refusal rule

May accept a gift of greater value if refusal is likely to offend or embarrass the donor or adversely affect foreign relations. The gift becomes United States property and must be reported and turned in to the Air Force in accordance with procedures prescribed in AFI 51-901

A gift recipient may purchase a gift if he or she desires by paying full retail value

For minimal value gifts accepted, the person receiving the gift should make a written record describing the circumstance of the gift, including the date and place of presentation, identify and position of the donor, description and value of gift, and means by which the value was determined

**References:**

5 U.S.C. 7342

DoDD 5500-7.R, *Joint Ethics Regulation*, 30 August 1993; through Change 4, 6 August 1998

DoDD 1005.13, *Gifts from Foreign Governments*, 19 February 2002

AFI 51-901, *Gifts From Foreign Governments*, 2 December 2003

## FREQUENT FLYER PROGRAMS

Chapter 4 of the *Joint Ethics Regulation* (JER) contains the key rules associated with travel benefits. This chapter of the JER discusses Frequent Flyer Programs (FFPs) and what can be done with accumulated "bonus" mileage and other benefits received from official travel. Long-standing travel policy (now changed) dictated that military members and Federal government employees were obligated to turn over to the government any gift, gratuity or benefit received while performing official travel.

With few exceptions, the old rules barred the personal use of benefits offered as part of a frequent flyer club, or similar incentive program, that offered upgrades, travel perks and free trips based upon an accumulation of frequent flyer mileage with a particular airline

The law supporting this policy was substantially changed by the FY02 DoD Authorization Act, signed into law on 28 Dec 2001

Under the new law, Federal employees (including military members) and their families who receive a promotional item as a result of traveling at government expense, or while traveling in furtherance of government business at the expense of a non-Federal entity under 31 U.S.C. 1353, may keep the item for personal use if the item:

Is available to the public under the same terms; and

Can be accepted at no additional cost to the government

The term "promotional item" includes, among other things, frequent flyer miles, travel upgrades and access to carrier clubs or facilitates

The new policy applies to promotional items received before, on, or after the date of the enactment of the Act (28 Dec 2001)

The new rules were implemented in the Joint Federal Travel Regulation (JFTR) and Joint Travel Regulation (JTR) on 31 Dec 2001

Therefore, personnel may now accumulate and use official travel mileage and benefits for personal use

Travelers should be reminded of two related considerations

First, they may not be reimbursed twice for the same travel expenses

For example, a government traveler may accept reimbursement for lost luggage from the offending airline, but then may not then file a claim against the government for the loss -- the traveler has already been made whole by the carrier

Similarly, a traveler who accepts payments from an airline for voluntarily relinquishing a seat may keep those payments, but may not seek additional reimbursement from the government for expenses incurred by the resulting delay (i.e., per diem, lodging, miscellaneous expenses)

Member must take regular leave if delay would cause member not to arrive at his appointed place of duty on time

Voluntary bumping may not be done if it will interfere with the TDY mission

A traveler who is involuntarily bumped from a seat is considered to be "awaiting transportation" for per diem and miscellaneous expense reimbursement; therefore, any monetary compensation from the airline (including meal and/or lodging vouchers) for the denied seat belongs to the government

Member must turn in all such items with his TDY voucher on return

Second, government travelers are still required to use the Government travel card to cover the expenses incurred while traveling on official orders

Thus, a traveler who has a personal credit card that would generate more desirable travel benefits in conjunction with an official trip cannot decide to use his or her personal credit card in lieu of the Government travel card

Air Force will pay additional costs and per diem associated with the delay caused by involuntary bumping

**References:**

DoDD 5500.7-R, *Joint Ethics Regulation*, 30 August 1993; through Change 4, 6 August 1998  
*Joint Federal Travel Regulations*, 1 April 2002  
*Joint Travel Regulations*, 1 March 2004  
59 Comp. Gen. 203 (1980)

## **GIFTS TO SUPERIORS**

To avoid the appearance that a supervisor is being improperly influenced, the *Joint Ethics Regulation* (JER) issues the following guidelines concerning gifts to superiors:

Generally, Air Force personnel may **NOT**

Solicit a contribution from other DoD personnel for a gift to a superior

Make a donation for a gift or give a gift to a superior; or

Accept a gift from subordinate personnel

EXCEPTIONS to the general rule prohibiting gifts to superiors or their solicitation

On an occasional basis, including occasions where gifts are traditionally given or exchanged, the following may be given to superiors and accepted from subordinates

Items having an aggregate market value of \$10 or less per occasion

Items such as food and refreshments; and

Personal hospitality at a residence

On special, infrequent occasions (marriage, birth of child, etc.) or on occasions that terminate the superior-subordinate relationship (retirement, separation, or PCS)

Employees may solicit a contribution for a group gift for a special, infrequent occasion, as long as the amount solicited does not exceed \$10 per person. Solicitation must be without pressure or coercion

The general rule is DoD employee may NOT accept a gift if the market value of the gift exceeds \$300 per donating group or organization. However, groups of employees are permitted to give gifts exceeding \$300 in value to superiors under the following conditions

Special, infrequent occasions that terminate the superior- subordinate relationship; and

The gifts are appropriate for the occasion and are uniquely linked to the departing employee's position or tour of duty, and commemorate the same

Under all circumstances, gifts must be truly VOLUNTARY

**References:**

DoDD 5500.7-R, *Joint Ethics Regulation*, 30 August 1993; through Change 4, 6 August 1998  
5 C.F.R. 2635.301-304  
*See HQ USAF/JAG Message, 10 Jan 97, JER Amendment - Gifts to Superiors*

## USE OF GOVERNMENT COMMUNICATIONS SYSTEMS

With the explosion of the "Information Age," government employees now have access to computers, copier machines, fax machines, cellular phones, the Internet, and electronic mail. Under the *Joint Ethics Regulation* (JER) the use of government resources, communications systems and equipment (including telephones, data fax machines, electronic mail, and the Internet) are for official and authorized use only.

All usage, official and personal, is subject to being monitored, and no classified information may be communicated over unclassified lines

"Official use" may include morale and welfare communications for deployed personnel, when approved by the theater commander

"Authorized use" is permitted when "agency designees" (the first supervisor who is a commissioned officer or a civilian above GS/GM-11 in the chain of command or supervision of the employee concerned) authorizes their employees to make limited personal use of government resources (other than personnel). The agency designee must determine the following

There is no adverse affect on duty performance

The duration and frequency are reasonable and, normally, the use is during nonduty hours (which may include break time)

A public interest is being served such as keeping employees at their work stations, educating them on the use of new technology, improving their morale, or enhancing their technical or professional skills

There is no adverse reflection on the U.S. Government (no pornography, chain letters, commercial advertising, criminal activities such as gambling, or breaches of security)

There is no overburdening of the communications system; and

There is no significant additional cost to DoD

This instruction applies to all uses of Air Force e-mail systems by Air Force organizations, personnel, and contractors regardless of the classification of the information transmitted or received

It is a punitive regulation, violations of which are punishable under Article 92, UCMJ

Specific prohibitions

Any use of government-provided computer hardware or software for other than official and authorized government business

--- Activities for **personal or commercial financial gain**. This includes, but is not limited to; chain letters; stock trading; commercial solicitation; and sales of personal property, **except on authorized bulletin boards established for such use**

Storing, processing, displaying, sending, or otherwise transmitting offensive or obscene language or material. Offensive material includes, but is not limited to, "hate literature," such as racist literature, materials or symbols (for example, swastikas, neo-Nazi materials, and so forth), and sexually harassing materials. Obscene material includes, but is not limited to, pornography and other sexually explicit materials

Storing or processing classified information

Storing or processing copyrighted material (including cartoons unless approval is obtained from the author or publisher or the use falls within some other exception to the copyright laws such as educational purposes)

Participating in chat lines unless for official purposes and approved by Public Affairs

Obtaining, installing, copying, storing, or using software in violation of the appropriate vendor's licensing agreement

Permitting any unauthorized individual access to a government-owned or government-operated system

To protect against downloading viruses from the Internet and introducing potential risk to the Air Force networks, take the following precautions

Check all files downloaded from the net for viruses, and get authorization to load any software on an Air Force automated information system

Official use includes communications, including emergency communications, the Air Force has determined necessary in the interest of the Federal government

Official use includes, when approved by the theater commander in the interest of morale and welfare, those communications by military members and other Air Force employees who are deployed for extended periods away from home on official business

The agency designee (see definition above) can allow limited personal use of e-mail

Brief communications made while traveling on official business to notify family members of official transportation or schedule changes

Using government systems to exchange important and time-sensitive information with a spouse or other family members; such as, scheduling doctor, automobile, or home repair appointments, brief internet searches, or sending directions to visiting relatives

Educating or enhancing the professional skills of employees (e.g., use of communication systems, work-related application training, etc.)

Improving the morale of employees stationed away from home for extended periods

Job searching in response to federal government downsizing

Authorized use must be approved by supervisor and should be checked against local or command policy

Prohibited use includes

Distributing copyrighted materials by e-mail or e-mail attachments without consent from the copyright owner (failure to obtain consent may violate federal copyright infringement laws and could subject the individual to civil liability or criminal prosecution)

Intentionally or unlawfully misrepresenting your identity or affiliation in e-mail communications

Sending or receiving e-mail for commercial or **personal financial gain** using government systems

Sending harassing, intimidating, abusive, or offensive material to, or about others

Using someone else's identity (user ID) and password without proper authority

Causing congestion on the network by such things as the propagation of chain letters, broadcasting inappropriate messages to groups or individuals, or excessive use of the data storage space on the E-mail host server

**References:**

DoDD 5500.7-R, *Joint Ethics Regulation*, 30 Aug 93; through Change 4, 6 August 1998

AFI 33-129, *Transmission of Information via the Internet*, 4 April 2001

AFI 33-119, *Electronic Mail (E-Mail) Management and Use*, 1 March 1999

AFI 33-114, *Software Management*, 13 May 2004

## HONORARIA

Military members may accept the payment of money or anything of value for an appearance, speech or article, unrelated to their official duties, assuming there are no statutory or regulatory prohibitions.

An honorarium is generally defined as a payment given to someone, such as a consultant or a speaker, for services for which fees are not legally required

In the context of the *Joint Ethics Regulation* (JER), honoraria are considered compensation for a lecture, speech or writing and involve the payment of money or anything of value

Prior to 1996, military members were generally prohibited from accepting any honorarium on any topic, even if there was no connection between the subject of the appearance, or article, and the individual's official duty

However, pursuant to a Department of Justice opinion dated 26 February 1996, that prohibition is no longer enforced against any government employee, military or civilian. Military members are no longer prohibited from accepting the payment of money or anything of value for an appearance, speech or article, unrelated to their official duties

Travel reimbursement for an appearance, speech or article related to official duties may be accepted, but a speaker's fee or other direct compensation may not be accepted

Questions concerning the acceptance of an honorarium, should be addressed to your ethics counselor or the staff judge advocate

### **References:**

DoDD 5500.7-R, Joint Ethics Regulation, 30 August 1993; through Change 4, 6 August 1998  
5 C.F.R. 2635.807 (a)(2)(iii)(D), effective 1 January 2003

## HONORARY MEMBERSHIPS

Air Force personnel are occasionally offered memberships in various non-defense contractor private organizations such as golf, tennis, gun, health or social clubs. Such offers usually waive initiation fees and may waive all or a portion of membership dues, but the individual is responsible for all charges incurred and any dues not waived. Usually, these memberships terminate on the individual's reassignment or retirement and do not create an equity position in the club.

The *Joint Ethics Regulation* (JER) prohibits military members or civilian employees from accepting such a membership if the membership is offered because of their official position

Previously, there was no prohibition to members accepting an unsolicited honorary membership from a non-defense contractor entity. This included country clubs

Now, an Air Force member may accept honorary membership only if the offer is unrelated to government employment and offered to all military members, regardless of rank or position

Air Force personnel may become regular members of associations whose membership includes DoD contractor personnel (example, Air Force Association)

If acceptance is not otherwise prohibited, acceptance of an honorary membership does not violate 18 U.S.C. 209 (unauthorized acceptance of compensation by a government official for services as a government official)

Before accepting any honorary membership, military members should seek the advice and guidance from their ethics counselor or local SJA

### **Reference:**

DoDD 5500.7-R, *Joint Ethics Regulation*, August 1993; through Change 4, 6 August 1998

## USE OF GOVERNMENT RESOURCES FOR MEMENTOS AND GIFTS

Air Force policy is that appropriated funds cannot be used to purchase gifts for military members, employees, or private citizens unless specifically authorized by law. The only authority to use Air Force appropriated funds for gifts is AFI 65-603, which specifies the circumstances and the individuals to whom gifts (or “mementos”) may be presented. Generally, nonappropriated funds cannot be used when appropriated funds are authorized, whether such funds are available or not. The use and limits on the use of nonappropriated funds is outlined in AFI 34-201.

### IMPERMISSIBLE USE OF FUNDS

You can't use appropriated funds to purchase PCS or retirement mementos for either military or DoD civilian personnel

You can't use nonappropriated funds to purchase PCS mementos for either military or DoD civilian personnel

In general, you can't use nonappropriated funds to purchase trophies and awards that are used to recognize mission accomplishment and competition that contribute to military effectiveness. Nonappropriated funds may be used to purchase trophies and make nominal monetary awards for winners under the individual recognition program provided appropriated funds are not available or not authorized

You can't use mission accomplishment recognition, such as meritorious service recognition, to honor PCS or retiring personnel. AFI 36-2803 and AFI 36-1001 provide for appropriate recognition in these circumstances

### PERMISSIBLE USE OF FUNDS

You can use nonappropriated funds in support of a retirement ceremony to purchase light refreshments and mementos (\$20 limit) for retiring military and DoD civilian personnel

You can use appropriated funds to purchase special trophies and plaques that are used to recognize mission accomplishment (e.g., personnel of the quarter awards)

You can use appropriated funds (i.e., representation funds) to purchase mementos/gifts for distinguished citizens of foreign countries, and certain U.S. citizens who are not DoD employees

**References:**

DoDD 7250.13, *Official Representation Funds (ORFs)*, 23 February 1989; Change 5,  
3 March 1995

AFI 65-603, *Official Representation Funds -- Guidance and Procedures*, 17 February 2004

AFI 34-201, *Use of Nonappropriated Funds (NAFS)*, 17 June 2002

AFI 36-2803, *The Air Force Awards and Decorations Program*, 15 June 2001

AFI 36-1001, *Managing the Civilian Performance Program*, 1 July 1999

## **OFF-DUTY EMPLOYMENT**

Air Force members may participate in off-duty employment, subject to the limitations and prohibitions stated in the *Joint Ethics Regulation (JER)*.

Personnel should obtain approval from their commander prior to engaging in outside employment. Although the Air Force does not require an individual to complete an AF Form 3902, *Application and Approval for Off-Duty Employment*, individuals should be aware there is frequently a local or command policy to do so

Financial disclosure filers shall obtain prior approval before working for a prohibited source. For more information on who is required to file financial disclosures, see your ethics counselor

Personnel may not engage in outside employment, with or without compensation, that

Interferes with or is not compatible with performing their government duties

May reasonably be expected to bring discredit upon the government or the Department of Defense

May tend to create a conflict of interest; or

Will detract from readiness or pose a security risk

Personnel are encouraged to engage in teaching, writing or lecturing

Such activities must not depend upon information gained as a result of government service, unless available to the public or with SecAF approval

Civilian presidential appointees may not accept anything of monetary value for imparting information substantially relating to responsibilities, programs, or operations of the Air Force, or for official ideas which have not been made public

Generally, federal employees may not receive payment for articles or speeches related to their official duties

### **References:**

DoDD 5500.7-R, Joint Ethics Regulation, 30 August 1993; through Change 4, 6 August 1998  
5 C.F.R. 2635, subpart H

## PROCUREMENT INTEGRITY

The current Procurement Integrity Act (The Act) is found in the National Defense Authorization Act for Fiscal Year 1996 and at 41 U.S.C. §423 (implemented at FAR 3.104). The Act and its amendments regulate the conduct of Federal employees who are involved in procurements and the administration of contracts.

Employees involved in procurements over \$100,000 must report contacts with bidders or offerors regarding future employment to their supervisors and ethics counselors, and must disqualify themselves from further participation if they do not immediately reject the contact

When a contact is made, two actions must be taken: prompt reporting of the contact in writing and either rejection of the offer or disqualification from participation

There is no contact under the Procurement Integrity provisions if the employee is not "seeking employment." For example, requesting a job application is not considered "seeking employment," so there would be no contact with the recipient of the request for purposes of the Procurement Integrity Act. However, if the employee then submits the application, he or she must then report the contact and disqualify him or herself from further participation

Employees do not have to report contacts with sole source contractors under The Act because reports are required only if employees are personally and substantially involved in competitive procurements, and sole source procurements are not competitive

They may nevertheless be disqualified from any further participation. Under the *Joint Ethics Regulation* (JER), employees must submit a written notice of disqualification

Furthermore, employees are advised to inform their supervisor and seek the guidance of their ethics counselor as soon as possible

In procurements conducted under OMB Circular A-76, the Federal Acquisition Regulation requires a clause in the solicitation and the contract that gives government employees who are adversely affected by the award of the contract a right of first refusal for employment under the contract

If a civilian employee or military service member is ordered to perform duties consistent with his or her position, such as perform the duties of Source Selection Authority, and that individual takes actions that require disqualification from those duties, that individual may be subject to administrative action

Actions taken by an employee that result in disqualification may be construed as a refusal to perform assigned duties. This could result in disciplinary or adverse action

For example, if a contracting officer has special expertise that results in working almost exclusively on the contracts of a certain contractor or on contracts in a certain specialized area,

and that individual is disqualified from acting with regard to that contractor or to contractors in the specialized area, he or she may be disciplined

Certain employees (e.g., program managers) who are involved in procurements or the administration of contracts, either of which is valued at \$10 million or greater, are prohibited from working for the contractor for a period of one year following their involvement

This compensation ban extends only to the prime contractor. That is, a former official is not prohibited from accepting compensation "from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract"

For example, after leaving DoD, a former program manager of ABC program may work for a subcontractor on the ABC program, even though he or she dealt with the subcontractor in the role of program manager

However, if a subcontract is a sham or a vehicle established to provide services by individuals for the prime contractor on the ABC program, compensation would be considered "indirect compensation" from the prime, which is restricted by regulation

The Act also prohibits

Disclosure of contractor bid or proposal information and source selection information

Individuals from knowingly obtaining contractor bid or proposal information or source selection information

Government personnel may request an advisory opinion from their ethics counselor and/or the staff judge advocate as to whether specific conduct would violate the JER or The Act, or regarding their status as a procurement official. One who relies in good faith on such an opinion cannot be found to have knowingly violated the applicable restriction. Procurement personnel should obtain advisory opinions

**WARNING:** This is an extremely complex and constantly changing area of the law, and you should contact your local ethics counselor if you have any questions!

**References:**

Procurement Integrity Act, 41 U.S.C. §423

DoDD 5500.7-R, *Joint Ethics Regulation*, 30 August 1993; through Change 4, 6 August 1998

## STANDARDS OF ETHICAL CONDUCT

Each commander has the responsibility of insuring that the standards of conduct enunciated in the *Joint Ethics Regulation (JER)*, DoD Directive 5500.7-R, are brought to the attention of all personnel. It is fundamental Air Force policy that personnel shall not engage in any personal business or professional activity that places them in a position of conflict between their private interests and the public interest of the United States. In order to preserve the public confidence in the Air Force, even the appearance of a conflict of interest must be avoided.

Air Force personnel shall not use inside information to further a private gain for themselves or others if that information was obtained by reason of their Air Force position and is not generally available to the public

All personnel, upon first assumption of Air Force duties, should be thoroughly informed of the regulation's provisions

Annual reminders of the regulation can be accomplished by requiring unit members to read the regulation, by posting bulletin board items, by regularly published literature, and at commanders' calls

Personnel may obtain further clarification of the standards of conduct and conflict of interest provisions by consulting with their servicing legal office

The commander must realize that the resolution of a conflict of interest should be accomplished immediately so that the conflict is terminated

The JER prohibits some specific activities, including

Active duty members making personal commercial solicitations or solicited sales to DoD personnel junior in rank at any time (on or off-duty, in or out of uniform), specifically for insurance, stocks, mutual funds, real estate, or any other commodities, goods, or services

Soliciting or accepting any gift, entertainment, or thing of value from any person or company which is engaged in procurement activities or does business with any agency of the DoD (including contractors). There are exceptions to this rule, so if offered a gift, do not hesitate to consult the ethics counselor, normally the SJA

Soliciting contributions for gifts to an official superior, except voluntary gifts or contributions of nominal value on special occasions like marriage, illness, transfer, or retirement

Active duty military or civilian personnel using their grades, titles or positions in connection with any commercial enterprise or for endorsing a commercial product

Endorsing a non-Federal entity, event, product, service, or enterprise (explicit or implied). DoD employees must not use their official capacities and titles, positions, or organization names to

suggest official endorsement or preferential treatment of any non-Federal entity except those listed in subsection 3-210, such as the Combined Federal Campaign and the Air Force Assistance Fund

Accepting Employment outside of the Air Force or off-duty, if it interferes with or is not compatible with the performance of government duties, or if it might discredit the government. Squadron commanders are normally the approving authority for requests for off-duty employment

Unauthorized gambling, while on base or on-duty

DoD employees may not participate in their official DoD capacities in the management of non-Federal entities without authorization from the DoD General Counsel, except under very limited circumstances requiring the approval of the Secretary of the Air Force

DoD employees may, however, serve as DoD liaisons to non-Federal entities when appointed by the head of the DoD Component command or organization who determines there is a significant and continuing DoD interest to be served by such representation. Liaisons serve as part of their official DoD duties, under DoD Component memberships, and represent only DoD interests to the non-Federal entity in an advisory capacity

The *Joint Ethics Regulation* imposes annual financial reporting requirements for officers in the grade of O-7 or above and other government officials such as commanding officers and procurement officials. Consult the article, *Financial Disclosure Forms* in this chapter, or your SJA for more details

There are several specific topics concerning the *Joint Ethics Regulation* that are discussed in more detail within this Chapter of The Military Commander and the Law. As always, if you have specific questions, the installation SJA is the standards of conduct/ethics counselor and can assist you

**Reference:**

DoDD 5500.7-R, *Joint Ethics Regulation*, 30 August 1993; through Change 4, 6 August 1998

## *Chapter 9*

# ***INSTALLATION ISSUES***

## **ARMY AND AIR FORCE EXCHANGE SERVICE AND COMMISSARY BENEFITS**

Although Department of Defense Directives and service regulations govern exchange and commissary benefits, commanders exercise some discretion in granting, suspending or revoking privileges.

### **EXCHANGE PRIVILEGES**

Army and Air Force Exchange Service (AAFES)

The establishment of an exchange is authorized by the Departments of the Army and the Air Force at each installation where extended active duty military personnel are present and assigned to duty

An exchange may be established at other locations, such as state-operated National Guard installations or Reserve Training Centers, provided it is cost-effective

Exchange Privileges

Unlimited exchange privileges extend to all uniformed personnel and their family members, retired personnel and their family members, and others, such as Medal of Honor recipients and their family members

Unlimited exchange privileges may be extended to government departments or agencies outside the Department of Defense (DoD) when

The local commander determines the desired supplies or services cannot be conveniently obtained elsewhere, and

The supplies or services can be furnished without unduly impairing the service to exchange patrons

Limited exchange privileges extend to some government civilian employees and to others, such as members of foreign military services visiting a military installation

In nonforeign areas outside CONUS (e.g., Alaska, Hawaii, Puerto Rico) and overseas the responsible commander may extend limited or unlimited privileges to other personnel or organizations if it is in the best interest of the mission of the command concerned

Exceptions involving patron privileges are based on alleviating personal hardships and may only be granted by the Secretary of the Department concerned upon request by the installation commander through command channels

## **ABUSE OF EXCHANGE PRIVILEGES**

Exchange patrons are prohibited from

Purchasing items for the purposes of resale, transfer or exchange to unauthorized persons

Using exchange merchandise or services in the conduct of any activity for the production of income; and

Theft, intentional or repeated presentation of dishonored checks, and other indebtedness

## **COMMANDER ACTIONS WHEN ABUSE OCCURS**

When an abuse of privileges occurs, the commander will take prompt disciplinary and other appropriate action, such as revocation or suspension of exchange privileges

Commanders may revoke exchange privileges for any period deemed appropriate, except the minimum period of revocation is six months for shoplifting, employee pilferage and intentional presentation of dishonored checks

The individual concerned will be provided notice of the charges and the opportunity to offer disproving evidence

On appeal, the commander who revoked the privileges, or the next higher commander, may reinstate exchange privileges for cogent and compelling reasons

## **COMMISSARY PRIVILEGES**

Commissary

The DoD operates commissaries as an integral element of the military pay and benefits system and as an institutional element to foster the sense of community among military personnel and their families. The intent of patronage is to provide an income effect benefit through savings on food and household items necessary to subsist and maintain the household of the military family

Authorized Patrons

Several classes of individuals are authorized commissary privileges by regulation, including active duty and their dependent family members, retired personnel and their dependent family members and others

At overseas locations, military commanders or Secretaries of Military Departments may extend commissary privileges to certain individuals and groups of individuals, provided it is without detriment to the ability to fulfill the military mission

Restrictions on purchases

Authorized personnel may not sell or give away commissary purchases to individuals or groups not entitled to commissary privileges

Personnel are prohibited from using commissary purchases to support a private business

Sanctions for violating restrictions on purchases

Violations of restrictions shall provide a basis for suspension of commissary privileges or permanent revocation of commissary privileges

Disciplinary action under the UCMJ, Civil Service, or other pertinent regulations or agreements should be taken against the individual if the violations warrant such action

### **AGENTS OF AUTHORIZED USERS**

The wing commander can extend use of the exchange and commissary to an agent of an authorized user, when the user is not capable of shopping (usually up to a year)

#### **References:**

DODD 1330.17, *Military Commissaries*, 13 March 1987

DOD 1330.17-R, *Armed Services Commissary Regulations*, April 1987; Ch. 3, 3 Aug 1990

AFJI 34-210, *Army and Air Force Exchange Service Operating Policies*, 15 December 1992

AFJI 34-211, *Army and Air Force Exchange Service General Policies*, 18 June 1988

AFI 36-3026(I), *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel*, 20 December 2002

## **BANKRUPTCY: GOVERNMENT CONTRACTORS**

The Federal Bankruptcy Code affords special protection to businesses that seek bankruptcy protection, including those that do business with the government.

### **TYPES OF CONTRACTOR BANKRUPTCY PROCEEDINGS**

There are two types of business bankruptcy proceedings

Chapter 7 (Liquidation Bankruptcy), which entails the complete liquidation of all contractor assets and cessation of business activities

Chapter 11 (Reorganization Bankruptcy), which entails a reorganization of the business with continued operation during the reorganization process

Protection against creditors begins the day the bankruptcy petition is filed. Even if the government is unaware of the filing, the petition acts as an automatic stay of potential adverse actions against the contractor

Typical adverse actions (for example, termination for default, recovery of government-furnished equipment or materials, reprocurement, and setoffs) cannot be initiated or continued without the express permission of the bankruptcy court

Some actions not affected by bankruptcy include criminal actions, issuance of a show cause or cure letter (tailored to avoid violation of the bankruptcy law), conducting an inventory or audit to identify government property, issuance of a final decision of a contractor's claim, or coordinating a proposed termination letter through Air Force channels so that it is ready to serve immediately upon removal of bankruptcy protections

### **PROTECTING AIR FORCE INTERESTS**

Protection of Air Force interests in the bankruptcy forum is a unique challenge. It requires the assistance of personnel at all levels, including prompt notification of bankruptcy cases, and assistance in gathering facts, affidavits and documents

In many instances, the filing of a bankruptcy petition should be anticipated; it is often preceded by delinquency, failure to pay vendors or subcontractors, reduced production capacity, or other evidence of financial difficulty, even rumors

The base legal office should be notified immediately in any case where contractor bankruptcy is suspected or known. Early warning of anticipated bankruptcy maximizes protection of Air Force interests; failure to react swiftly to an actual filing guarantees loss of important rights

The Bankruptcy Code also contains protections against discrimination for contractors that have filed bankruptcy

A contracting officer cannot discriminate against a contractor in the award of a contract or an option solely because it has declared bankruptcy

The appropriate way to analyze a contractor's eligibility for award is through a responsibility determination or another nonbankruptcy basis for analysis. While a contractor may not be found ineligible for award merely because it is involved in bankruptcy proceedings, financial capability is always a factor to be considered in evaluating a bidder's responsibility

Protection against contractor bankruptcy often requires close cooperation with the Air Force Legal Services Agency, Commercial Litigation Division (AFLSA/JACN) and the U.S. Attorney's Office. The base legal office provides the necessary liaison between the installation and the other offices charged with protecting the government's interests

**References:**

11 U.S.C. § 101, Definitions

11 U.S.C. § 362, Automatic Stay

11 U.S.C. § 525, Protection against Discriminatory Treatment

11 U.S.C. Chapter 7, Liquidation Bankruptcy

11 U.S.C. Chapter 11, Reorganization Bankruptcy

## **CHILD DEVELOPMENT PROGRAMS**

AFI 34-248 outlines requirements for operating child development centers on Air Force bases. AFI 34-276 establishes the requirements for operating family child care programs.

## **INSTALLATION COMMANDER RESPONSIBILITIES**

Installation commanders are charged with establishing child development programs for children of active duty and DoD civilians with children newborn to 6 years of age; making resources available to make child care services affordable; and ensuring children's health, safety, and well-being while they are in child development programs

Key requirements include

Facilities and equipment

Fire protection

Curriculum

Schedules

Activity plans

Staff-to-child ratios

Management qualifications

Qualifications for Child Development Program Assistants

Criminal history background checks

Nutrition and food preparation

Child abuse protection

Supervision of children

Health

Safety

Short-term hourly care, extending no longer than 1 hour before the start and 1 hour after the end of the function for which the care is being offered, can be made available if family child care providers or another Services program, such as the Youth Program, are otherwise unavailable

## **CHILD CARE ISSUES**

HIV-positive children may be enrolled when it is appropriate for their health, neurological development, behavior, and immune status; however, routine screening of children for HIV prior to program entry is not required

The CDC director must inform only those with a need to know about the HIV-positive child's condition. This does not usually include other staff in the center or the parents of the other children enrolled

In the parent handbook, include a statement that the CDC program accepts children with chronic health problems, including HIV-positive children, for care and also employs and accepts as family child care providers individuals with chronic health problems, including HIV-positive individuals

Notify all parents when cases of measles or chickenpox (or other viral infections as determined by the center medical advisor) are occurring in the child care population. Provide individual notification to parents of HIV-positive children. Also notify the medical advisor

HIV-positive individuals may be employed in child care programs and HIV-positive individuals may be approved as family child care providers unless their care would endanger their health or that of others

Persons with AIDS (Acquired Immune Deficiency Syndrome), or persons with family members exhibiting symptoms of AIDS may not be employed in child care or approved as family child care providers

Frequent medical examinations of HIV-positive individuals employed in child care, approved as family child care providers, or those who are living in households approved to provide family child care may be required

### **References:**

AFI 34-248, *Child Development Centers*, 1 October 1999

AFI 34-276, *Family Child Care Programs*, 1 November 1999

## **COMMERCIAL ACTIVITIES**

The Army and Air Force Exchange Service (AAFES) or Services are the primary sources of resale merchandise and services, excluding the Defense Commissary Agency (DeCA) stores. Services and its Non Appropriated Fund Instrumentalities (NAFI) are secondary sources of resale merchandise and services. Services activities and NAFIs may engage in resale when the installation commander determines (in coordination with AAFES and Services) that AAFES cannot be responsive to the particular resale requirement.

Private Organizations (PO) and unofficial activities/organizations must not engage in activities that duplicate or compete with AAFES, Services activities, or NAFIs. This means POs and unofficial activities/organizations may not engage in frequent or continuous resale activities. However, the installation commander may authorize such things as continuous thrift-shop sales operations, museum shop sales of items related to museum activities, and occasional sales for fund-raising purposes like bake sales, dances, carnivals, or similar occasional functions.

## **DOD COMMERCIAL SPONSORSHIP PROGRAM**

Commercial sponsorship is a DOD program that allows corporations to provide support to morale, welfare or recreation programs in exchange for promotional recognition helping finance enhancements for MWR elements of Services events, activities, and programs

There must be a bona fide special event for sponsorship to apply; an event must have a theme, focus, and be for a specific, limited time

Membership drives over extended periods can be treated as events for sponsor support and recognition purposes; however, sponsor displays can only be authorized at specific events during the drive

MWR events appropriate for commercial sponsorship do not include normal day-to-day MWR management and overhead operations

Only Services MWR programs may use the commercial sponsorship program; other Air Force organization, units, private organizations, or unofficial activities or organizations are not authorized to use commercial sponsorship to offset program or activity expenses

Installation commanders control the commercial sponsorship program at base-level and approve/disapprove sponsorships worth \$5,000 or less (or other values as delegated by the MAJCOM)

## **UNSOLICITED COMMERCIAL SPONSORSHIP**

Unsolicited commercial sponsorship must be entirely initiated by the prospective sponsors or their representatives and be for a specific event

Services activities may generate sponsor awareness and interest by publishing brochures and leaflets, placing ads in newspapers and magazines, or issuing public affairs like news releases about the existence and availability of the program. They may also send letters of a strictly nonspecific nature as follow-ups to general advertisements

Air Force personnel may not provide information about specific needs of the Services MWR program to "encourage" offers of unsolicited sponsorship

### **SOLICITED COMMERCIAL SPONSORSHIP**

The Solicited Commercial Sponsorship Program is the only authorized process for soliciting commercial sponsors for MWR elements of Services programs

Commercial sponsorship managers announce all sponsorship solicitations to the maximum number of potential sponsors feasible in The Commerce Business Daily (CBD) per AFMAN 34-416, local newspapers, Chamber of Commerce newsletters or other appropriate business community publications, and then evaluate prospective sponsors' proposals on a best offer basis

MWR elements of Services programs may not solicit sponsorship from alcohol or tobacco companies under any circumstances

Military systems divisions of defense contractors will not be solicited; however, solicitations may be sent to any domestic consumer products divisions of defense contractors (unsolicited offers may be accepted from any segment of a defense contractor)

### **ON-BASE COMMERCIAL SOLICITATION**

On-base solicitation is a privilege, not a right, granted at the discretion of the installation commander

Solicitation on an Air Force installation is normally permitted, provided that

The solicitor is duly licensed and insured under appropriate laws

The installation commander has not prohibited the solicitation

A specific appointment has been made with the individual concerned and conducted in family quarters or other areas designated by the installation commander

The commercial activity does not compete with the BX or Commissary

Certain solicitation practices are prohibited on military installations, including

Soliciting personnel on duty

Soliciting any kind of mass audience (i.e., commander's call, guard mount, etc.)

Soliciting in housing areas without an appointment

Soliciting door-to-door

Implying DOD sponsorship or sanction

Soliciting members junior in grade

Procuring or supplying roster listings of DoD personnel

Using official ID cards by retirees or Reservists to gain access for soliciting

DoD personnel may NOT represent an insurer or broker in an official or business capacity with or without compensation (the base bulletin or any other official or unofficial notice cannot be used to announce the presence or availability of life insurance or securities sales on the base)

Housing occupants may operate limited business enterprises while living in base housing limited to the sale of products, minor repair service on small items, limited manufacturing of items or tutoring. NOTE: Child care in family quarters is governed by AFI 34-276. See article, Family Day Care Homes, this chapter

Sponsors must request permission in writing to conduct the commercial activity from the housing office

Occupants must meet local government licensing requirements, agreements, and host country business practices before requesting approval to operate a private business

## **RELATED ISSUES**

Games of Chance

Bingo and Monte Carlo (Las Vegas) events are controlled by the Air Force Club Program

Cash prizes may be awarded for bingo in accordance with AFI 34-272, para 3.17

Play in bingo programs should be limited to eligible patrons, their family members, and guests

Only non-monetary prizes may be awarded for Monte Carlo events, in accordance with AFI 34-272, para 3.18

Play in Monte Carlo events should be limited to club members and their adult family members, and members of other clubs exercising reciprocal privileges and their adult family members, and adult guests

Once a participant purchases a money substitute for a Monte Carlo event, no reimbursement can be made for any unused portion, and money substitutes can't be used to buy resale items, including food and beverages

Games must be operated with discretion and conform to local law or custom. The installation commander, with the advice of the staff judge advocate (SJA), determines which games fit the criteria

### Raffles

Occasional and infrequent raffles must be approved in advance by the installation commander, with the SJA's advice

Raffles must not otherwise violate local civilian laws

The funds raised must benefit DoD personnel or their families and must be conducted for a charitable (versus an entertainment or social) purpose

Raffles must not be conducted at the workplace

Air Force members or civilians must not conduct raffles during duty time

Air Force officials may not officially endorse a raffle

### Fundraising Events

The Air Force conducts two official fundraising events annually; CFC and the AFAF Campaign

MWR activities can sponsor fund-raising events and projects related to the purpose of, and for the benefit of, the Services organization. NOTE: Fundraising by private organizations is governed by AFI 34-223. See article, Private Organizations, this chapter

Fundraising events cannot benefit charities, foundations, private organizations or individuals, even if the Services NAFI shares in the proceeds

These activities cannot collect money for charities/worthwhile causes sponsored by other organizations

Services MWR facilities (e.g., golf course, bowling facility, athletic fields, etc.) can only be made available for fund-raising by a nonfederal entity if the event meets the requirements of AFI 35-201, AFI 36-3101, and DoD 5500.7R, paragraph 3-311

**References:**

DoDD 1344.7, *Personal Commercial Solicitation on DoD Installations*, 13 Feb 1986; Change 2, 2 May 1991

DoD 5500.7-R, *Joint Ethics Regulation*, 30 August 1993; Change 4, 6 August 1998

AFI 32-6001, *Family Housing Management*, 23 January 2002

AFI 34-219, *Alcoholic Beverage Program*, 9 September 1998

AFI 34-223, *Private Organization (PO) Program*, 11 August 2003

AFMAN 34-228, *Air Force Club Program Procedures*, 1 April 2002

AFI 34-262, *Services Programs and Use Eligibility*, 27 June 2002

AFI 34-272, *Air Force Club Program*, 1 April 2002

AFI 34-407, *Air Force Commercial Sponsorship Program*, 17 February 1999

AFMAN 34-416, *Air Force Commercial Sponsorship and Sale of NAFI Advertising Procedures*, 1 May 2001

AFI 36-3101, *Fundraising Within the Air Force*, 12 July 2002

## **DEBARMENT**

Wing commanders have broad authority to control activities on their installations, including the authority to remove or exclude any person whose presence on the installation is unauthorized or whose presence disrupts good order and discipline. This authority enables wing commanders to fulfill their responsibilities to protect personnel and property, to maintain good order and discipline, and to ensure the successful, uninterrupted performance of the Air Force mission.

### **COMMANDER'S RESPONSIBILITIES AND OPTIONS**

A commander's decision to remove or exclude a person from the installation is subject to judicial review. However, the decision is given substantial deference and will not be overturned unless proven to be arbitrary or capricious. An illegal barment could subject a wing commander to personal civil liability in a lawsuit alleging a Constitutional tort

Who is subject to debarment

- Civilians may be barred from a military installation
- Dependent family members and retirees may be barred, but they must be granted access for medical care (a statutory right)
- Civilian employees may be barred, but they should be removed from federal service before ordering debarment
- Otherwise, the employee will be sitting at home collecting a salary
- Check with the Civilian Personnel Office to determine if the local collective bargaining agreement contains due process requirements
- Salesmen and businesses may be barred for misconduct
- Misconduct may lead to debarment of a single agent or an entire firm
- Contractor employees may be barred for misconduct
- Contractor employees with security clearances are not entitled to greater protection from debarment
- Members of the armed forces are generally not barred
- Service members being involuntarily separated may, in conjunction with their discharge, be barred for good cause
- Possession, distribution, or use of drugs may be good cause for debarment

---- Exceeding weight standards, on the other hand, probably isn't good cause

## PROCEDURAL REQUIREMENTS

A person who is barred from the installation should be notified, in writing, that he or she is barred from entering the installation. The notification (barment letter) should state the reason for and period of barment

The period of the barment, unless otherwise stated, is indefinite

Determining the barment period is a matter of discretion

-- The commander should consider the individual, the reason for the barment, and the need for good order, discipline, and security (the bottom-line is what is reasonable given all the circumstances)

The individual can ask the installation commander to lift the barment at any time, regardless whether the barment is for a set period or indefinite

A copy of the barment letter should be personally delivered to the individual or sent by registered or certified mail to document that the person is on notice. A copy of the letter should be forwarded to the security forces for posting at the gate, and to the SJA's office to be maintained in the event of future litigation

Those who enter an installation after receiving notice of barment are subject to federal criminal prosecution under 18 U.S.C. § 1382

-- Maximum penalty for violation of the law is six months confinement and a \$500.00 fine

### **References:**

DoDD 5200.8, *Security of DoD Installations and Resources*, 25 April 1991  
AFI 31-101, *The Air Force Installation Security Program*, 1 March 2003

## **DISPOSAL OF PERSONAL PROPERTY**

Personal property of Air Force members and employees, as well as residents and visitors on Air Force installations, can come into the custody or control of the Air Force for a variety of reasons: death, capture, missing in action, incompetency, absence without leave, medical evacuation, loss, abandonment or a failure to claim. The Secretary of the Air Force is authorized to dispose of such property pursuant to Title 10, §§ 2575 and 9712, United States Code.

Special procedures are established in AFI 34-242, Mortuary Affairs Program, and AFI 34-244, Disposition of Personal Property, for disposition of property of deceased, missing, captured, or detained members, including a detailed method for determining the next-of-kin entitled to receive the property.

### **FOR DECEASED MEMBERS**

A Base Mortuary Officer (MO) is responsible for collecting, cleaning, inventorying and safeguarding property until the appointment of the Summary Court Officer (SCO)

A Summary Court Officer (SCO) is normally appointed by the installation commander to continue to collect, inventory and safeguard the property. The SCO will also dispose of the property (see article, Summary Court Officer Duties, in chapter 7)

### **FOR MISSING, DETAINED, AND CAPTURED PERSONS**

The MO secures and holds the property for 30 days or until the member's status is changed from missing to detained or captured

If either (1) the missing member's status is changed to detained or captured, or (2) there is no change in status after 30 days - then the property is released to the SCO

If the missing member returns, the property is released to the member

The SCO, if appointed, secures, inventories and disposes of the property to those authorized to receive it in the event of the member's death

### **References:**

AFI 34-242, *Mortuary Affairs Program*, 8 February 2001

AFI 34-244, *Disposition of Personal Property and Effects*, 2 March 2001

AFI 34-1101, *Assistance to Survivors of Persons Killed in Air Force Aviation Mishaps and Other Incidents*, 1 October 2001

## **DRIVING PRIVILEGES**

Driving on a military installation, whether in a government owned vehicle (GOV) or a privately owned vehicle (POV), is a privilege granted by the installation commander or designee.

Designees may include the vice commander, support group commander, or other appropriate official not occupying a law enforcement, investigative, or other position raising the appearance of a conflict of interest.

### **OPERATING A POV ON THE INSTALLATION**

A person must do the following in order to drive on-base

Comply with all laws and regulations governing motor vehicle operations on base

Comply with installation vehicle registration requirements

Possess, produce on demand, and comply with restrictions contained in a valid state driver's license (or host nation/SOFA license); possess and produce on demand proof of ownership or state registration; properly display vehicle safety inspection stickers, if required; and

Comply with the minimum requirements of the motor vehicle insurance laws and regulations in the state where the installation is located

Operators of GOVs must have proof of authorization to operate the vehicle

To operate a POV on the installation, an individual must register the vehicle with Security Forces. To do so, an individual must

Possess a valid state driver's license

Possess a valid state registration for the state in which the vehicle is registered

Present proof of compliance with the minimum vehicle insurance requirements for the state in which the installation is located; (NOTE: If the installation is located in a state not requiring insurance, the installation commander may set reasonable liability insurance requirements for registration and operation of POVs within the confines of the installation.); and

Present proof of satisfactory completion of a vehicle safety inspection by the state in which the vehicle is registered or the state in which the installation is located, if an inspection is required in either state

### **IMPLIED CONSENT**

In return for accepting the privilege of operating a motor vehicle on a military installation a driver gives implied consent in a number of areas, including

Consent to tests for the presence of alcohol or drugs in their blood, on their breath, and in their urine, provided there is a lawful stop, apprehension, or citation for any offense committed while operating or in physical control of a motor vehicle while under the apparent influence of alcohol or drugs; and

Consent to the removal and temporary impoundment of their POVs if it is (1) illegally parked; (2) interfering with operations; (3) creating a safety hazard; (4) disabled by accident or incident; (5) abandoned, or left unattended in a restricted or controlled access area

## **SUSPENSION**

The installation commander can administratively suspend or revoke on-base driving privileges. A suspension up to 12 months may be appropriate if a driver continually violates installation parking standards, or habitually violates other nonmoving standards. Commander will immediately suspend driving privileges pending resolution of intoxicated driving incidents under the circumstances outlined below

Refusal to take a lawfully requested chemical test for the presence of alcohol or other drugs in the driver's system; or

Operating a motor vehicle with Blood Alcohol Content (BAC) or Breath Alcohol Content (BRAC) 0.10 percent by volume or higher, or in excess of the applicable BAC or BRAC level in the local civilian jurisdiction, whichever is lower

Receipt of an arrest report or other official document reasonably showing an intoxicated driving incident occurred

If arrested off-base for DWI, on-base driving privileges can be suspended. If acquitted on the merits, driving privileges should then be restored

## **REVOCAATION**

The installation commander will immediately revoke driving privileges for a period of not less than one year in the following circumstances

A person is lawfully detained for intoxicated driving and refuses to submit to a BAC or BRAC test

Conviction, nonjudicial punishment, or a military or civilian administrative action resulting in the suspension or revocation of a driver's license for intoxicated driving; or  
The installation commander determines an immediate revocation is required to preserve public safety or the good order and discipline of military personnel

## **PROCEDURES**

A point system is used on-base to provide a uniform administrative device to impartially supervise traffic offenses. Points are assessed for violations of motor vehicle traffic regulations for on-base and off-base traffic offenses. Certain procedural guidelines apply before an individual's driving privilege may be suspended or revoked

The individual has the right to hearing before a designated hearing officer

Must notify the individual of the right to a hearing, then it is up to the individual to request a hearing

Can appeal a suspension or revocation within 10 days of notification of the suspension or revocation

The suspension or revocation is not stayed pending an appeal

A suspension for a driving while intoxicated offense may be effective immediately if based on reliable evidence. Such evidence can include witness statements, a military or civilian police report, chemical test results, a refusal to complete chemical testing, video tapes, written statements, field sobriety test results, or other evidence

Successful completion of alcohol rehabilitation is a condition for reinstatement of driving privileges following a DWI

Civilian offenders may be prosecuted in Federal Magistrate's Court for on-base traffic offenses. Additionally, federal regulations (32 C.F.R. § 210.3(c)) authorize installation commanders to prescribe vehicular and pedestrian traffic rules (but such rules may require notification and negotiation with the local union)

**References:**

AFPD 31-2, *Law Enforcement*, 6 May 1994

AFI 31-204, *Air Force Motor Vehicle Traffic Supervision*, 14 July 2000

AFI 31-101, *The Air Force Installation Security Program*, 1 March 2003

AFH 31-223, *The Air Force Resource Protection Program*, 1 February 1997

AFI 51-905, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians*, 1 June 1998

## **FAMILY MEMBER MISCONDUCT**

Installation commanders must constantly try to resolve difficult problems arising from family member misconduct. The wing commander is responsible for maintaining good order and discipline, and for protecting Air Force resources, yet has little authority when it comes to punishing civilians in general, and family members in particular. Nonetheless, there are certain actions available to deal with family member misconduct.

### **COMMANDER REPONSIBILITIES AND OPTIONS**

#### Administrative Actions

Suspend or revoke privileges

Driving suspension may be mandatory in certain circumstances (e.g., drunk driving)

BX / Commissary

MWR facilities

Commercial solicitation

Terminate military family housing

Requires 30 days written notice

Air Force pays for the move

See article, Removal from Base Housing, this chapter

Debarment (must still provide access to medical treatment if authorized or available)

18 U.S.C. §1382 makes it a crime to enter the installation after previously being barred

Debarment should be in writing, setting forth the specific reasons for debarment. Debarment may be indefinite, but set time limits are recommended (See article, Debarment, this chapter.)

#### Criminal actions

Criminal actions depend upon the jurisdiction of the base

If the base is under exclusive federal jurisdiction, family members may be prosecuted in Federal Magistrate's Court. (see article, Federal Magistrate Program, this chapter.) This is a federal prosecution

If the base has concurrent jurisdiction, either federal court or state court may be the proper forum for prosecuting family members. Several states are very jealous of their jurisdiction over juveniles. Refer this issue to your SJA. Some bases have negotiated Memoranda of Understanding with state juvenile authorities to determine prosecution of such cases

If the base has only proprietary jurisdiction, the state retains the authority to prosecute family member misconduct (involving only state crimes) occurring on the installation. Any family member misconduct should be referred to the local authorities for prosecution

Some installations have established programs for handling juvenile misconduct. Often called Juvenile Correction Boards, these boards consider juvenile cases and recommend to the commander how to handle the matter

**References:**

DODD 1010.7, *Drunk and Drugged Driving by DOD Personnel*, 10 August 1983, Ch. 2, 20 November 1985

DODI 6055.4, *DOD Traffic Safety Program*, 20 July 1999

AFI 31-204, *Air Force Motor Vehicle Traffic Supervision*, 14 July 2000

AFI 32-6001, *Family Housing Management*, 23 January 2002

AFI 34-249, *Youth Programs*, 1 June 2000

AFI 36-3026(I), *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel*, 20 December 2002

AFI 51-905, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians*, 1 June 1998

## **FEDERAL MAGISTRATE PROGRAM**

The Federal Magistrate program provides an additional means of enforcing discipline on the base. The availability of the program depends on the location and jurisdiction of the base, the type and locale of the offense, and the status of the offender. The commander has the full range of administrative sanctions, as well as criminal sanctions under the UCMJ, available when dealing with misconduct by a military member. The options are more limited when dealing with a civilian offender.

## **COMMANDER RESPONSIBILITIES AND OPTIONS**

Civilian employees

Administrative sanctions run the gamut from administrative counseling and reprimands to removal (*see* AFI 36-704, *Discipline and Adverse Actions*)

A civilian employee may also be subject to any other administrative or criminal sanctions discussed below. However, there may be some restrictions

Any civilian may be subject to administrative sanctions

The wing commander may suspend or revoke privileges, such as

Commercial solicitation

Driving on the installation; or

Base Exchange and Commissary use

For misconduct, the commander may terminate entitlement to military family housing

Must give 30 days written notice and the Government pays for the move

The commander may bar any civilian from the installation

Must allow access for medical care for dependent family members and retirees

Commercial solicitors and civilian employees have certain additional rights (*See* article, *Debarment*, this chapter)

Criminal actions committed by a civilian on a base that has federal jurisdiction may be handled in federal court, including Magistrate Court

Any federal statute that does not rely on territorial jurisdiction may result in prosecution regardless of the status of the base (e.g. counterfeiting, espionage, sabotage, bribery of federal officers)

If the base has only proprietary jurisdiction, federal statutes that rely on territorial jurisdiction may not be enforced in federal court. They must be handled in state court

If the base has exclusive federal jurisdiction, the state may not prosecute for offenses committed on the installation. Federal courts provide the only remedy

If the offender violated state law, a violation of the Assimilative Crimes Act, 18 U.S.C. 13, may be alleged

This potentially makes violating a state statute a federal offense

This is available where the conduct does not otherwise violate a federal statute

## **HOW MAGISTRATE COURT WORKS**

Federal Magistrate Court is an alternative to prosecution in federal district court

Prosecution in Magistrate Court requires consent of the defendant

Magistrates normally try misdemeanor offenses (an offense for which the authorized penalty does not include 1 year imprisonment), and may try juvenile offenders

Air Force judge advocates, acting as Special Assistant U.S. Attorneys, may prosecute cases in Magistrate Court under the provisions of AFI 51-905

Wing commander decides whether to refer after finding administrative steps inadequate

However, if safety, discipline, or other considerations warrant, a commander may make a blanket determination that administrative disposition of certain offenses committed by civilians on base is not appropriate and that all such offenses should be referred to trial

Upon request, the Air Force must bargain with the local union before implementing the magistrate program or expanding the existing program to civilian employees

### **References:**

AFI 36-703, *Civilian Conduct and Responsibility*, 1 August 1999

AFI 36-704, *Discipline and Adverse Actions*, 22 July 1994

AFI 51-905, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians*, 1 June 1998

## **FREE SPEECH, DEMONSTRATIONS AND OPEN HOUSES**

Air Force commanders have the inherent authority and responsibility to execute the mission, protect resources and maintain good order and discipline. This authority and responsibility includes placing lawful restrictions upon speech and protest activities.

### **COMMANDER RESPONSIBILITIES**

Commanders must preserve the service member's right of expression, consistent with good order, discipline and national security, to the maximum extent possible. To properly balance these interests, commanders must exercise prudent judgment and consult with their staff judge advocates

Air Force members may not distribute or post any unofficial printed or written material within any Air Force installation without permission of the installation commander

Air Force members may not write for unofficial publications during duty hours

Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in an effort to deprive individuals of their civil rights

Members who actively participate in such groups or activities are subject to adverse administrative and disciplinary action, including separation and punishment under the UCMJ

Mere membership in these groups is not prohibited; however, membership must be considered in evaluating or assigning members

Air Force members may complain and request redress of their grievances under Article 138, UCMJ, and through the Inspector General Complaint System. They may also petition any member of Congress without fear of reprisal

### **CONTROLLING OR PROHIBITING DEMONSTRATIONS AND PROTEST ACTIVITIES**

Commanders may also take measures to control or prevent demonstrations and protest activities within the installation

When faced with demonstrations or related activities on an Air Force installation you may prohibit them if

they interfere with mission accomplishment, or

they present a clear danger to loyalty, discipline, or morale of your service members.

No one may enter a military installation for any purpose prohibited by law or unlawful regulation, or reenter an installation after having been barred by order of the installation commander

Air Force members are prohibited from participating in demonstrations when they are on duty, when they are in a foreign country, when they are in uniform, when their activities constitute a breach of law and order, or when violence is likely to result. Members who violate this provision are subject to disciplinary action under the UCMJ

## **POLITICAL ACTIVITIES BY MEMBERS OF THE AIR FORCE**

Air Force members may register to vote, vote, and express a personal opinion on political candidates and issues, but not as a representative of the Armed Forces

For a list of prohibited and permitted political activities, see AFI 51-902, para. 3 and 4

## **OPEN HOUSE REQUIREMENTS AND RESPONSIBILITIES**

An open house where the general public is invited onto the installation does not, in and of itself, cause the installation to lose its status as "closed" for the purposes of preventing political or ideological speech ("Closed" means not a public forum for protests or demonstrations, such as community parks or sidewalks)

Open houses are for local community relations. Commanders retain the authority to prevent political or ideological speech or demonstrations on the installation during an open house

Commanders can prevent or stop political or ideological speech because such speech creates a danger to loyalty, good order and discipline

Commanders need not wait until loyalty, good order or discipline are actually negatively affected before preventing or stopping the speech

Speech that presents such a danger can be prevented at the outset because it presents such a danger

If a person or group attempts to engage in political or ideological expression or demonstrations on an installation, the commander should escort the offending party or parties off the installation and issue a barment letter, the violation of which can subject the offender to criminal penalties

An installation loses its status as "closed" for the purposes of preventing political or ideological speech or demonstrations only if the commander allows political or ideological speech or demonstrations to occur or by abandoning control over the installation or parts of it

Installation commanders should be careful about whom they invite onto the installation and what they allow those people to do. It is important to work closely with the SJA to plan open houses so that potential problems can be prevented and to solve free speech issues should they arise

**References:**

AFI 51-902, *Political Activities by Members of the US Air Force*, 1 January 1996

AFI 51-903, *Dissident and Protest Activities*, 1 February 1998

AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice*, 30 June 1994

AFI 90-301, *Inspector General Complaints*, 30 June 2001

## INSTALLATION JURISDICTION

To understand the degree of control a commander has over an Air Force installation, one must be familiar with the concepts of title and jurisdiction.

### TITLE

Title in relation to a military installation is virtually the same as in a private real estate transactions: title simply means legal ownership -- the legal right to the use and possession of a designated piece of property

In most cases, the Air Force has title to the property on which its installations are located. Some installations, however, sit on leased property

The installation Civil Engineer maintains the deed or lease to the installation. Questions concerning title to the installation's real property should be referred to the SJA

### JURISDICTION

The concept of jurisdiction is separate and distinct from that of title

Jurisdiction includes the right to legislate (*i.e.*, implement laws, rules and regulations) and to enforce those laws. Having title does not necessarily include legislative jurisdiction

### SOURCES OF LEGISLATIVE JURISDICTION

Article I, § 8, clause 17, of the United States Constitution confers upon Congress the power to exercise legislative jurisdiction over federal property. The government can acquire the right to exercise legislative jurisdiction in three ways

Purchase and Consent: The federal government purchases the property and the state legislature consents to giving the federal government jurisdiction

Cession: After the federal government acquires title to property, the state may cede jurisdiction, in whole or in part, to the federal government. The federal government can, with the consent of Congress, later retrocede jurisdiction back to the state. Prior to 1940, it was presumed that jurisdiction was ceded at the time the government acquired the property. Since 1940, however, there must be an affirmative acceptance of jurisdiction before the federal government will have legislative jurisdiction. 40 U.S.C. § 255. Check the deed to determine when the federal government acquired the property

Reservation: At the time the federal government ceded property to establish a state (particularly in the western U.S.), it reserved some of the land as federal property. In that case, the federal government retained legislative jurisdiction over the property it reserved. Again, check the deed

## TYPES OF LEGISLATIVE JURISDICTION

The inquiry does not stop with determining if the federal government has legislative jurisdiction. It is also necessary to determine what type of jurisdiction it has. There are four types of legislative jurisdiction

**Exclusive Jurisdiction:** As the term implies, this type of jurisdiction gives the federal government sole authority to legislate. Unless exclusive jurisdiction was reserved at the time land was granted to the state, it is necessary to go back to the state for exclusive jurisdiction. The state may have elected to reserve some authority (for instance, authority to serve civil and criminal process on the property). If the state failed to reserve such authority, it is waived. For some years now, it has been federal policy not to acquire exclusive jurisdiction. While at first blush this may seem odd, there are legitimate reasons for the policy. For instance, state and local authorities may be able to deal better with particular situations than the federal government (e.g., child welfare services, domestic relations matters, etc.)

**Concurrent Jurisdiction:** Both the state and federal governments retain all their legislative authority. In the event of conflict, the federal government prevails under the Supremacy Clause of the Constitution. Art. VI, Clause 2, U.S. Constitution

**Partial Jurisdiction:** Both the state and federal government have some legislative authority, but neither one has absolute power. For instance, the state may have reserved the authority to impose and collect taxes or it may have ceded only criminal jurisdiction over the property. Again, federal supremacy applies in the event of a conflict

**Proprietary Jurisdiction:** In this case, the U.S. is like any other party who has only a possessory interest in the property it occupies. The U.S. is simply a tenant with virtually no legislative authority. The federal government maintains immunity and supremacy for inherently governmental functions. The only federal laws that apply are those that do not rely upon federal jurisdiction (espionage, bank robbery, tax fraud, counterfeiting, etc.). However, the installation commander can still exclude civilians from the area pursuant to the commander's inherent authority. *Greer v. Spock*, 424 U.S. 828 (1976)

### **Reference:**

AFI 32-9005, *Real Property Accountability and Reporting*, 30 September 1994

## **MEDIA RELATIONS DURING AIRCRAFT ACCIDENTS**

Initial News Release. Give all available, releasable, commander-approved information to the news media within an hour after an accident is reported

The initial release should include information as indicated in AFI 35-101, *Public Affairs Policies and Procedures*, para. 7.12

## **ACCIDENTS ON MILITARY INSTALLATIONS**

If no classified material is exposed, the commander will permit news media photography

If classified information or materials are exposed and cannot be covered or removed, media personnel or visitors will not be allowed to photograph or videotape the site

Notify media or visitors of any restrictions on what can be filmed

Bar or restrict media or visitors from sensitive sites

Immediately notify security forces of suspected filming of classified information or activities by media personnel or visitors. Take into custody any exposed film; provide a receipt and then promptly develop and examine the film. Do not detain the media or visitors

Review seized films or videotapes with security forces to see if classified information is contained on the films or videotapes and return all portions that do not contain classified information

Immediately notify the local Air Force Office of Special Investigations (AFOSI) if

The film contains classified information; or

It appears there was intent to deliberately film or videotape classified information for purposes of profit, espionage or to have any other significant adverse impact on national security

## **ACCIDENTS AT OFF-BASE LOCATIONS**

If no classified information is exposed, the senior Air Force representative authorizes news media photography

If undetermined whether classified information is exposed, explain that fact to any media photographer at the scene. Advise them that no photography is authorized. Warn them that taking pictures without permission may violate federal law

If classified information is exposed and cannot be covered or removed

Explain that federal law prohibits photography when official permission is expressly withheld and ask the news media to cooperate

Do not use force if news media representatives refuse to cooperate unless the area has been declared a National Defense Area. See article, National Defense Areas, Chapter 9 of this Deskbook, for further information. If photographs are taken after a warning is issued, Air Force officials must ask civilian law enforcement authorities to stop further photography of the exposed classified information and to collect all photographs

If no civilian law enforcement authorities are on the scene and news media representatives take unauthorized pictures, do not seize the videotapes or film or detain the photographer

Immediately contact the managing editor or news director of the medium employing the photographer

Explain the situation and request the return of videotape or film having suspected classified information

Explain failure to return the material to military authorities violates federal law

### **RELEASING NAMES OF ACCIDENT VICTIMS**

Deceased. Responsible installation public affairs (PA) office releases the names of people killed in Air Force accidents after the next-of-kin have been notified

Installation commander may release the names early when a military accident in a civilian community causes significant property damage or loss of life, only to reassure the community the Air Force members were well qualified

Survivors. Generally, release the names of all survivors immediately. Report survivors who are believed to be in immediate danger of dying as survived but in critical condition. If in the CC's opinion releasing the survivors' names will reveal the identity of deceased personnel prior to next of kin notification, withhold the names

Missing or Presumed Lost. PA office at departure base will release the names of passengers and crew to news media individually, as the next of kin are notified; this should not delay the announcement that the aircraft is missing

When key political persons are killed, injured, or missing while on an Air Force installation or in an Air Force vehicle, withhold casualty information until OASD/PA approves

### **ACCIDENT INVESTIGATIONS**

Commanders and PA representatives must not speculate about the causes of the accident, even if the cause seems obvious. Explain that only a safety investigation board (SIB) or accident investigation board (AIB) is qualified to determine the causes

Do not lead the reporter to believe that all SIB findings will be made available. Explain the purpose of the safety board is to prevent accidents, not to fix blame. The safety board's conclusions are privileged (as are statements given to the board under the promise of confidentiality) and must be protected

If a reporter requests the AIB or SIB Report, direct him or her to the convening authority of the AIB. See article *Air Force Safety and Accident Investigations*, Chapter 10 of this Deskbook,. For more detailed information on accident report releases, refer to AFI 51-503, *Aircraft, Missile, Nuclear, and Space Accident Investigations*

**References:**

AFI 34-1101, *Assistance to Survivors of Persons Involved in Air Force Aviation Mishaps*, 1 October 2001

AFI 35-101, *Public Affairs Policies and Procedures*, 26 July 2001

AFI 51-503, *Aircraft, Missile, Nuclear, and Space Accident Investigations*, 9 August 2002

AFI 91-204, *Safety Investigations and Reports*, 12 April 2004

## MINOR MILITARY CONSTRUCTION

The term "construction" is a term of art when it comes to funding. The lay definition of construction would include most any work on a physical structure, in one or multiple phases. However, the definition of "construction" for *funding* purposes is more restrictive and often more difficult to determine.

### CONSTRUCTION FUNDING

#### "Specified" Military Construction Appropriation (MILCON)

Applies to any project that exceeds \$750,000

Congressional line-item authorization required

#### "Unspecified" Minor Military Construction Appropriation (UMC)

Available for any project with a cost between \$750,000 and \$1.5 million (between \$1.5 million and \$3 million IF intended solely to correct life, health, or safety deficiencies)

Each military department receives an appropriation for minor construction

The Secretary of the Air Force controls expenditure of these funds

The Secretary must also notify Congress and wait 30 days before work begins (Congress must object within 30 days)

#### "Unspecified" Minor Military Construction, using Operation and Maintenance Appropriation (O&M)

Congress permits the use of O&M funds for unspecified minor construction up to \$750,000 per project (\$1.5 million IF intended solely to correct life, health, or safety deficiencies)

Expenditure of these funds is controlled by the MAJCOMs (unless approval authority is delegated to the installation commander)

With limited exceptions, these funds may not be used to finance projects related to exercises outside the United States that are coordinated or directed by the Joint Chiefs of Staff

### FUNDING PITFALLS

Projects may not be split into separate segments (commonly called "project splitting") to avoid funding limitations. For instance, it is improper to split a proposed \$800,000 building into two \$400,000 projects funded with O&M funds to avoid the \$750,000 limitation

Projects may not be completed in phases (commonly called "phasing") in order to avoid funding limits. For instance, it is improper to build a project for \$450,000 in one fiscal year and another project for \$350,000 in the next FY, resulting in an \$800,000 building, in order to avoid the \$750,000 O&M limit

Defining exactly what is a "project" can be difficult. A project is generally all work necessary, including land acquisition, excavation, building, installation of equipment, landscaping, etc., to produce a complete and useable facility. It can also include work on an existing facility, including an extension, addition, expansion, alteration, or conversion, or the replacement of an existing facility damaged beyond economical repair

For funding purposes, "maintenance" and "repair" are NOT considered construction; therefore, the \$750,000 limit on the use of O&M funds is not applicable. The only limitation is the dollar amount the installation has available in its O&M account

Maintenance is defined as recurrent work necessary to preserve or maintain a facility so it can be used for its designated purpose. In other words, recurrent work necessary to prevent deterioration

Repair means to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated purpose

Only funded costs count toward the dollar limitations. Funded costs include such things as materials, supplies, labor, lodging (TDY), and the maintenance and operation of government-owned equipment. Unfunded costs generally include military salaries (if military labor is used), planning and design costs, depreciation of government-owned equipment, and items received on a nonreimbursable basis as excess distribution from another department or agency. While unfunded costs do not count toward the funding limitation, they must still be calculated and reported

**References:**

DOD 7000.14-R, *DoD Financial Management Regulations (FMRS), Volume 2B, Budget Formulation and Presentation*, June 2000, Chapter 8

AFI 32-1021, *Planning and Programming of Military Construction (MILCON) Projects*, 24 January 2003

AFI 32-1022, *Planning and Programming NAF Facility Construction Projects*, 29 June 1994

AFI 32-1032, *Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects*, 15 October 2003

AFI 65-601V1, *Budget Guidance and Procedures*, 24 December 2002

AFI 65-601V2, *Budget Management For Operations*, 21 October 1994

## **MWR AND NONAPPROPRIATED FUND INSTRUMENTALITIES**

Morale, Welfare, and Recreation (MWR) activities are those activities that provide for the comfort, pleasure and mental and physical improvement of authorized users. The activities include recreational and free-time programs, resale merchandise and services, and activities to promote the general interest.

Nonappropriated Funds (NAF) are funds that are not appropriated by Congress and are not furnished from revenue derived from taxation. NAF funds are self-generated by Nonappropriated Fund Instrumentalities (NAFIs).

NAFIs are DoD fiscal and organizational entities that exercise control over NAFs and furnish or assist other DoD organizations in providing MWR services

NAFIs are instrumentalities of the federal government, created under the authority of Air Force instructions. NAFI employees are federal employees but are not civil servants

NAFIs are not incorporated under the laws of any state, but enjoy the legal status of an instrumentality of the United States, i.e., a lawsuit against a NAFI is a suit against the United States. NAFIs are NOT private organizations established under AFI 34-223

The Resource Management Flight Chief (RMFC) is the appointed funds custodian responsible for protecting, accounting for and using NAFs. The RMFC is the single custodian for all base level NAFIs (except base restaurants, civilian welfare funds, and some NAFIs at remote or isolated sites). No individual or group has any right to ownership in NAFI assets

Benefits accrue to persons through participation in NAFI activities and programs

NAFIs may not generally show movies; sponsor, conduct or allow gambling; provide or sell alcoholic beverages; hoard or dissipate NAFI assets

AAFES is the primary source of resale merchandise and services for military personnel, dependents and other authorized patrons

NAFIs may engage in resale activities when commander determines AAFES cannot meet the requirement in a responsive manner and the goods or services provided are directly related to the purpose and function of the NAFI involved

### **Reference:**

AFI 34-201, *Use of Nonappropriated Funds (NAFS)*, 17 June 2002

## NATIONAL DEFENSE AREAS

Air Force commanders are charged with responsibility for protecting DoD resources under their control. That responsibility is not limited to resources located on federal land under DoD jurisdiction, but applies to such resources wherever they are located, whether on or off a military installation. For the most part, commanders rely on federal, state, and local civil authorities to protect off-base assets. However, when civil authorities are unavailable, unable, or unwilling to provide protection, it may be necessary to establish a National Defense Area (NDA), thereby enabling direct military protection of the assets concerned.

Definition: An NDA is an area established on nonDoD (usually nonfederal) lands located within the United States, its territories or possessions, for the purpose of safeguarding classified defense information or protecting DoD equipment and/or material. Establishment of an NDA temporarily places the land concerned under the effective control of the DoD. An NDA can also be established on federal lands under the control of other federal agencies

Commanders of MAJCOMs, numbered air forces, wings, groups, installations, and designated "on-scene commanders" for major accident responses, all have authority to establish NDAs. Once established, the commander has authority/responsibility to define the boundary, mark it with an appropriate barrier, and post warning signs

### Rules for establishing an NDA

NDAs may only be established within the United States, its possessions or territories. They are not applicable in overseas areas

NDAs may only be established under emergency situations such as aircraft crashes; emergency landings by aircraft carrying nuclear weapons; emergency diversions of military aircraft to civilian airports; and accidents involving nuclear weapons ground convoys (Planned rest stops are not emergencies)

The size, shape and location of the NDA must be reasonably related to what is needed to protect the resource concerned. The boundaries should be clearly defined, preferably by some form of temporary barrier, such as rope or wire. Warning signs should be posted at each entry control point and along the boundary

To the extent possible, the consent and cooperation of the landowner should be sought when establishing an NDA. However, military necessity ultimately drives the location, size, and shape of an NDA, and it may be established with or without the owner's consent

Because the NDA effectively deprives the landowner of the use of the property during the period the NDA is in existence, the Air Force may have to compensate the landowner for the temporary "taking" of the property

Commanders should consult with their servicing staff judge advocate when deciding to establish, disestablish, or modify an NDA

#### Enforcement

Commanders have the authority to prohibit entry into NDAs and to remove those who enter without authority, using the minimum force reasonably necessary to prevent violation of the NDA and to protect the DoD resources concerned

Apprehension or detention of civilian personnel who violate the security requirements of the NDA should normally be done by civilian law enforcement authorities

If civil authorities cannot or will not provide assistance, on-scene military personnel may detain civilian violators or trespassers and escort them from the NDA

Civilian offenders detained by military personnel should be released to proper civil authorities as quickly as possible; coordinate with the servicing staff judge advocate

Military action to detain civilian violators is limited to the NDA and the immediate boundary area. Pursuit of civilian offenders by military authorities beyond the immediate area should be left to the responsibility of civil law enforcement authorities

#### Media Relations

On-scene commanders should be sensitive to interests of the media, and should limit photography only as much as necessary to protect classified information. For example, rather than prohibiting all photography, it may be sufficient to simply limit photography to those angles or distances which would not result in exposure of classified information

If an NDA has been established, military authorities may use reasonable force to prevent photography by anyone within the NDA, to apprehend or detain offenders, and to seize film and equipment. If photography is done from outside the NDA, military should turn the matter over to civilian authorities

If an NDA has not been established, military authorities at off-base locations may not use force, but should ask civilian law enforcement officials to stop further filming of exposed classified information/resources, and to collect all photographs already taken

If civil authorities are unwilling or unable to assist, the commander concerned should contact the managing editor or director of the news agency employing the photographer, request return of the film suspected of containing classified information, and explain that failure to return the film may constitute a violation of federal law

The attached form letter may be used to communicate establishment of an NDA to local governments, citizens, media and others

**References:**

50 U.S.C. § 797

18 U.S.C § 1385

DoDD 5200.8, *Security of DoD Installations and Resources*, 25 April 1991

DOD 5200.8-R, *Physical Security Program*, 13 May 1991

AFI 31-101, *The Air Force Physical Security Program*, 1 March 2003

AFI 31-201, *Security Police Standards and Procedures*, 4 December 2001

AFI 32-4001, *Disaster Preparedness Planning and Operations*, 1 May 1998

AFMAN 32-4004, *Emergency Response Operations*, 1 December 1995

AFI 35-101, *Public Affairs Policies and Procedures*, 26 July 2001

**Attachment:** Sample letter establishing an NDA

MEMORANDUM FOR WHOM IT MAY CONCERN

FROM: (Commander or On-Scene Commander)

SUBJECT: Establishment of National Defense Area

1. In accordance with Section 797 of Title 50 of the United States Code and AFI 31-101, I (as the on-scene commander) (as the commander responsible for the resources), (am)(have been directed by, name and rank of the commander responsible for the resources to) establishing a National Defense Area as described in paragraph 4 of this letter. This action is being taken for the purpose of protecting and securing priority military resources.
2. Entry into this National Defense Area is subject to my approval. The protection of priority military resources is the primary consideration. Also, I wish to ensure the protection of human life and civilian property in the National Defense Area and ensure the integrity of the site pending investigation and recovery operations. Therefore, all requests to enter the National Defense Area must be addressed to my attention.
3. Entering a National Defense Area without authority is a federal offense; and upon conviction, a violator shall be liable for a fine, not to exceed \$5,000 or imprisonment for not more than one year, or both.
4. The National Defense Area is described as follows:  
[Describe NDA by coordinates, landmarks, boundary markings, or other certain fixed points.]

SIGNATURE BLOCK FOR COMMANDER OR  
ON-SCENE COMMANDER

**NOTE:** Use the appropriate wording. If the on-scene commander is also the commander responsible for the resource involved, he/she may authorize the establishment of the National Defense Area. In all other cases, the on-scene commander may only establish a National Defense Area after being directed to do so by the commander responsible for the resource involved.

## **OFF-LIMITS ESTABLISHMENTS**

The establishment of off-limits areas is a function of command. It may be used by commanders to help maintain good discipline, health, morals, safety, and welfare of service members. Off-limits action is also intended to prevent service members from being exposed to or victimized by crime-conducive conditions. Armed Forces Disciplinary Control Boards (AFDCBs) advise and make recommendations to commanders on matters including establishment of off-limits areas.

## **ARMED FORCES DISCIPLINARY CONTROL BOARDS**

AFDCBs are established under the provisions of Air Force Joint Instruction (AFJI) 31-213

They may be local or regional; some bases choose not to establish a board

Boards may recommend the commander place a civilian establishment or area "off-limits" to military members

The Board is usually composed of a president and voting members, appointed by the commander, and representatives from various base functional areas, such as law enforcement, legal counsel, Equal Opportunity, Public Affairs, Chaplains, consumer affairs, and medical, health or environmental protection

To place an establishment "off-limits" the board normally must

Notify the proprietor of the offending establishment, in writing, of the alleged condition or situation requiring corrective action

Specify in the notice a reasonable time for the condition or situation to be corrected

Provide the opportunity to present any relevant information to the board

The AFDCB recommends to the commander that the establishment be placed "off-limits"

The Commander makes the final decision. A decision to place an establishment off-limits may be appealed to the next higher commander after exhausting any local appeal rights. The establishment remains off-limits until the decision is overturned or the commander determines adequate corrective action has been taken

## **EMERGENCY SITUATIONS**

In emergency situations, commanders may declare establishments or areas temporarily off-limits to personnel of their respective commands; but, follow up action must be taken by AFDCBs as a first priority

## COMMANDER DISCIPLINARY OPTIONS

Members who enter "off-limits" areas or establishments are subject to UCMJ action. Family members of service members and others associated with the Service or installation should be made aware of off-limits restrictions

Do not post "off limits" signs or notices in the United States on private property

In areas Outside of the Continental United States (OCONUS), off-limits and other ADCB procedures must be consistent with existing Status of Forces Agreements (SOFAs)

### **Reference:**

AFJI 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations*, 30 June 1993 (Effective 30 July 1993)

## **OUTSOURCING AND PRIVATIZATION**

### **DEFINITIONS**

Outsourcing: The sourcing of a new requirement or transfer of an activity that has been performed in-house to an outside provider. The Air Force retains full control and responsibility (through service contracts) of the recurring services or functions that are outsourced

Privatization: The transfer of ownership of functions, business assets, or both from the public to the private sector. Services will be provided by the private sector

### **THREE DEGREES OF PRIVITIZATION**

Competitive outsourcing governed by OMB Circular A-76

Purchase of services traditionally performed in-house

No transfer of ownership of government property

Primary purpose is cost savings

Housing privatization governed by 10 U.S.C. §§ 2871-2884

Sec 2872: Acquisition or construction of family housing units and unaccompanied housing units by private persons

On or near military installations

May or may not involve the transfer of AF owned property and waiving the usual government property disposal process

Section 2879 gives the services the authority to lease, on an interim basis, facilities that are completed while the construction project is ongoing

Construction of “housing” may include ancillary facilities like child care centers, community centers and housing offices under section 2881

Market incentives

Under sections 2873 and 2875, the services may offer

Loan guarantees up to, the lesser of, 80% of the project value or the outstanding principal of a loan

Loans directly to a contractor up to the limit of budget authority

Equity investment in the enterprise in the form of a limited partnership or corporation and/or through the purchase of stocks or bonds

Military members assigned to privatized housing may be required to make rental payments through allotments under section 2882

Differential lease payments that bring rental payments up to fair market value without increasing a military member's out of pocket expenses are authorized under section 2877

Utility systems privatization governed by 10 U.S.C. § 2688

Includes equipment, fixtures, structures used for

electricity generation

water treatment

wastewater treatment

natural gas delivery

steam generation

telecommunications

Service contracts may be with purchaser of the DoD system or a third party that provides services

Transfers of DoD property

May convey title in fee simple or less

Must use competitive procedures

Must receive fair market value

Must demonstrate a long term economic benefit and long term cost reduction

**References:**

10 U.S.C. § 2688

10 U.S.C. §§ 2871-2884

OMB Circular A-76

OMB Circular A-76 Revised Supplemental Handbook

## **POSSE COMITATUS**

The Posse Comitatus Act states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years or both.

## **PUNISHMENT FOR VIOLATIONS**

Possible sanctions for violating the Posse Comitatus Act

Fine of \$10,000 and/or two years imprisonment; and

Suppression of evidence illegally obtained

The court may let the accused go free

So far, the courts have been reluctant to grant this remedy. However, in recent cases the courts have warned that repeated violations will require use of the exclusionary rule

## **WHAT POSSE COMITATUS PROHIBITS**

Prohibitions

The armed services are precluded from assisting local law enforcement officials in enforcing civilian laws, except where authorized by the Constitution or act of Congress

By its terms, the Act applies only to the Army and Air Force

The Navy and Marine Corps follow the Act by policy

The Act applies to the Reserves and to the National Guard while in Title 10 (federal) service, but not to the Guard while in Title 32 (state) status

The Act does not apply to the Coast Guard

The act does not apply to off-duty conduct, unless induced, required or ordered by military officials

The act does not apply to civilian employees, unless acting under the direct command and control of a military officer

## EXCEPTIONS TO POSSE COMITATUS

### Statutory exceptions

By its terms, the Act does not preclude support "expressly authorized by the Constitution or Act of Congress." Congress has enacted a number of statutory provisions falling into this category

Several statutes authorize the military to engage in actions that would otherwise violate Posse Comitatus (all sections below refer to Title 10, United States Code)

§ 371 allows the military to provide to local law enforcement officials any law enforcement information collected "during the normal course of military training or operations." It requires the military to consider the needs of local law enforcement when planning training missions. Moreover, it mandates turning over information relevant to drug operations unless doing so would threaten national security

§ 372 allows the military to loan any equipment, base facility, or research facility to local law enforcement, although you may charge them for its use (*See* § 377). Loan of "arms, ammunition, tactical-automotive equipment, vessels and aircraft" require proper coordination

§ 373 makes military personnel available to train Federal, State, and local CLEA officials on operation and maintenance of equipment properly loaned under § 372, and to provide expert advice to such officials

§ 374 allows SecDef to loan military personnel to operate and maintain loaned equipment under § 372, and under limited circumstances

The military is still prohibited from enforcing the civilian laws. We may not participate in a search, seizure, arrest, or similar activity in support of local law enforcement (§ 375)

The military still has the right to execute the laws on the installation for a military purpose

Even on the installation, we "detain" civilians before turning them over to civil authorities. We do not arrest or apprehend civilians. This is a critical distinction

The military may still engage in humanitarian acts, such as looking for a lost child. However, the courts will examine humanitarian acts to ensure we are not engaging in a subterfuge to disguise a Posse Comitatus Act violation

Posse Comitatus is still a Modern Problem: Despite the fact that this area goes back to the Civil War, it is still an issue that surfaces fairly frequently. For example, in the immediate aftermath of the Oklahoma City bombing, civilian law enforcement agencies sought military help and the Posse Comitatus Act was looked to for guidance

**References:**

AFI 10-801, *Assistance to Civilian Law Enforcement Agencies*, 15 April 1994

AFI 10-802, *Military Support to Civil Authorities*, 19 April 2002

AFMAN 32-4004, *Emergency Response Operations*, 1 December 1995

## **PRIVATE ORGANIZATIONS**

### **DEFINITION**

A private organization is a self sustaining special interest group, set up by people acting outside the scope of any official position they may have in the federal government

- Private organizations are NOT integral parts of the military service nor are they federal entities. They are not nonappropriated fund instrumentalities (NAFIs) nor are they entitled to the sovereign immunities and privileges given to NAFIs
- Private organizations operate on an Air Force installation with the written consent of the installation commander. This authority can be delegated to the Support Group Commander
- When an unofficial activity's/organization's current monthly assets (which include cash inventories, receivables, and investments) exceed a monthly average of \$1,000 over a 3-month period, the activity/organization must become a PO, discontinue on-base operations, or reduce its current assets. (For more information see Unofficial Activities / Snack Bars)

### **OPERATING RULES**

Each private organization must be approved in writing by the installation commander or his/her designee

The Services Squadron Commander or Director monitors and advises all private organizations and directs the Resource Management Flight Chief to keep a file on each PO

The Resources Management Flight Chief reviews each private organization annually to make sure documents, records and procedures are in order

Private organizations must be self-sustaining and cannot receive direct financial assistance from a NAFI in the form of contributions, dividends or donations

Private organizations with gross revenues of \$250,000 or more must have an annual audit done by a Certified Public Accountant (CPA). Private organizations with gross revenues of \$100,000 but less than \$250,000 must have an annual financial review conducted by an accountant (CPA not required). Private organizations with gross revenues of less than \$100,000 but more than \$5,000 are not required to conduct independent audits or financial reviews, but must submit an annual financial statement to the Recreational Support Flight Chief

The installation staff chaplain should coordinate on requests to establish religiously oriented private organizations

Private organizations may not unlawfully discriminate on any proscribed basis (race, color, sex, marital status, age, religion, national origin, political affiliation, or physical handicap)

Each private organization has the responsibility of obtaining adequate insurance or waiver thereof by the installation commander. A waiver of the insurance requirement will not protect the private organization or its members from valid claims or successful suits

Private organizations will not engage in activities that duplicate or compete with any base Services activity, NAFI, or the Army and Air Force Exchange Service (AAFES)

Private organizations must comply with all applicable federal, state and local laws governing such activities. Private organizations desiring tax-exempt status must file an application with the IRS. To qualify as tax-exempt organizations for federal tax purposes, private organizations must be organized for one or more of the purposes specifically outlined in the Internal Revenue Code

Private organizations are prohibited from conducting games of chance, lotteries, or other gambling activities, except in VERY limited circumstances (e.g. certain types of raffles) as set forth in AFI 34-223, paragraph 10.16, and the *Joint Ethics Regulation*

Private organizations are not authorized to sell alcoholic beverages

Private organizations will not engage in resale activities unless specific authorization is granted. The installation commander or the Services Squadron Commander or Division Chief may authorize occasional sales for fund raising purposes such as bake sales, dances, carnivals, and similar infrequent functions

-- 'Occasional sales' for fund-raising purposes is specifically defined as **not more than two (2) fund-raising events per calendar quarter**. This prohibition against frequent or continuous resale activities does not preclude collective purchasing and sharing of purchased items by members of POs or unofficial activities/organizations so long as there is no actual resale

-- Waivers to the above limitation may be sought through the chain of command to HQ AFSVA/SVPC. For more information, consult your Staff Judge Advocate

**References:**

AFI 34-223, *Private Organization (PO) Program*, 11 August 2003

DoD 5500.7-R, *Joint Ethics Regulation*, 30 August 1993; through Change 4, 6 September 1998

## REMOVAL FROM BASE HOUSING

The Air Force prefers that military personnel retain their assigned family housing for the duration of their tour at the installation unless there are reasons that justify termination.

Military personnel may be required to terminate occupancy of family housing when

- The conduct or behavior of the member OR DEPENDENT FAMILY MEMBER(S) is contrary to accepted standards or is adverse to military discipline, or
- The member or dependent family members are responsible for the willful, malicious or negligent abuse or destruction of property
- Cases involving early termination must be fully documented and should be retained on file. An involuntary move from military family housing is at government expense. Commanders are authorized to terminate housing for the above reasons with 30 days written notice to the member. Basic due process probably requires allowing the member the right to respond (orally/in writing) before the commander makes his or her decision.

### **References:**

AFI 32-6001, *Family Housing Management*, 23 January 2002  
AFH 32-6009, *Housing Handbook*, 1 June 1996

## **SMOKING IN AIR FORCE FACILITIES**

Department of Defense and Air Force policy is to promote a healthy work environment. As part of that policy, nonsmoking is established as the accepted norm. The Air Force offers encouragement and professional assistance to smokers seeking to quit smoking.

### **IMPLEMENTING THE AIR FORCE POLICY**

Installation commanders enforce policies on the use of tobacco products

Medical treatment facility commanders will provide tobacco cessation classes

Health care providers will question patients on their history of tobacco use at appropriate visits and will encourage patients to stop using tobacco products

### **PROHIBITIONS**

The Air Force prohibits smoking (cigar, cigarette, pipe) and the use of smokeless tobacco products in the workplace. In addition, the Air Force prohibits indoor tobacco use in all Air Force facilities, except

- Recreation areas designated by installation commanders
- Assigned government housing

The Air Force prohibits smoking in Air Force vehicles and on Air Force or contract aircraft

The Air Force prohibits students from using tobacco in any professional military education or formal training school during duty hours

- Instructors and staff of PME and formal training courses are strongly encouraged to refrain from use of tobacco products and must be away from student view if using such products during school duty hours

When possible, installation or squadron commanders designate outdoor smoking areas that are reasonably accessible to employees and provide a measure of protection from the elements

- Such areas will be away from points of ingress/egress

The Air Force prohibits advertisements for tobacco products in all official Air Force publications

Application to civilian employees of the federal government

-- Implementation of the DoD and Air Force policy on smoking must be coordinated with the local bargaining unit in accordance with the terms of the collective bargaining agreement. Note -- only the implementation (not whether smoking will or will not be permitted) requires coordination. Consult with the local labor relations officer for guidance in this area. (*See also* AFI 36-701, *Labor-Management Relations*, 27 July 1994)

Application to contractor employees and other non-DoD personnel

-- This AFI applies to all contractor employees and other non-DoD personnel on Air Force facilities and in Air Force buildings, vehicles, and aircraft

**References:**

DoDD 1010.10, *Health Promotion*, 22 August 2003

AFI 40-102, *Tobacco Use in the Air Force*, 3 June 2002

AFI 36-701, *Labor-Management Relations*, 27 July 1994

*See also* appropriate MAJCOM and/or local policies

## **SPOUSES' CLUBS**

### **THE ROLE OF SPOUSES' CLUBS**

Officer or NCO Spouses' Clubs are private organizations that the installation commander may authorize to operate on a base when he or she concludes the organization will make a positive contribution to the lives of base personnel

### **SOURCES OF AUTHORITY**

Because spouses' clubs are private organizations, it's important to remember these organizations are composed of people "acting outside the scope of any official position they may have in the federal government"

-- Thus, unlike the Air Force and other instrumentalities of the federal government, which have distinct legal and regulatory systems of command, spouses' clubs have no formal lines of authority interconnecting the various base clubs

-- Each club is a separate entity that actually derives its authority from its membership by common consent

-- In terms of this organizational authority, spouses' clubs do not rely on federal law or Air Force instruction, but spouses' clubs are not organizationally free from all laws and regulations

--- State laws regarding corporate entities govern clubs that choose to incorporate

-- Additionally, many of the activities that spouses' clubs engage in may be subject to other state and federal laws and regulations

To operate on Air Force installations, all private organizations must comply with AFI 34-223, governing the basic responsibilities, policies, and practices of private organizations. Further, AFI 34-223 defines and classifies private organizations

-- It provides policy for their establishment and gives guidance on how they may operate

-- It sets out responsibilities for commanders, their staffs, and members of private organizations located on Air Force installations

### **RESTRICTIONS ON SPOUSES' CLUBS**

AFI 34-223, para. 10.1, prohibits a private organization from using in its title or letterhead the name or seal of the Department of Defense, including the acronym "DoD". It also prohibits use of the name, abbreviation, or seal of any military department or service. Furthermore, private organizations may not use the seal, insignia, or other identifying device of the local installation

AFI 34-223, para. 10.2, prohibits membership or hiring discrimination based on age, race, religion, color, national origin, ethnic group or gender

Spouses' clubs must not engage in activities that duplicate or compete with any activities of the Army and Air Force Exchange Service (AAFES) or any other nonappropriated fund instrumentality (NAFI)

- With the exception of thrift shop sales of used clothing and other used merchandise, private organizations are generally prohibited from engaging in frequent or continuous resale activities and may not operate amusement or slot machines
- Continuous operation of a thrift shop requires specific approval of the installation commander
- Clubs must get specific permission from the installation commander to conduct bake sales, carnivals and other occasional sales for fund raising purposes
- If a club is planning any such fund raising activity, it should first get written permission from the installation commander

Private organizations are prohibited from soliciting funds for their organization on base

The instruction specifically prohibits games of chance, lotteries, or other gambling type activities (to include Monte Carlo night gambling) except under limited circumstances. Raffles that comply with city, county, state, federal (and/or international) law and that are conducted infrequently for the benefit of DoD personnel and their family members as a community are permitted when such requests have been reviewed by the SJA and have been authorized in advance by the installation commander

## **SCHOLARSHIPS**

There have been numerous questions about spouses' club scholarships. One of the most common is whether members of the spouses' club may receive one of the scholarships

- Funding of scholarships is generally permissible and the club's general welfare funds may be used to finance the scholarship program
- Scholarships may be awarded by the spouses' club to members of the "Air Force family" or the general public
- Members of the spouses' club may receive a scholarship but only if the selection of the recipient is made by nonmembers of the spouses' club and only if the scholarship competition is open to the entire "Air Force family"

## **ART AUCTIONS**

Sponsoring art auctions has traditionally been a fund raising activity for spouses' clubs, but the "art sales" industry has come under fire in the past

-- Investigations by the AFOSI and other agencies have involved artists, their agents, and, in some cases the sellers of art work

-- If a club gets permission from the local commander to hold an art auction fund raiser, the club must be especially diligent to protect itself from fraud or other harm. Specifically, the spouses' club must ensure the buyer has direct interaction with the seller (auction company) rather than with the spouses' club - meaning that a dissatisfied buyer's remedies are exclusively through the auction company and not the spouses' club

-- Insist on a detailed contract clearly setting out the rights and obligations of both the club and the auctioneer. For example, it should require the auctioneer to announce the status (original, serigraph, reproduction, etc.) for each piece being sold immediately before bidding begins on that piece

--- Spouses' club officials must ensure

----The contract includes a clause protecting the organization against legal action

----Checks from buyers are made out directly to the auction company

**References:**

AFI 34-223, *Private Organization (PO) Program*, 11 August 2003

AFI 36-3101, *Fundraising within the Air Force*, 12 July 2002

## **UNOFFICIAL ACTIVITIES / SQUADRON SNACK BARS**

### **DEFINITION**

Unit coffee funds, flower funds, or other small operations commonly known as "snack bar" funds are permitted when classified as unofficial activities with limited assets

Assets may not exceed a monthly average of \$1000 over a 3-month period

When assets exceed the above figure, the snack bar must either become a private organization, discontinue its operations, or reduce its assets below the \$1000 threshold

Installation and unit commanders must carefully review the status of all such unofficial activities operating on their installation and ensure their compliance with all applicable rules and regulations

No such fund can "duplicate or compete" with any Services, nonappropriated fund instrumentalities (NAFI), or AAFES activity

Unofficial activities/private organizations may not engage in frequent or continuous resale activities or operate amusement or slot machines

AFI 34-223, specifically amended paragraph 10.9, defining occasional sales for fund-raising purposes as not more than two (2) fund-raising events per calendar quarter

This prohibition against frequent or continuous resale activities does not preclude collective purchasing and sharing of purchased items by members of unofficial activities/organizations so long as there is no actual resale

They are usually NOT NAFIs

Unit snack bars are subject to lawsuits and should purchase liability insurance in an amount adequate to cover potential liability arising from the preparation/service of food. Individual members of the unit/squadron could incur personal liability if not insured

Snack bars must comply with all federal, state and local laws governing such activities, including federal tax laws. Interest from an interest bearing bank account must be reported to the IRS by the financial institution. Accordingly, it might be wise for the fund to utilize only a noninterest bearing account

Unofficial activities/private organizations may not sell alcoholic beverages, solicit funds, or conduct games of chance, lotteries, raffles, or other gambling-type activities

**References:**

AFI 34-223, *Private Organization (PO) Program*, 11 August 2003

AFI 36-3101, *Fundraising within the Air Force*, 12 July 2002

## UTILITY CONTRACTING AT BASE LEVEL

Most Air Force installations depend on local utilities for one or more of the following utilities: electricity, natural (or manufactured) gas, potable and nonpotable (gray) water, domestic (sewage) services, industrial wastewater services, thermal energy, chilled water, steam, hot water, and high temperature hot water services. These services are usually provided under a contract negotiated between the installation (and perhaps other DoD or Federal users in the local area) and the local utility. Utility contracts involve a large portion of an installation's O&M budget and must be closely scrutinized.

### "HOT" ISSUES

Electric Deregulation: The electric utility industry is undergoing dramatic change throughout the United States. Many states are in the process of deregulating the generation component of electric utility service. What this means to the base is that it will be capable of contracting, on a competitive basis, for electric generation. Bases should monitor deregulation initiatives that may occur at the state level. Where the base is competitively able to procure generation, it must do so in compliance with the procedures in the Competition in Contracting Act and the Federal Acquisition Regulation. While deregulation promises competition and lower rates, the former monopolistic utility companies may attempt to secure lost investments ("stranded costs") from the state public utility commissions (ultimately, the customers). Such stranded costs could easily vitiate any true savings from competition. Careful attention must be given to utility contracting laws and guidance, and installations should not hesitate to call the Utility Litigation Team, AFLSA/JACL (ULT), for assistance

Privatization: One of the rapidly developing areas is utility privatization. The Secretary of Defense, in his Defense Reform Initiative, directed that military installations should "get out of the business of managing infrastructure." Privatization will entail three transactions: (1) bill of sale/deed of utility system to the contractor; (2) right of way/easement, and (3) utility service agreement (for on-base service)

Energy Conservation: DoD is under Executive Mandates to reduce energy consumption by 20% by 2000, 25% by 2005, and 30% by 2010 (based on 1985 standards). To effect compliance with the mandate, the Air Force has developed two programs: (1) Demand Side Management (agreements with the utility company), pursuant to 10 U.S.C. § 2865; and (2) Energy Savings Performance Contracting (agreements with private contractors), pursuant to 10 U.S.C. § 2865 and 42 U.S.C. § 8287. The Air Force has developed templates and regional concepts to effect energy conservation projects easily under both programs

## APPLICABLE REGULATIONS

The controlling authority over DoD utility contracting is the Federal Acquisition Regulation (FAR), Part 41, the Defense Federal Acquisition Regulation Supplement (DFARS), Part 241) and any applicable MAJCOM FAR Supplement. The Armed Services Procurement Regulation (ASPR) controls utility contracts entered into before 27 February 1995, the effective date of FAR Part 41

Guidance for obtaining utility services at Air Force installations is set out in AFI 32-1061, *Providing Utilities to USAF Installations*, and AFI 51-301, *Civil Litigation*

## UTILITY CONTRACTS

Water/sewer and electricity are generally purchased by the installation on a sole source basis from a local supplier. In the case of water/sewer service, the supplier is usually a city or municipality. Electricity are usually obtained from a city/municipality, an electric cooperative or an investor-owned utility

Per Defense Energy Program Policy Memorandum 93-1, natural gas service is obtained through the Defense Energy Support Center. They are responsible for competitively procuring natural gas supplies for military installations. This program is mandatory unless certain exceptions apply

Utility contracts are either base-specific contracts (negotiated between the base and utility); or “exhibits/authorizations” under a General Services Administration (GSA) Area-Wide Contract (previously negotiated between GSA and the utility). The contract duration for such contracts may be up to ten years (definite term) or indefinite in nature. The Air Force has favorable indefinite duration contracts that have existed over thirty years, which have been upheld under judicial scrutiny. The installation should use the contract type it considers most advantageous

## UTILITY MANAGEMENT

IAW AFI 32-1061, every utility contract the installation has must be reviewed by the base utility team at least annually in order to ensure utilities are being acquired at the most favorable rate available. The “base utility team” should be comprised of personnel from JA, CE, FM, and PK/LGC to periodically review utility contracts and address utility issues. This includes, among other things

A review of the installation's customer account number(s)

A list of other federal agencies buying utilities from the company

A list of the large industrial and commercial customers in the same rate class as the installation

A copy of each contract with all contract modifications

A map showing the point(s) of delivery to the installation

An annual summary chart or graph showing each month's meter readings (energy consumption or demand), and other billing data (power factor, load factor, and minimum charges)

A copy of customer classifications and rate schedules; and

Utility financial reports, newspaper stories on the utility, summaries of prior rate increases and interventions, and summaries of service history to the installation

## PROPOSED UTILITY RATE INCREASES

AFI 51-301 and AFI 32-1061 require the installation legal office to report to AFLSA/JACL (ULT) under the following conditions

\$200,000 for electric, natural gas, water, or wastewater (sewage) service

\$75,000 for telephone service (telephone and cable rate are reported to HQ AFC4A/JA); and

Increases (regardless of the monetary amount) which appear unreasonable, unjustified, or discriminatory (for example, an increase of 15%)

The Utility Litigation Team represents the Air Force in negotiations or in public proceedings (Public Utilities Commission). Installations should provide necessary support to aid the Team in any negotiations/litigation

## SUMMARY

The utility field is one of the fastest changing areas of procurement law. Commanders must rely on their utility contract attorneys for advice in this complex area

Counsel dealing with utility issues must be aware of the controlling regulations and statutes, and strive to keep abreast of any changes in this area

### **References:**

AFI 32-1061, *Providing Utilities to US Air Force Installations*, 15 March 2002

AFI 33-111, *Telephone Systems Management*, 13 May 2004

AFI 51-301, *Civil Litigation*, 1 July 2002

AFI 64-101, *Cable Television Systems on Air Force Bases*, 3 June 1994

## **VOLUNTEER SERVICES**

Officers and employees of the federal government may not accept voluntary services exceeding that authorized by law except in emergencies involving the safety of human life or the protection of property.

### **WHEN VOLUNTEER SERVICES MAY BE ACCEPTED**

Acceptance of "gratuitous" services (when the provider agrees in writing and in advance to waive any right to compensation) is permissible

Acceptance of gratuitous services may pose other issues, such as conflict of interest, liability for damages or injuries both to and by the provider, or the illegal augmentation of another appropriation

Government employees may not waive their rights to statutory entitlements. This issue may arise in connection with civilian employees and uncompensated overtime

Seek an SJA opinion any time "free" services are offered, unless you know they are specifically authorized by law

### **TYPES OF PERMISSIBLE VOLUNTEER SERVICE**

The military services are specifically authorized by law to accept certain voluntary services, including medical, dental, legal, religious, family support, library, and MWR services

Volunteers providing services under these authorized programs are considered federal employees only for purposes of compensation for work-related injuries, tort claims for damages or loss, maintenance of records, and conflicts of interest

The volunteer must have been acting within the scope of the accepted services

The volunteer will most likely be entitled to Department of Justice representation should he or she be named in an action filed under the Federal Tort Claims Act (FTCA)

A volunteer may not be placed in a policy-making position

Volunteers may be provided training to ensure they can appropriately provide the necessary services

Federal agencies are specifically authorized by law to accept voluntary services provided by student interns as part of an established educational program

The military services are specifically authorized by law to accept the services of Red Cross volunteers

They are not employees of the United States, but under a Memorandum of Understanding between the Departments of Justice and Defense, they are generally considered government employees for purposes of the protections of the FTCA

**References:**

AFI 51-502, *Personnel and Government Recovery Claims*, 1 March 1997

AFI 36-3105, *Red Cross Activities Within the Air Force*, 2 May 1994

DoD Directive 1330.5, *American National Red Cross*, 16 August 1969 (with 4 changes)

10 U.S.C. Section 1588

31 U.S.C. Section 1342

*Chapter 10*

***CIVIL LAW ISSUES  
FOR  
THE COMMANDER***

## **BANKRUPTCY: PERSONAL**

Air Force members are required to meet financial obligations in a timely manner; however, the Air Force maintains a policy of strict neutrality with respect to bankruptcy

- Filing for bankruptcy protection is a statutory right of all citizens and does not provide a basis for adverse action
- However, misconduct associated with the circumstances leading to bankruptcy may be a proper basis for discipline

The base legal office assists in the following two ways

- Legal assistance attorneys assist Air Force members and eligible beneficiaries with advice regarding personal bankruptcy
- Legal office staff advises commanders whether disciplinary action is appropriate in a particular case. The SJA will resolve any potential conflicts of interest

As with any question of financial responsibility, the commander must balance the personal interests and well-being of the individual against the needs of good order and discipline. Bankruptcy is one way of dealing with financial problems responsibly. Unfortunately, it is often accompanied by actionable financial irresponsibility

### **References:**

- 11 U.S.C. § 525, Protection Against Discriminatory Treatment
- Article 123a, UCMJ (Making, Drawing, Uttering Check, Draft, or Order Without Sufficient Funds)
- Article 134, UCMJ (Dishonorably Failing to Pay Debt)
- AFI 36-2906, *Personal Financial Responsibility*, 1 January 1998
- AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004
- AFI 36-3208, *Administrative Separation of Airmen*, 28 May 2003 and IC 2004-1, 10 June 2004

## **CONFIDENTIALITY AND PRIVILEGED COMMUNICATION**

In the federal/military sector, privileged communication and the protection of confidentiality exists only in the following relationships:

### **CHAPLAIN - PENITENT**

Absolute privilege for all information confided in chaplain or clergyman as a formal act of conscience or religion

Applies to civilians and service members; “clergyman” includes a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman

The privilege extends to the chaplain's or clergyman's staff

### **ATTORNEY - CLIENT**

Absolute privilege for all information confided to an ADC or legal assistance attorney during representation except with respect to some future crimes or frauds upon the court

Communications between a commander and SJA are privileged only when the commander is acting as an agent or official of the Air Force and the commander's interests in no way conflict with those of the Air Force

The privilege extends to non-lawyer members of the attorney's staff, i.e., paralegals, secretaries, etc.

### **PHYSICIAN - PATIENT**

The Military Rules of Evidence (MRE) generally do not recognize a physician-patient privilege

No privilege for civilians treated in a military facility, but Privacy Act and other federal regulations protect any illegal third party disclosure (*See* AFI 33-332 and DoD 6025.18-R)

### **MEDICAL RECORDS**

Military medical records are the property of the Air Force

-- Information in the health record is personal to the individual and will be properly safeguarded (*See* AFI 41-210, para. 2.1)

-- Commanders or commanders' designees may access members' military medical records when necessary to ensure mission accomplishment (*See* AFI 41-210, para. 2.5.6.2 and DoD 6025.18-R, para. C7.11)

## **PSYCHOTHERAPIST - PATIENT**

A limited privilege exists between persons subject to the UCMJ and psychotherapists. *See Jaffee v. Redmond*, 116 S.Ct. 1923 (1996) and MRE 513

-- Generally, the limited privilege protects only confidential communications which are made to a psychotherapist (or assistant) for the purpose of diagnosis in cases arising under the UCMJ

-- Exceptions include, but are not limited to: when the patient is dead; the communication is evidence of spouse or child abuse or neglect and there is an allegation of such misconduct; or law or regulation imposes a duty to report the information

Under AFI 44-109, communications between a patient and a psychotherapist (or assistant) made for purposes of facilitating diagnosis or treatment of the patient's mental or emotional condition are confidential and must be protected against unauthorized disclosure

A limited privilege also applies to active duty military members ordered to undergo a sanity board pursuant to RCM 706 and MRE 302

A limited privilege also exists under the Limited Privilege Suicide Prevention (LPSP) Program pursuant to AFI 44-109, which applies to confidences made after notification of an investigation or of suspicion of commission of a criminal act, and placement into the LPSP program

## **DRUG/ALCOHOL ABUSE TREATMENT PATIENTS**

AFI 44-121, para. 3.7.1, grants limited protections for Air Force members who voluntarily disclose personal drug use or possession. Those protections do not include any future drug abuse

-- Such disclosure may not be used as the basis for UCMJ action or for the characterization of service in a discharge proceeding

-- Member must disclose before his or her drug abuse is discovered or the member is placed under investigation. Member may not disclose after he is ordered to give a urine sample as part of the drug testing program in which the results are pending or have been returned as positive

Federal law protects confidentiality of medical records pertaining to drug and alcohol abuse. (*See* 42 U.S.C. 290dd-2 and 290ee-2)

## **SPOUSAL PRIVILEGE**

Spouse may elect not to testify against the other spouse as long as a valid marriage exists at the time of the testimony

A spouse may prevent testimony by the other spouse (or ex-spouse) regarding private communications made during the marriage even if the marriage has been dissolved at the time of testimony

Neither privilege applies when one spouse is charged with a crime against the other spouse, the child or children of either spouse, if the marriage is a sham as determined by state law, or if the spouses are co-conspirators in crime

## **MEDICAL QUALITY ASSURANCE PRIVILEGE**

10 U.S.C. §1102 generally restricts access to information emanating from a medical quality assurance program activity. However, the statute specifically authorizes release of this information “[t]o any officer, employee, or contractor of the Department of Defense who has a need for such [information] to perform official duties”

Information must only be used for official purposes and safeguarded IAW the Privacy Act

## **FAMILY SUPPORT CENTER PROGRAM**

Family Support Center (FSC) staff should neither state nor imply that confidentiality exists

Information collected from members and families must only be used for official purposes and must be safeguarded IAW the Privacy Act

FSC Director will notify the appropriate authority when an Air Force member constitutes a potential danger to self, others, or could have an impact on Air Force mission

### **References:**

42 U.S.C. §§ 290dd-2 and 290ee-2, Substance Abuse Treatment Records

10 U.S.C. § 1102, Quality Assurance Documents

MANUAL FOR COURTS-MARTIAL, RCM 706, MIL. R. EVID. 302, 501-513 (2002)

AFI 33-332, *Privacy Act Program*, 29 January 2004

AFI 36-2706, *Military Equal Opportunity and Treatment Program*, 1 December 1996

AFI 36-3009, *Family Support Center Program*, 1 February 1997

AFI 44-109, *Mental Health and Military Law*, 1 March 2000

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, 26 September 2001

AFI 41-210, *Patient Administration Functions*, 12 November 2003

TJAG Policy Memorandum: TJAGD Standards-2, Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct, 20 December 2002

DoD 6025.18-R, *DoD Health Information Privacy Regulation*, 24 January 2003

## **FREEDOM OF INFORMATION ACT**

The Freedom of Information Act (FOIA) is a disclosure statute that permits access to information. The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.

It applies to the Department of Defense, Air Force, and other federal executive agencies

Enacted in 1966, it generally provides a right of access to federal executive agency information, except records (or portions) that are protected from disclosure by one of the FOIA exemptions listed below

A FOIA record includes any information that would be an agency record subject to the requirements of [the FOIA] when maintained by an agency in any format, including an electronic format

### **FOIA EXEMPTIONS**

There are nine exemptions under the FOIA, which provide a basis for withholding information (of which seven apply to the Air Force)

Classified information (Confidential, Secret, Top Secret; Note: "For Official Use Only" is not a security classification)

Those matters relating solely to the internal personnel rules and practices of the agency; this exemption has two categories

High 2: release of these records would substantially hinder the effective performance of the agency's mission by allowing the requester to circumvent agency practices

Low 2: trivial records of a housekeeping nature that serve no public interest

Information exempted by another statute (e.g., drug rehabilitation information)

Trade secrets, or commercial or financial information submitted on privileged or confidential basis

Inter- or intra-agency documents normally privileged in the civil court context (e.g., attorney work-product, pre-decisional policy discussions, etc.)

Law enforcement information (e.g., information that would interfere with enforcement, confidential sources)

Information in personnel, medical, and similar files which, if disclosed to the requester, would result in a clearly unwarranted invasion of personal privacy

Some examples of personal information which are releasable because there is no unwarranted invasion of personal privacy are: name, rank, date of rank, gross pay, present and past duty assignments, future assignments which have been finalized, office/organizational address, and duty phone number. However, the names and addresses (postal and/or e-mail) of DoD military and civilian personnel in sensitive units, routinely deployable units, or assigned in foreign territories are normally not releasable

Information not normally releasable as an unwarranted invasion of personal privacy includes: home addresses, home phone numbers, social security numbers, etc.

## **FOIA REQUESTS**

**IF YOU RECEIVE A FOIA REQUEST, IMMEDIATELY TAKE IT TO THE BASE FOIA OFFICE FOR PROCESSING.** By law, the agency must respond to the requester within 20 working days of receiving a perfected FOIA request

The FOIA request can be made by "any person," which has been broadly defined to include foreign citizens and governments, corporations, and state governments. To comply with the rules, the request must

Be in writing (includes requests sent by facsimile, or electronically)

Explicitly or implicitly invoke the FOIA (e.g., cite "the law," "the regulation")

Reasonably describe the desired record; and

Give assurances to pay any required fees or explain why a waiver is appropriate

Requests may not be prepared using government resources or sent through official mail

## **FOIA PROCESSING**

Written request received at base FOIA office is sent to the OPR for initial review

After initial review, forwarded to JA for comment

If JA recommends approval, local OPR can approve request and release information

If JA recommends denial, then a legal review is attached and the case is forwarded immediately to the Initial Denial Authority (IDA) (MAJCOM/CC or appropriate delegatee)

The IDA takes appropriate action. If records are denied, wholly or in part, the IDA tells requester the nature of the denied records, the applicable FOIA exemption, the reason for the

denial, and the appeal procedure to follow. The IDA must issue its decision within 20 working days of receipt of the request by the base FOIA office

Appeals are taken to the SAF/GCA for resolution after being reassessed by the MAJCOM FOIA office

Requester may file suit in federal district court for release of information if the appeal results in denial

Agencies are not required to create, compile, or obtain records not in their possession, but must apply a reasonableness standard if extracting data from an existing record to comply with the request would be a “business as usual approach”

Honoring form or format requests: in making any record available to a person, the agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Agencies are required to make reasonable efforts to maintain their records in forms or formats that are reproducible, and have an affirmative duty to search for records in electronic form or format

Multi-track processing is authorized if the number of pending requests or complexity of a request precludes response within the statutory 20 working day limit. All tracks operate on a first-in, first-out system. If the base FOIA office determines a request is not eligible for its fastest track, it must give the requester the opportunity to limit the scope of the request

Simple requests: Ones that clearly identify the requested records, have few responsive records, deal with only one installation and, generally, one OPR, and do not involve Privacy Act, classified, or deliberative process materials; can be processed quickly

Complex requests: Ones that include massive responsive records, cause significant impact on units, require coordination from multiple offices, and include material that is classified or privileged, or originated from a non-government source; take substantial time to process

Expedited track: Agencies are required to promulgate regulations providing for expedited processing of requests for records if the requester demonstrates a “compelling need.” Agencies must notify expedited processing requesters whether the request has been granted within 10 calendar days. Denial of a request for expedited processing, whether initially or on appeal, is subject to judicial review. A “compelling need” means failure to receive the records in an expedited manner reasonable poses an imminent threat to the life or physical safety of an individual. Agencies may process “urgently needed” material in the expedited track after “compelling need” requests have been fulfilled

## **ELECTRONIC READING ROOMS**

Installation commanders must establish electronic reading rooms on the installation web site and make frequently requested records—records requested three or more times per quarter, within reason—available through links in the reading room site

Certain records, such as policy statements, created on or after 1 November 1996, must be made available electronically in a public reading room within one year of creation

**References:**

5 U.S.C. § 552, Freedom of Information Act

DODD 5400.7, 29 September 1997/Air Force Supplement to DODD 5400.7, *DOD Freedom of Information Act Program*, 24 June 2002

## PERSONAL LIABILITY OF COMMANDERS AND SUPERVISORS

### INTRODUCTION

Federal employees are generally entitled to Department of Justice representation if lawsuits are brought against them for acts they commit in the scope of their employment, if those acts do not violate federal statutes

Historically, suits against present or former federal officials in their personal capacity for money damages based upon official conduct were rare

Similarly, common law tort suits brought in state courts were dismissed because of the doctrine of official immunity

### LIABILITY FOR CONSTITUTIONAL TORTS

In 1971, the Supreme Court of the United States held for the first time in *Bivens v. Six Unknown Named Agents* that an alleged violation of the United States Constitution could serve as the basis for a suit for money damages against federal officials

However, the Court said that a federal official would have absolute immunity if the official was acting in the scope of employment and if there were "special factors counseling hesitation" on the part of the court to allow a civil action for damages to proceed

In 1983, the Court found, in *Bush v. Lucas*, that the administrative remedies given an aggrieved employee by the Civil Service Reform Act were "special factors" that protected federal supervisors from liability

However, in *Otto v. Heckler*, a supervisor engaging in sexual harassment was found to be outside the scope of his employment and was not immune

Also in 1983, in *Chappell v. Wallace*, the Court held that the relationship between military personnel (including civilian supervisors) was a "special factor" as long as the act had been "incident to service" at the time of the alleged wrong, based upon the circumstances at that time

In 1987, in *United States v. Stanley*, the Court ruled that there need not be a superior/subordinate relationship for this immunity to apply (*e.g.*, a civilian employee allegedly injuring an enlisted member)

If there is no "special factor" in a case, the federal official is only entitled to qualified immunity: he is immune so long as his acts did not violate clearly established constitutional guarantees (*i.e.*, those of which a "reasonable person" would have been aware)

## **LIABILITY FOR COMMON LAW TORTS**

The Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act") now gives federal employees absolute immunity from liability for state common law torts (including negligence, libel, slander, assault, battery, trespass), as long as they were in the scope of employment at the time of the alleged tort

The Act does not apply to constitutional torts (discussed above) or to acts violating a federal statute (*e.g.*, environmental torts)

The Department of Justice must certify that the employee was acting "in scope" at the time of the incident, and that certification can be reviewed by the court hearing the lawsuit

## **ENVIRONMENTAL TORTS**

The major environmental statutes (Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act) either contain immunity provisions for federal employees acting in scope or have been held by courts to grant immunity, Meyer v. United States Coast Guard

However, federal officials have been held criminally liable for violations of various environmental statutes that contain criminal penalties. United States v. Carr

Also, if a defendant is being tried for violating federal (not state) criminal law, the Department of Justice will generally decline both criminal and civil representation

For a more detailed discussion of potential liability for environmental violations, See *Environmental Law: Commander's Liability under Environmental Laws*, Chapter 14, this Deskbook

## **REPRESENTATION OF FEDERAL EMPLOYEES**

Should you or one of your personnel be served with any summons or complaint, immediately contact the Staff Judge Advocate

Department of Justice representation is available in almost all cases if the employee was acting within the scope of employment and if the action was not a violation of a federal criminal statute

Time standards for requesting representation and answering the complaint are extremely critical, so do not waste any time

Private insurance (at your own expense) is available to protect you against civil (not criminal) liability

**References:**

*Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)

*Bush v. Lucas*, 462 U.S. 367 (1983)

*Otto v. Heckler*, 781 F.2d 754 (9th Cir. 1986), modified, 802 F.2d 337(9th Cir. 1986)

*Chappell v. Wallace*, 462 U.S. 296 (1983)

*United States v. Stanley*, 483 U.S. 669 (1987)

*Meyer v. United States Coast Guard*, 644 F. Supp. 221 (E.D.N.C. 1986)

*United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989)

Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679

Department of Justice Policy, 28 C.F.R. Part 50

## **THE PRIVACY ACT**

The Privacy Act (PA) is designed to accomplish several purposes. Primarily, it limits the government's ability to collect information about an individual to that authorized by law or executive order and necessary for government business. The PA also authorizes individuals to access records maintained on them by the government and to correct factual errors therein. The PA only governs activities of the federal executive branch of government.

### **BASIC STRUCTURE OF PA SYSTEMS**

Every system of records must be listed in the Federal Register, regardless of who establishes or maintains the records, before information may be collected

A system of records contains information on individuals that is retrieved by the individual's name or personal identifier (such as SSN); all systems of records must have a PA warning on them

System of records developers and managers must perform Privacy Impact Assessments before creating a system of records or modifying information contained in a system of records

Personal notes maintained by a supervisor as memory aids at her own initiative are not considered a system of records, even if maintained by name or personal identifier, unless the records are required by command policy or regulation, or the supervisor shows the records to other agency personnel

Contractors who maintain systems of records for an executive agency are bound by the PA

Before being required to provide information for a system of records, an individual must be given the opportunity to read the Privacy Act Statement (PAS) for the system of records; the PAS appears in the Federal Register listing for the system of records and can be posted as a sign or printed and handed to the individual. The PAS may also be verbally told to the individual. It includes the authority for collecting the information, whether disclosure is voluntary or mandatory, routines uses of the information, and consequences of not providing the information, if any

### **DISCLOSURE PROCEDURES**

To the subject of the record

Subjects of PA records and their designated representatives may request copies of their records

Individuals do not need to state a reason for requesting access

System managers must verify the requester's identity

Requesters must describe the records they are seeking; “all records on me” is not sufficient; system managers may ask for clarification

Requesters may not use government resources to create or send their request

If records will be released, system manager must notify sender within 10 work days and provide access to the record within 30 work days of receiving the request; the system manager may take up to 20 work days to determine whether release is authorized if he notifies the requester of the reason for the delay within 10 work days

The requester may have to pay fees if the record exceeds 100 copied pages

Denials

For a record to be denied, it must be covered by an exemption published in the Federal Register as a final rule

Only specific documents in the record covered by the exemption may be denied

Segregate non-exempt documents and release them

Third-party information contained in the record may be redacted depending on the nature of the information and its relevance to the record; always contact your servicing legal office for guidance on releasing third party information in a PA record

System managers send recommendations for denials to their servicing legal office and PA office for review within five days of receiving the request

MAJCOM commanders take action on recommended denials

Limits on release to subject of record

Do not release information collected in anticipation of civil litigation or created as attorney work product

Have medical records reviewed by a doctor before release; if the doctor determines disclosing the records could cause mental harm or hardship to the requester, ask the requester for the name of a physician to whom the records can be sent. Include a letter to that physician with the records explaining the reviewing doctor’s basis for not disclosing the records directly to the requester

--- Consult AFI 41-210 and DOD 6025.18-R for additional guidance regarding medical records

To third parties

The PA requires written consent from the subject before releasing information unless one of 12 exceptions applies. Use this checklist to determine whether release to a third party is appropriate

Do not place PA information in areas where individuals without an official need to know will have access (including common drives on computer systems)

Before releasing information other than that specifically protected by the PA, balance the public interest in disclosing the information against the subject's probable loss of privacy

Exceptions allowing disclosure to third parties without subject consent

To DoD employees with an official need to know

Disclosure is required by the Freedom of Information Act (FOIA)

To agencies outside DoD, if consistent with the routine uses listed in the Federal Register's system of records notice

To the Bureau of the Census

Compilations of statistical data where individual data is not identifiable

To the National Archives and Records Administration for permanent storage

To a federal, state, or local agency for civil or criminal law enforcement action (requires written request from head of the agency)

To An individual or agency requiring the information for compelling health or safety reasons (the subject of the records need not be at risk)

To the Congress

To the Comptroller General

To a court of competent jurisdiction in response to a court order from the judge

To a consumer reporting agency (see 31 U.S.C. § 3711 for guidelines), if allowed by system of records notice

## **SPECIAL HANDLING REQUIREMENTS**

Medical Records of Minors

If overseas and the minor is between ages 15 and 17, inclusive, do not release a minor's medical records to the minor's parents or legal guardians without court order or consent from the minor,

if regulation or statute provides for confidentiality of the records and the minor has asked for confidentiality

If within the territorial United States, state laws may limit parental access to medical records of their children. Consult with your servicing legal office for compliance requirements

When transmitting PA material using e-mail, the sender must include a warning that the e-mail contains PA material and is FOUO at the beginning of the message and include "FOUO" at the beginning of the subject line

Do not place PA material on Internet sites accessible by individuals without an official need to know the information

#### Violations

Subjects may file suit in civil court to gain access to PA materials and correct errors in those materials; the court may award attorneys fees, court costs, and damages of \$1,000 or more

Individuals may be criminally prosecuted for willful, unauthorized disclosures of PA information or maintenance of an unauthorized system of records; this is a misdemeanor offense carrying a maximum fine of \$5,000

#### **References:**

5 USC § 552a, Privacy Act

DoD 6025.18-R, *DoD Health Information Privacy Regulation*, 24 January 2003

AFI 33-332, *Privacy Act Program*, 29 January 2004

AFI 41-210, *Patient Administration Functions*, 12 November 2003

## **REPORTS OF SURVEY**

The report of survey (ROS) is an official report of the facts and circumstances supporting the assessment of financial liability for the loss, damage, or destruction of Air Force property and serves as the basis for the government's claim for restitution.

### **REPORTS OF SURVEY GENERALLY**

Air Force members and employees can be held liable for the loss, damage or destruction of government property proximately caused by their negligence, willful misconduct, or deliberate unauthorized use

With respect to government owned motor vehicles, however, Air Force members and employees may be held financially liable only if the damage resulted from their gross negligence, willful misconduct, or deliberate unauthorized use

The purpose of the gross negligence standard is to more equitably distribute the risk of liability associated with government vehicle damage

As with any ROS, the commander is not precluded from taking other administrative or disciplinary action against individuals who damage government vehicles through simple negligence not amounting to gross negligence

### **PURPOSES OF THE REPORT OF SURVEY**

Purposes of ROS

- Authorizes adjustment of property accountability records

- Establishes pecuniary liability

Prescribes corrective action to prevent recurrence of loss, damage or destruction of Air Force property; and

- Serves as authority for effecting collection of an indebtedness

### **WHEN REPORTS OF SURVEY ARE NOT USED**

ROS is not accomplished for

- Damage occurring during combat operations

Most loss or damage to major weapons systems used in authorized operations or occurring during aircraft accidents

Damage to rental vehicles (unless an Air Force contracting officer enters into a written agreement with a commercial rental vehicle company to make vehicles available for government use)

Property owned by another DoD component or Nonappropriated Fund Instrumentality (NAFI)

### **WHEN REPORTS OF SURVEY ARE REQUIRED**

The requirement for a ROS is controlled by the type of property involved and the circumstances of the loss, damage or destruction

An ROS is required for unresolved discrepancies with supply system stocks involving

Sensitive or classified items, regardless of dollar value

Pilferable items, when a discrepancy is \$100 or more

An indication or suspicion of fraud, negligence, theft or abuse

Personal arms

An amount greater than \$50,000

An ROS is normally required for property record items lost, damaged or destroyed. It is mandatory for

Controlled or sensitive items

All types of weapons

Property having a security classification

### **LIABILITY OF AIR FORCE MEMBERS**

Liability is usually limited to one month's base pay, with the following exceptions

Accountable officers, whose negligence, willful misconduct or deliberate unauthorized use of government property proximately caused the loss of, or damage to, property under their accountability, are liable for the entire amount of the loss to the government

Individuals are liable for the full amount of loss or damage to personal arms and equipment proximately caused by their own negligence, willful misconduct, or deliberate unauthorized use

Family housing occupants may be fully liable for damage if

The loss or damage was caused by gross negligence or willful misconduct of the member; or

The loss or damage was caused by gross negligence or willful misconduct of a dependent or guest when the member was on notice of the particular risk involved and failed to take preventive action

## **THE REPORT OF SURVEY PROCESS**

### Initiating a Report of Survey

Normally the organization that maintains accountability records for the lost or damaged property is responsible to initiate an ROS by appointing an initial Investigating Officer (IO)

Unit commanders appoint the IO for property record items

The accountable officer will appoint the IO for supply system stocks

IO should be appointed as soon as possible after loss or damage is discovered

IO must be an officer, an NCO (E-5 or above), or a civilian (WG-9, WL-5, WS-1 or GS-7 or above) and should be senior to individual(s) facing potential liability

IO determines and documents facts surrounding the loss or damage and recommends whether or not an individual should be held financially liable

IO forwards report to appointing authority

### Appointing Authority

Usually the Comptroller, designated in writing by the approving authority

Appoints financial liability officer when

The initial investigation results are insufficient to make a determination of whether or not negligence or abuse was the proximate cause of the loss, damage or destruction of government property; or

The value of the property, or the circumstances of the case, warrant further investigation

Reviews all ROSs, appeals, and requests for waiver or reconsideration and makes recommendations to the approving authority

### Financial Liability Officer

Must be an officer, NCO (E-7 or above), or a civilian employee (GS-7, WG-9, WL-5, WS-1 or above) and should be senior to the individual subject to possible financial liability

Conducts investigation by examining physical evidence and interviewing witnesses to determine proximate cause of loss or damage, responsibility for the loss or damage, and cost or estimate of repairs

Forwards findings and recommendations to Appointing Authority

Approving Authority

Usually the wing commander. In unusual situations, the authority may be delegated in writing to squadron or other unit commanders

May authorize appointing authority to take final action on all ROSs involving less than \$2,000 where there is no evidence of negligence or other misconduct

Takes final action on ROSs in cases where appointing authority does not take final action, including

Cases, for any dollar amount, where there is no evidence of negligence, willful misconduct, or deliberate unauthorized use; and

Cases where the amount to be assessed is equal to or less than \$10,000 and the senior host-base commander is not personally involved

Approves or disapproves investigation findings and recommendations and ensures individuals are notified

Ensures all persons found financially liable are informed of their appeal rights and given an opportunity to review the file

Considers appeals and requests for reconsideration or for waiver of liability

Authorizes or delegates approval of repairs or replacement in kind

Intermediate commander (e.g., Numbered Air Force) takes action on reports when amount of financial liability to be assessed exceeds \$10,000 but does not exceed \$25,000, or when the senior host base commander is personally involved

MAJCOM commander takes action on all reports not approved at base or intermediate command level, or when the intermediate commander is personally involved

If the MAJCOM commander is personally involved and negligence is evident, the report is forwarded to USAF/LGSS

Individual rights

Consult counsel

Review the ROS file and evidence

Request waiver, or request permission to provide repair or replacement in kind

Request reconsideration

Appeal

## **AVOIDING REPORT OF SURVEY LIABILITY**

Waiver, Reconsideration, and Appeal

Waiver

Member specifically requests waiver in writing, supplying supporting evidence for the request. (If the case involves assigned family housing the approving authority **MUST** consider a waiver, even if the member does not specifically request it)

Factors to consider include degree of abuse or negligence involved, extent to which collection would cause substantial financial hardship or adversely impact unit morale, prior instances of negligent conduct toward government property, and available government remedies against other culpable persons

Approving Authority may waive all or part of an individual's liability, IF

The waiver is determined to be in the best interest of the Air Force; and

The waiver is not specifically prohibited (as in the case of accountable officers and personal arms and equipment)

If denied, the member may appeal the determination of liability and request further waiver consideration by the MAJCOM commander

Reconsideration

Member may request reconsideration based on minor corrections, new evidence, or because the property thought to be missing is later found

Minor corrections that do not involve important changes to the findings or recommendations should be made to the original and to any copies of the ROS

Based on new evidence, the approving authority may reopen the investigation, if necessary, or may take corrective action without further investigation

If property believed to be lost is later found but is damaged, the original ROS should be canceled and a new ROS initiated

#### Appeal

Must be submitted in writing, and

Must specifically state the alleged errors or injustices in the report of survey process

Unless precluded by AFMAN 23-220, the approving authority may grant the appeal

If denied, the ROS is forwarded to the MAJCOM commander for final action, or HQ USAF/LGSS if the MAJCOM commander is the approving authority

Collection is suspended until all appeals are complete unless the individual is scheduled for impending separation

#### Financial Liability Board

A team of investigators consisting of officers, enlisted members, or civilian employees who are qualified to investigate an accident, incident, or occurrence within their area of expertise. (May consist of two or more persons, one who will be the base Claims Officer)

Consolidates functions of the appointing authority and financial liability officer (one of the members is appointed in the orders to serve as appointing authority); and its objective is to relieve commanders of the administrative burdens involved in the ROS process

Makes a preliminary review to determine whether a financial liability officer is required

Acts as financial liability officer by investigating cases as necessary

Inspects the destruction or abandonment of unserviceable property

If the ROS involves \$2,000 or less and there is no indication of negligence or misconduct, the member acting as appointing authority can take final action

#### **References:**

AFMAN 23-220, *Reports of Survey for Air Force Property*, 1 July 1996

AFI 34-202, *Protecting Nonappropriated Fund Assets*, Chapter 6 (Losses and Collection Actions), 07 June 2002

## **RESERVE FORCES**

### **TOTAL FORCE CONCEPT (AIR RESERVE COMPONENT, ARC)**

In 1973, Total Force policy was established, calling for a mix of active and reserve component forces to ensure maximum military capability is achieved at minimum cost. There are three overarching groups of reserve forces personnel:

Ready Reserve: Main component is the Selected Reserve

Can be units or individuals

Includes all Air National Guard personnel

Standby Reserve: Members maintain affiliation without being in Ready Reserve; not in units, not required to train

Retired Reserve: Subject to recall by SecAF

### **AIR FORCE RESERVE**

Missions: Provide trained units and individuals to accomplish assigned taskings in support of national objectives and perform peacetime missions that are compatible with training and mobilization readiness requirements

Primary reserve categories

Category A: (Unit Reservists -- a stand-alone reserve unit)

Assigned to and train on weekends (UTA = Unit Training Assembly) as a Reserve unit, such as an airlift group or fighter wing

Commanders and supervisors with questions about how to handle alleged misconduct involving Category A Reservists should contact their unit Staff Judge Advocate. In addition, they may contact HQ AFRC/JA at Robins AFB, Georgia

Category B: (Assigned/Train as an individual; backfill RegAF members)

Individual Mobilization Augmentees (IMAs)

Assigned to the 9005 Air Reserve Squadron, HQ ARPC, but attached to active duty organizations

Commanders and supervisors with questions about how to handle alleged misconduct involving Category B (IMA) Reservists should contact their unit Staff Judge Advocate. In addition, they may contact HQ ARPC/JA at Denver, Colorado

Annual membership requirements

Category A Reservists

48 UTA (Unit Training Assembly) periods (also known as IDT, or Inactive Duty for Training status); 4 periods per weekend for a total of 12 weekends per year

15 ADT (Active Duty for Training) days

Category B Reservists (IMAs)

24 IDT periods per year (2 IDT periods per day for a total of 12 days per year)

12 AT (Annual Tour) active duty days per year

Full-time management

Air Reserve Technicians (ARTs) or Military Technicians (MTs): Title 5 Federal civilian employees with a “condition of employment” requiring they maintain active reserve membership (reserve “status”) in their reserve unit. If they lose reserve status, they usually lose Title 5 civilian employee status (removed for failing to meet condition of employment)

Active Duty Personnel

AGRs (Active Guard/Reserve): AFRC personnel on extended active duty for more than 180 days (often 4 or 6 years) who provide full-time support to AFR units

Air Force active duty personnel

Federal Civil Service Employees

UCMJ jurisdiction: Reserve personnel are subject to the UCMJ while in active status (ADT or full-time active duty) or inactive duty for training status (UTAs or IDTs). (*See* article, this Deskbook (Chapter 2), titled *UCMJ Jurisdiction Over Reservists*.)

## **AIR NATIONAL GUARD**

Dual Mission based upon Militia Clause of U.S. Constitution, Article 1, Section 8

Federal status: Title 10 of the United States Code

State status: Title 32 of the United States Code (e.g., disaster relief, riot control, etc.)

Annual membership requirements: 48 UTAs (i.e., 12 weekends) and 15 ADT days

Full-time support

Active duty personnel

AGRs: ANG personnel on active duty; same as for Air Force Reserve

Active duty Air Force advisors

Air National Guard Technicians or Military Technicians (MTs): Federal civilian employees who occupy technician positions. Must be members of both State Guard and federal civil service. If they lose one status, they lose the other

State Civilian Employees

UCMJ jurisdiction: ANG personnel are only subject to the UCMJ when "in Federal status" (Art. 2(a)(3), UCMJ), which requires being on Title 10 orders (either ADT, full-time active duty, or called up for federal service). In any other status (Title 32 training or state service) only the state has jurisdiction. Complex rules govern when ANG personnel are in which status

**References:**

10 U.S.C. 12301, *et seq.* (reserve components generally); 10 U.S.C. 10216-10218 (Military Technicians)

32 U.S.C. 709 (Air National Guard Technicians)

DoDD 1205.18, *Full-Time Support to the Reserve Components* (May 25, 2000)

## **AIR FORCE SAFETY AND ACCIDENT INVESTIGATIONS**

The Air Force has an extensive set of requirements for investigating aviation, missile, and nuclear mishaps.

### **BACKGROUND**

AFI 91-204, *Safety Investigations and Reports*, and AFI 51-503, *Aerospace Accident Investigations*, are the two most important instructions dealing with investigating accidents involving aircraft, missiles, or nuclear resources

The safety investigation (AFI 91-204) determines cause to prevent future mishaps

The deliberations, opinions, and conclusions of investigators and any evidence from witnesses and contractors given under confidentiality are in Part II of the Report. It is privileged and nonreleasable outside safety channels

The aircraft accident investigation (AFI 51-503) provides a report fully releasable to the public and preserves evidence for claims, litigation, disciplinary and administrative actions, and all other purposes

By providing an alternate source of non-privileged information for use outside safety and operational channels, the integrity of the safety privilege is protected

### **SAFETY INVESTIGATIONS: AFI 91-204**

AFI 91-204 investigations

Composed of Board of Officers/Investigating Officer

NOT for disciplinary actions, line-of-duty determinations, flying evaluation boards, litigation, claims, or assessing pecuniary liability (for or against the government)

Witnesses are not sworn

Safety report is barred from use by U.S. Attorney even if it favors USAF

In *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792 (1984), the Supreme Court upheld the privileged nature of safety reports (Part II)

Potential problem areas with safety investigations

Misunderstanding the purpose and use of information

Interface with accident investigators

Part I of the safety report is releasable to the accident investigators

The safety investigation has priority on wreckage, witnesses, and documents

Talking to next-of-kin (NOK) of mishap victims

Very tough job in any event; exercise discretion

Relatives should speak with the Family Liaison Officer appointed by the Commander

Do not discuss: mishap responsibility, legal liability, classified information, or cause factors

Provide non-privileged information only

Use caution: it is easy to invite claims and lawsuits

Requests for information

Determine whether the requester is asking for the SIB report or the AIB report

For SIB reports, the disclosure authority is the Commander, Air Force Safety Agency (AFSA).  
The OPR is HQ AFSC/JAR

For AIB reports, direct requests to the MAJCOM responsible for initiating the investigation

Creating even the appearance of improper use of AFI 91-204 information for disciplinary actions, flying evaluation boards, etc.

Imperative that commanders have 'clean hands'

Document where you got the information to take action

Safety Report/Court-Martial

Obtaining a conviction is extremely difficult if a safety investigation precedes the court-martial.  
The defense will request the privileged portion of the report and then litigation could develop over its release

Bottom Line: If substantial evidence of criminal misconduct is present and the mishap cause is readily apparent, the Convening Authority should delay the SIB and proceed with the AIB

## **AEROSPACE ACCIDENT INVESTIGATIONS: AFI 51-503**

Accident investigations are required in

All Class A mishaps, as defined by AFI 91-204

Cases with a probability of high public interest

All suspected cases of friendly fire

Accident investigations can be convened at the Convening Authority's discretion when

There is anticipated litigation for or against the Government or a Government contractor, or

There is anticipated disciplinary action under the UCMJ against any individual, or

There are damages to third parties that likely will exceed \$250,000

Accident investigation responsibilities

Convening Authority (MAJCOM Commander for Class A accidents)

Convenes investigation

Ensures appropriate condolence letters are sent to NOK. Also, sends letter to the NOK of deceased and seriously injured personnel explaining process and status of ongoing investigations and of any planned NOK briefings

Funds costs associated with conducting AIB

Determines what accident information is released to the public before the investigation is complete

Approves the AIB Report and PA Release Plan

Installation Commander

Appoints a host base liaison officer to assist the AIB in logistical and administrative support, as well as arranging witness interviews

Provides in-house logistical and administrative support for the AIB, except billeting (even if the host base is not assigned to the investigating MAJCOM)

Removes and stores wreckage from the mishap site, until a release is obtained

Assists the convening authority in the initial clean up of the mishap site

**References:**

AFI 91-204, *Safety Investigations and Reports*, 12 April 2004

AFI 51-503, *Aerospace Accident Investigations*, 9 August 2002

*See also* article, *Media Relations During Aircraft Accidents*, Chapter 9, this Deskbook

## **SOURCES OF COMMAND AUTHORITY**

Article II, Section 2 of the United States Constitution provides the original source of command authority to the President as Commander-in-Chief.

## **CHAIN OF COMMAND**

Chain of command runs from the President and the Secretary of Defense to the Combatant Commander (or to service secretaries)

Chairman of the Joint Chiefs functions within the chain of command by transmitting communications to the commander of the combatant commands from the President and the Secretary of Defense

Service Chiefs are responsible to the secretary of the military department for management of the services

Subordinate authority to command may be conferred by statute, delegated, or assumed

## **THE CONCEPT OF COMMAND**

Concept of command carries dual function

Legal authority over people, including power to discipline

Legal responsibility for the mission and resources

Command devolves upon an individual, not a staff

Command is exercised by virtue of the office and the special assignment of officers holding military grades who are eligible by law to command

A commander exercises control through subordinate commanders

Staff, including vice and deputy commanders, have no command functions. They assist the commander through planning, investigating, and recommending

Some command duties may be delegated

Responsibilities of command may never be delegated

## **COMMAND AUTHORITY OVER ACTIVE DUTY FORCES**

The commander's authority over military members extends to conduct of the members whether on or off the installation

The commander exercises authority by virtue of his or her status as a superior commissioned officer

Enlisted members take an oath upon enlistment to obey the lawful orders of those appointed over the member

Articles 89, 90, and 92 of the UCMJ proscribe the failure or refusal to respect the commander's authority

## **COMMAND AUTHORITY OVER RESERVISTS**

Commanders' authority over Reserve members

Commanders always have administrative authority to hold Reservists accountable for misconduct occurring on or off duty, irrespective of the military status of the Reservist when the misconduct occurred

Commanders have UCMJ authority over Reservists only when Reservists are in military status

## **COMMAND AUTHORITY OVER CIVILIANS**

The commander has authority over civilian employees on base

The commander acts as the employer of civilian employees

The commander can give promotions and bonuses, as well as impose sanctions

The AFI 36 series defines this relationship

The commander has less authority over nonemployee civilians on base

As "mayor" of the base, the installation commander has authority to maintain order and discipline, and to protect federal resources

As a practical matter, this authority may be limited to detaining individuals for civilian law enforcement officials and barring them from the installation

The installation commander may bar an individual from the base for misconduct but must follow certain procedural requirements

The commander has almost no authority over civilians off base. *See* articles on Posse Comitatus and National Defense Areas in this book

**References:**

AFI 51-604, *Appointment To and Assumption of Command*, 1 October 2000

Several topics mentioned in this article are included in other articles within this Deskbook.

Those topics include:

- Installation Jurisdiction
- Free Speech, Demonstrations and Open Houses
- Special Court-Martial Convening Authority Duties
- Civilian Personnel and Federal Labor Law
- Equal Opportunity and Treatment
- Sexual Harassment
- Family Member Misconduct
- Driving Privileges
- Exchange and Commissary Benefits
- Federal Magistrate Program
- Posse Comitatus
- National Defense Areas
- Off-Limits Establishments

## **UNAUTHORIZED PROCUREMENT**

Commanders are routinely faced with the need to acquire supplies, services, and construction necessary for the operation of the installation or squadron. Often it is necessary to turn to the private sector to furnish these supplies, services, and construction. The purpose of this section is to alert commanders to one of the key limitations that applies in such instances—contracting authority.

### **PROCUREMENT AUTHORITY**

The authority to bind the government to a contract and an obligation to pay a debt is limited to individuals that have been granted express authorization to do so

- The head of each federal agency is authorized to enter into contracts on behalf of the agency
- Contracting authority may be delegated, and in most instances it is a contracting officer (CO) that is responsible for entering into government contracts. Each CO has a "Certificate of Appointment," often called a warrant, that states the limitations on the CO's contracting authority. In most cases, the limitation is based on a set dollar value (e.g., authority to bind the government up to a limit of \$500,000)

On occasion, an individual without authority will enter into a commitment expecting the government to assume responsibility for the financial obligation. Rarely are such unauthorized commitments the product of a deliberate attempt to circumvent the procurement system. Rather, it is usually a matter of not fully understanding the procurement procedures coupled with an honest effort to satisfy a legitimate requirement that leads to trouble. An individual who makes an unauthorized commitment is subject to disciplinary action

### **RATIFICATION OF UNAUTHORIZED COMMITMENTS**

The Federal Acquisition Regulation (FAR) has a procedure for the ratification of an unauthorized commitment. Ratification means the act of approving an unauthorized commitment by an official who has the authority to do so. However, the FAR also requires agencies to take positive action to preclude the need for ratification actions. Additionally, depending on various factors, including the amount of money involved, the approval authority may be at a high level. In general, an unauthorized commitment must meet the following criteria to be eligible for ratification

- Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment
- The ratifying official has the authority to enter into a contractual commitment
- The resulting contract would otherwise have been proper if made by an appropriate CO

- The CO, upon reviewing the unauthorized commitment, determines the prices to be fair and reasonable
- The CO recommends payment and legal counsel concurs
- Funds are available and were available at the time the unauthorized commitment was made; and
- The ratification is in accordance with any limitations prescribed under agency procedures
- Commanders have a responsibility to ensure their personnel are informed of proper contracting authority

Bottom line with contracting authority and ratifications: ratification procedures exist as a possible avenue to minimize the impact of an unauthorized commitment, but they should not be viewed as a substitute for compliance with proper procurement practices

**Reference:**

Federal Acquisition Regulation (FAR), Subpart 1.6

## **ADMINISTRATIVE INQUIRIES AND INVESTIGATIONS**

Commanders will find themselves involved in or supervising several different types of investigative procedures.

### **INHERENT AUTHORITY TO INVESTIGATE**

All commanders possess inherent authority to investigate matters or incidents under their jurisdiction

- Such authority is incident to command
- Air Force policy is that inquiries and investigations will be conducted by the echelon of command capable of conducting a complete, impartial, and unbiased investigation
- Reprisal against an individual for making a complaint is prohibited
- Many investigations and inquiries are conducted pursuant to a specific regulation. Examples include Reports of Survey, Line of Duty, Homosexual Conduct, Accident Investigations, etc.
- When a specific regulation does not apply, the investigation is conducted under the commander's inherent authority. AFI 90-301, *Inspector General Complaints*, provides excellent guidance on how to conduct a commander investigation or inquiry **BUT SHOULD NOT BE CITED AS THE AUTHORITY** for the investigation or inquiry

### **INVESTIGATIONS GOVERNED BY AIR FORCE INSTRUCTIONS**

Types of Administrative Inquiries and Investigations

- AFI 90-301, *Inspector General Complaints*, provides authority for investigations and inquiries
  - Resulting from IG complaints
  - Directed or initiated within IG channels
  - Conducted by an inspector or inspector general
- Those governed by other instructions
  - AFI 51-503, *Aerospace Accident Investigations*
  - AFI 91-204, *Safety Investigations and Reports*

- AFI 71-101, Vol. 1, *Criminal Investigations* (investigations conducted by AF Office of Special Investigations (OSI))
- AFI 31-206, *Security Forces Investigation Program*
- AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice*
- AFI 36-2910, *Line of Duty (Misconduct) Determination*
- AFI 36-1201, *Discrimination Complaints* (EEO Complaints by Civilian employees)
- AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*
- Complaints of discrimination or unequal treatment (EOT) by military personnel AFI 90-301 (IG) and AFI 36-2706, *Military Equal Opportunity and Treatment Program*
- Other investigations directed by specific instructions
- Virtually all others fall within the inherent authority of the commander
- AFI 90-301 may not be used as authority
- However, AFI 90-301 may be used for guidance (i.e., procedures and format)

## **PROCEDURES**

Often conducted by a single Investigating Officer

Investigation or Inquiry

- Inquiry: determination of facts on matters not usually complex or serious; can be handled through routine channels. Report may be summarized
- Investigation: used for serious, complex matters requiring a determination of extensive facts. Investigations conducted under the commander's inherent authority should include a written report. Normally, exhibits and sworn witness testimony support the facts that are determined

Actual AFI 90-301 inquiries or investigations may be privileged documents

- The Inspector General controls release
- *DoD/Air Force FOIA Program, DOD5400.7-R, AFSUP, and (Air Force) Privacy Act Program, AFI 33-332, govern release*
- Ensure that privileged information is kept to a minimum

## Witnesses

- Must be advised of the nature of the investigation and, if applicable, their right to counsel
- May refuse to answer questions only by invoking Article 31 of the UCMJ (military members) or Fifth Amendment (civilians)
- Confidentiality should be granted only when the necessary information cannot be obtained by any other means

## Additional Guidance

- If the matter is more properly the domain of Security Forces or AFOSI (suspected criminal activity, etc.), have them conduct the investigation
- Always consult with the SJA before directing any inquiry or investigation
- Following initial interviews (for ALL types of investigations and inquiries) with AF personnel who are the subject of an investigation or inquiry, AF investigators will refer the individual to his/her first sergeant, commander or supervisor. These referrals must include person-to-person contact between the agency and unit personnel, and be documented

## **References:**

- AFI 90-301, *Inspector General Complaints*, 30 January 2001
- AFI 51-503, *Aerospace Accident Investigations*, 9 August 2002
- AFI 91-204, *Safety Investigations and Reports*, 12 April 2004
- AFI 71-101, V-1, *Criminal Investigations*, 1 December 1999
- AFI 71-101, V-2, *Protective Service Matters*, 18 November 2002
- AFI 31-206, *Security Forces Investigations Program*, 1 August 2001
- AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice*, 30 June 1994
- AFI 36-2910, *Line of Duty (Misconduct) Determinations*, 4 October 2002
- AFI 36-1201, *Discrimination Complaints*, 25 July 1994
- AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, 26 September 2001
- AFI 36-2706, *Military Equal Opportunity and Treatment Program*, 1 December 1996
- DOD5400.7-R, AFSUP, *DoD Freedom of Information Act Program*, 24 June 2002
- AFI 33-332, *Privacy Act Program*, 29 January 2004

## **FLYING EVALUATION BOARDS**

The Air Force has stringent requirements that must be met and maintained to perform rated flying duties.

### **POLICY**

Each rated officer has an obligation to maintain professional standards. When performance of rated duty becomes suspect, a Flying Evaluation Board (FEB) may be convened

FEBs are administrative, fact-finding proceedings conducted to ensure information relevant to an officer's rated qualification is reviewed and discussed in a fair and impartial manner. The proceedings are not adversarial and are closed to the public

FEBs are not a substitute for disciplinary or other administrative action

### **REASONS TO CONVENE A FLYING EVALUATION BOARD**

Suspension or disqualification from aviation service for more than 5 years

Lack of proficiency (unless enrolled in a formal flying training program)

Failure to meet standards while enrolled in USAF formal flying training course

Lack of judgment in performing rated duties

Failure to meet ground/flying training or annual physical exam requirements

Intentional violation of flying regulations

Officer exhibits habits, traits of character, or personality characteristics that make it undesirable to continue the officer in flying duties

### **COMPOSITION OF A FLYING EVALUATION BOARD**

A flying unit commander (wing or comparable level) normally convenes an FEB

Three rated voting members, qualified for aviation service in an active aviation service code (ASC) and senior in rank to the respondent, will be appointed

One additional rated officer is appointed to act as a nonvoting recorder

A judge advocate may be appointed as a nonvoting legal advisor to advise on procedural matters and ensure a fair hearing. A judge advocate shall not be appointed as an assistant recorder

A flight surgeon may be appointed as a nonvoting member when a medical problem may be a significant contributing factor

## **FLYING EVALUATION BOARD PROCEDURES AND GUIDELINES**

Notify the respondent in writing. The notification letter contains the reasons for the FEB, when and where the board will meet, witnesses to be called, and rights of the respondent

Respondent may submit a request for voluntary disqualification from aviation service in lieu of FEB (VILO). FEB action is suspended until the MAJCOM acts on the VILO request

Rights of the respondent

Assigned military counsel of his or her own choosing (if available) or civilian counsel (at respondent's expense)

Informed in writing of the specific reasons for convening the board

Review all evidence and documents to be submitted to the board by the recorder (before convening the board)

Challenge voting members for cause

Cross-examine witnesses called by the board and call witnesses and present evidence (recorder arranges for military witnesses)

Testify personally and submit a written brief (respondent may not be compelled to testify)

Rules of evidence

An FEB is not bound by formal rules of evidence prescribed for courts-martial; however, observing these rules promotes orderly procedures and a thorough investigation

The decision about the authenticity of documents rests with the senior board member

Findings and Recommendations

Made in closed session (voting members only)

Each finding must be supported by specific evidence

Findings must include comment on each allegation or point in question

Recommendations must be consistent with the findings and only address qualification for aviation service - remain qualified or be disqualified

If the officer holds more than one aviation qualification, the FEB must make a recommendation as to both qualifications

If the FEB recommends disqualification, it may also recommend whether the officer should be prohibited from wearing the associated aviation badge

Minority report is appropriate if there is a disagreement among the voting members

Review process

Convening Authority's SJA reviews for legal sufficiency; review is limited to sufficiency of the evidence and compliance with procedural requirements

Convening Authority adds comments and recommendations; must explain any recommendations that are contrary to those of the FEB

The Convening Authority or higher reviewer may reconvene the FEB or order a new board

MAJCOM commander makes the final determination in all FEB cases convened at the MAJCOM level or lower

**Reference:**

AFI 11-402, *Aviation and Parachutist Service, Aeronautical Ratings and Badges*, Chapter 4,  
29 July 2003

*Chapter 11*

***THE AIR FORCE  
LEGAL ASSISTANCE PROGRAM***

## **LEGAL ASSISTANCE PROGRAM**

Under 10 U.S.C. § 1044, the armed services may provide legal assistance to eligible beneficiaries concerning personal, civil legal problems, subject to the availability of legal staff resources. Legal assistance in the Air Force is provided in accordance with AFI 51-504.

### **LEGAL ASSISTANCE PROGRAM STRUCTURE**

The Air Force has structured the program into two general categories: (1) mobility/deployment-related and (2) non-mobility or deployment-related legal assistance

**Mobility/Deployment-Related Legal Assistance:** Ensures the legal difficulties of military members do not adversely affect command effectiveness or mission readiness

Beneficiaries include active duty members, including reservists and guardsmen on federal active duty under Title 10 U.S.C., and their family members who are entitled to an ID card; also, civilian employees stationed overseas and their family members who are entitled to an ID card and reside with them. Reservists and National Guard not on Title 10 status, but who are subject to federal mobilization in an inactive status, are eligible for legal assistance for wills and powers of attorney. Similarly, DoD civilian employees (but not contractors) deploying to or in a theater of operations for contingencies or emergencies shall be furnished assistance with wills and powers of attorney. Finally, foreign military personnel may be provided legal assistance in limited circumstances for specific matters (See instruction for further guidance)

Areas of legal assistance include

Wills, living wills, powers of attorney, and notaries

Servicemembers Civil Relief Act (SCRA, *see* article, *Servicemembers Civil Relief Act*, in chapter 7) and Veterans' reemployment rights issues

Casualty affairs

Family care plan issues

Landlord-tenant and lease issues

Tax assistance

Involuntary allotment issues (with the exception of undisputed Bank of America (government credit card) salary offsets); and

Other issues deemed mission related by TJAG, MAJCOM SJA, NAF SJA, the base SJA, or the commander

Non-Mobility or Deployment Legal Assistance: Not specifically defined in the instruction; however, it is limited to personal, civil legal problems. Base legal offices must provide nonmobility-related legal assistance as resources and expertise permit, as determined by the SJA

Beneficiaries include: Personnel eligible for deployment-related legal assistance; retired personnel and their family members who are entitled to ID cards, and unremarried former spouses entitled to an ID card; and active or retired officers of the commissioned corps of the Public Health Service

A third category of legal assistance relates specifically to personal, civil legal problems arising out of the terrorist incidents of 11 September 2001

Beneficiaries include: personnel eligible for mission-related and nonmission-related legal assistance; injured DoD civilian employees and the next of kin of deceased or dying DoD civilian employees victimized in the 11 September 2001 terrorist incidents

#### MATTERS OUTSIDE THE SCOPE OF THE PROGRAM

The following are specifically considered outside the scope of legal assistance

Business or commercial enterprises (except in relation to the SCRA)

Criminal issues

Standards of Conduct issues

Law of Armed Conflict issues

Official matters in which the Air Force has an interest

Specifically including undisputed Bank of America (i.e. government credit card) salary offsets

Legal concerns or issues raised on behalf of another person

Representation of a client in a civilian court or administrative proceeding; and

Drafting or reviewing real estate sales or closing documents, separation agreements, divorce decrees, or inter vivos trusts unless the SJA determines an individual attorney within the office has the expertise to do so

#### ETHICAL CONSIDERATIONS

Ethical considerations include

Information received from a client during legal assistance, and documents relating to the client are legally confidential and privileged

Privileged information may be released only with the client's express permission; pursuant to a court order; or as otherwise permitted by the Air Force Rules of Professional Responsibility

Disclosure may not be lawfully ordered by any superior military authority

If a commander is contacted by a legal assistance attorney on behalf of a client (e.g., regarding a member's failure to provide financial support to family members), the commander should understand the legal assistance officer is representing the interests of that particular client

If the commander needs advice concerning the matter, he or she should contact the SJA

The SJA represents the interests of the Air Force and the commander, unlike the individual legal assistance officer who primarily represents the interests of the particular legal assistance client

Referral: Due to the scope and limitations of the program, as well as the particular needs of the client, it is often necessary to refer clients to other sources, such as a civilian attorney (through the local bar referral service), the area defense counsel, chaplain, EEO counselor, social actions, Military Personnel Flight, family advocacy or the Family Support Center

**References:**

10 U.S.C. § 1044, *Legal Assistance*

DoDI 1400.32, *DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures*, 24 Apr 1995

AFI 51-504, *Legal Assistance, Notary and Preventive Law Programs*, 27 October 2003

AFPD 51-5 (Section C), *Military Legal Affairs*, 27 Sep 1993

TJAG Special Subject Letter 2002-1, *Providing Legal Assistance in Bank of America Travel Card Debt Cases*, 28 Jan 2002

TJAG Special Subject Letter 2001-7, *Legal Assistance to DoD Civilian Employee Victims of 11 September 2001 Terrorist Incidents*, 18 Sep 2001

TJAG Special Subject Letter 2001-8, *Legal Assistance to Participating Guard and Ready Reserve Members*, 27 Sep 2001

TJAG Policy Letter 18, *Preventive Law and Legal Assistance Policy*, 2 Apr 1998

## **NOTARIES**

Many important documents should be or are required by law to be notarized. Notarization demonstrates that the person who signed the document is, indeed, the person who is required to sign the document, and can also confirm that the person made an oath as a part of executing the document.

### **WHO IS ELIGIBLE FOR AIR FORCE NOTARY SERVICE**

Personnel eligible for notary service executed under Title 10 of the U.S. Code are

Members of the armed forces

Other persons eligible for legal assistance under 10 U.S.C. §1044 or other regulations of the DoD (for the Air Force: AFI 51-504)

Persons serving with, employed by, or accompanying the armed forces outside the U.S., Puerto Rico, Guam, and the Virgin Islands; and

Other persons subject to the UCMJ outside the U.S

### **WHO MAY NOTARIZE DOCUMENTS UNDER THIS PROGRAM**

Under 10 U.S.C. §1044a and Air Force instructions, the following individuals have the general powers of a notary public and of a consul of the United States in the performance of all notarial acts to be executed by certain eligible personnel

Judge advocates on active duty

Reserve judge advocates (at any time, not just when active duty or performing inactive duty training)

Civilian attorneys serving as legal assistance officers

Adjutants, assistant adjutants, and personnel adjutants on active duty (or performing inactive duty training)

Enlisted paralegals, E-4 or higher, on active duty (or performing inactive duty training); and

Officers or senior NCOs (MSgt and above) stationed at geographically separated units (GSUs) or remote locations where no judge advocate or paralegal notary is assigned, who have been designated in writing by the GSU's servicing general court-martial convening authority staff judge advocate (SJA)

## **SPECIAL RULES FOR CERTAIN MILITARY INSTRUMENTS**

10 U.S.C. 1044b, 1044c, and 1044d, respectively, provide for the execution of military powers of attorney, military advance medical directives (living wills), and military testamentary instruments (wills). These documents

Are exempt from any requirement of form, formality, or recording that is required under the laws of a state

Military powers of attorney and advance medical directives (but not wills) are also exempt from any state requirements of substance

Shall be given the same legal effect as powers of attorney, living wills, and wills prepared and executed in accordance with the laws of the state concerned. (Note: military advance medical directives are not enforceable in states that otherwise do not recognize living wills)

All other documents, notarized under the authority of 10 U.S.C. §1044a, are subject to state law as to form, substance, formality or recording

## **NOTARY PROCEDURES AND GUIDELINES**

Notary procedures and guidelines include

Personnel signing documents as a notary under 10 U.S.C. § 1044a must

Specify date and location and list title and office

Use an inked stamp or a raised seal that contains the words "Notary Public Authorized Under 10 U.S.C. Section 1044a"

Verify the identity of each person whose signature is to be notarized (usually with an ID card)

Administer an oath for any "sworn" document

Maintain a personal notary log, which includes each signer's name and signature, type of document, date, and location, and remains with the individual notary

Personnel signing documents as a notary under 10 U.S.C. § 1044a must not

Accept any fees for the performance of a notarial act

Certify a copy as a "certified copy" unless they are the custodian of the original (only the custodian of the original document can create "certified" copies)

Certify a copy of any document as a true and accurate copy or notarized copy (as compared to a certified copy) without comparing it to the original

**References:**

10 U.S.C. 1044a, *Authority to Act as Notary*

AFI 51-504, *Legal Assistance, Notary and Preventive Law Programs*, 27 October 2003

## **PREVENTIVE LAW PROGRAM**

The Air Force Preventive Law Program's purpose is to educate military members and their families on legal issues in order to allow them to focus upon mission requirements, to prevent legal problems from occurring, and to reduce the time and resources needed to correct legal problems when they do occur. The program includes information on all legal matters, not just legal assistance issues.

### **PROGRAM EMPHASIS AND CONTENT**

Every base must have a preventive law program that includes, as a minimum

Deployment Preparation - educating members on personal legal needs for mobility readiness, such as the importance of preparing wills and powers of attorney

Commander Awareness - educating commanders and staff agencies on the full range of legal services provided by the legal office and on all legal matters affecting command

Tax Assistance - establishing an active, well publicized, tax program; and

Legal Assistance and Consumer Protection - providing information on personal, civil legal matters

### **HOW THE PREVENTIVE LAW PROGRAM WORKS**

The program is administered through JAG functional channels and its scope at a given base depends on the available resources of the base SJA and the judge advocate appointed as the base preventive law officer

Rather than focusing on individual legal assistance clients, the program consists of an aggressive base-wide education program

Examples of activities that are part of the preventive law program include

Conducting oral presentations at commander and first sergeant seminars, commanders' calls, staff meetings, base committee meetings, and newcomers' orientations

Submitting articles for base newspapers, daily bulletin notices, or unit bulletin boards; preparing handouts or pamphlets on topics of interest for distribution at the legal office or other appropriate offices, such as the Family Support Center

Base radio or television programs

Presenting legal training workshops for law enforcement personnel

**References:**

AFI 51-504, Legal Assistance, Notary and Preventive Law Programs, Chapter 3,  
27 October 2003

AFPD 51-5, *Military Legal Affairs*, 27 September 1993

## **WILLS AND POWERS OF ATTORNEY**

To ensure mission readiness, members must effectively manage their personal and financial affairs. Wills and Powers of Attorney (POAs) can be very useful, especially for members with mobility responsibilities. A will is an instrument by which a person (testator) makes a disposition of their property to take effect after their death. A POA is a document by which a person conveys the authority to handle specified affairs. Commanders should emphasize the importance of preparing wills, POAs, and other necessary documents prior to deployment, preferably upon initial assignment to a unit or to a mobility position.

### **WILLS**

Most people should have a will, especially the following

Personnel with minor children

Without a will, a court has little valid guidance to help determine where to place minor children

The court will normally follow the designation of a guardian for the children in a will. More importantly, such designation normally prevents indecision and family disputes concerning who will now care for orphaned children

Personnel with extensive or certain valuable property

Even as between husband and wife with little property other than a house, a surviving spouse may find settling affairs easier with a will. Many states have "family probate" laws which allow a spouse to probate a valid will without a lawyer and with minimal expense

Without a will, property is distributed according to state law

Generally, state laws leave all property in the following order of precedence: surviving spouse; children; parents; then siblings

Each state's scheme varies, but generally the property will only pass to blood relatives, not to in-laws or stepchildren

A common misconception is that without a will, all of a person's property goes to the state. Normally, a state will not receive the property unless there are no surviving relatives

If a member does not want state law to determine what happens to his estate, the member must make a valid will

A will is normally written in general language and will be effective until changed or revoked by the testator. However, events may impact specific provisions in the will. Therefore, a will should be reviewed periodically and whenever any of the following occur

The birth or death of any person affected by the will

The marriage or divorce of the testator

A substantial change in the testator's estate

The requirements for making a valid will vary widely from state to state. The base legal office ensures each member's will is validly executed under the applicable state law. For this reason, members should avoid "do-it-yourself" wills

## **POWERS OF ATTORNEY**

A POA is a document that allows someone else to act as your legal agent. Though the agent may not be an attorney-at-law, he or she becomes your “attorney-in-fact” when granted authority under a POA. POAs are available at virtually any legal office and should be tailored to a given situation

### Special POA

Grants limited authority to accomplish specific transactions. Duration is limited by the person giving the POA or to a reasonable time within which to accomplish the transaction, usually not more than 1 year

Examples include buying or selling real estate, purchasing or selling a car, shipping or storing household goods

### General POA

Gives comprehensive authority over virtually all legal (and probably nonlegal) affairs. Basically, the person named can do any and all things the grantor could do

Because the authority granted is so expansive, this type of POA should only be used if a Special POA will not suffice and if the agent is completely trustworthy

A person with a general POA, who is not trustworthy, has the ability to cause very serious problems of all kinds (i.e. financial, legal, etc.) for the grantor

Many banks and realtors will not accept a General Power of Attorney for the purchase or sale of real estate, and require a Special POA containing the legal description of the property and the actions authorized

### Durable POA

Takes effect upon, or is still effective notwithstanding, a person's medical incapacity and designates another person to make decisions on behalf of the incapacitated person

Allows the attorney-in-fact to make decisions or manage affairs on behalf of the incapacitated person for the duration of the incapacity

The authority may extend to decisions for medical purposes, including a decision regarding terminating or limiting medical care in appropriate cases

It generally eliminates the need for a court to establish a guardian and conservator for the incapacitated person

#### General considerations

Although a POA can be very useful, it can be abused as well. Personnel should be careful choosing to whom they grant authority

Third parties (e.g., businesses or banks) may or may not accept a POA, at their discretion

It is impossible to guarantee a POA will not be misused. To revoke a POA before its expiration, personnel may execute a Revocation of POA and give a copy to any person that might deal with the person who has the original POA

#### Military Powers of Attorney and Wills

10 U.S.C. 1044b, 1044c, and 1044d, respectively provide for the execution of military powers of attorney, military advance medical directives (living wills), and military testamentary instruments (wills). These documents

Are exempt from any requirement of form, formality, or recording that is required under the laws of a state

Military powers of attorney and advance medical directives (but not wills) are also exempt from any state requirements of substance

Shall be given the same legal effect as powers of attorney, living wills, and wills prepared and executed in accordance with the laws of the state concerned. (Note: Military advance medical directives are not enforceable in states that otherwise do not recognize living wills)

#### **References:**

AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, 27 October 2003

10 U.S.C. 1044b, 1044c, 1044d (military POAs, medical directives, and wills)

DoDD 1350.4, *Legal Assistance Matters*, 28 Apr 2001

*Chapter 12*

***THE AIR FORCE  
CLAIMS PROGRAM***

## **INTRODUCTION TO CLAIMS**

### **WHAT IS A "CLAIM"**

A claim is any signed, written demand made on or by the Air Force for the payment of a sum certain

It does NOT include any obligations incurred in the regular procurement of services, supplies, equipment, or real estate

### **AIR FORCE CLAIMS POLICY**

Establish and administer a vigorous Air Force claims program to investigate and process all administrative claims on behalf of or against the Air Force

Pay meritorious claims in the amount necessary to restore the claimant, as nearly as possible, to his or her position before the incident on which the claim is based

The personnel (household goods) claims process is not intended to be an adversarial one. The policy underlying passage of the Personnel Claims Act is to pay meritorious personnel claims fairly and promptly to maintain claimants' morale and avoid their financial hardship. Claimants who have suffered loss or damage are entitled to helpful, friendly, and courteous service

### **CLAIMS JURISDICTION AND SETTLEMENT AUTHORITY**

The Air Force designates a geographic area of claims responsibility for each base staff judge advocate within CONUS, USAFE, PACAF, and CENTAF

The DoD assigns single-service responsibility for processing and settling claims for and against the United States outside the country

#### **References:**

31 U.S.C. 3701, 3721, Military Personnel and Civilian Employees' Claims Act

AFPD 51-5, *Military Legal Affairs*, 27 September 1993

AFI 51-501, *Tort Claims*, 9 Aug 2002

AFI 51-502, *Personnel and Government Recovery Claims*, 1 March 1997

AFMAN 51-505, *Tort Claims Manual*, Draft (available at [https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE/JAC/jact/RefPage.htm](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jact/RefPage.htm))

AFLSA/JACC, *General Claims Handbook*, 30 September 1997 (available at [https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE/JAC/jacc/Library\\_of\\_Information/Library\\_of\\_Information.htm#hbook](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jacc/Library_of_Information/Library_of_Information.htm#hbook))

## **PERSONAL PROPERTY CLAIMS**

### **INTRODUCTION**

Under 31 U.S.C. § 3721, the Air Force may settle and pay claims for loss and damage of members' personal property when such loss or damage is "incident to service"

Not all property claims are covered

Covered claims generally fall into three categories

Household goods (PT) claims

Vehicle shipments (PTV) claims, and

Other tangible personal property (P) claims

Requirements under the statute

The loss or damage must be incident to the member's service

The loss or damage cannot be recoverable through private insurance

The claim must be substantiated

The Air Force must determine that the member's possession of the property was "reasonable or useful" under the circumstances; and

The claimant must not have been negligent

Maximum payment is \$40,000, unless the claim arises from emergency evacuations or extraordinary circumstances in which cases the maximum payment is \$100,000

### **PROCESSING GUIDELINES**

Statute of Limitations

Written claim for a sum certain must be presented by the member (or authorized agent with a power of attorney) within two years from the incident date or date of delivery

The requirement to file the DD Form 1840/1840R with the claims office within a 70-day period is separate from the requirement to file the claim within two years

Damage for privately owned vehicles (POVs) is noted on DD Form 788 at the port

## Proper Claimants

Active duty Air Force military personnel

Retired or separated Air Force military personnel who suffer loss or damage resulting from the last entitled storage or movement of their personal property

Civilian employees of the Air Force paid from appropriated and nonappropriated funds

Note: Claims filed by nonappropriated funds civilian employees are paid from nonappropriated funds

Civilian employees of the Defense Commissary Agency (DeCA) who work on an Air Force installation

DoD school teachers and administrative personnel

AFRES and ANG personnel when performing active-duty, full-time Guard duty, IDT training, and ANG technicians (serving under 32 U.S.C. 709)

AFROTC cadets traveling at government expense or on active duty summer training

USAF Academy cadets

Survivor of a deceased proper claimant

Payable Claims - for loss or damage in the following general categories

From transportation or storage under orders (examples: household goods and unaccompanied baggage shipments, shipped vehicles, mobile homes and contents in shipment, and in some circumstances do-it-yourself (DITY) moves)

At "quarters" and "other authorized places" (examples: fire, explosion, hurricane, theft, vandalism in base housing in CONUS; at overseas quarters either on or off base)

To privately owned vehicles (examples: in shipment, theft or vandalism to parked cars, damages or loss during TDY if use of POV authorized, paint sprays); and

Other categories as described in AFI 51-502, Chapter 2, Section E

Depreciation and maximum allowances

The military services have jointly established an "allowance list - depreciation guide" to determine depreciation rates for most items and to limit maximum payments for some categories of items

For missing or destroyed property, claimants are paid the actual value of the item at the time of loss. The actual value is the current replacement cost, less depreciation. The law does not permit awarding current replacement cost without regard to depreciation

Full-replacement insurance coverage may be purchased directly from carrier or private insurer at member's expense

For repairable items, claimants are paid the actual cost or estimated cost of repairs, up to the actual depreciated value of the items

Reconsideration of a claim

A claimant may request reconsideration of an initial settlement or denial of a claim

Sixty (60) days is considered reasonable time to appeal

Request in writing to the settlement authority, who attempts to resolve disputes with the claimant on an item-by-item basis, and forwards to the next higher authority only those items for which the relief requested by the claimant could not be granted

**References:**

AFI 51-502, *Personnel and Government Recovery Claims*, 1 March 1997

AFLSA/JACC, *General Claims Handbook*, Chapter 2, 30 September 1997 (available at [https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE/JAC/jacc/Library\\_of\\_Information/Library\\_of\\_Information.htm#hbook](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jacc/Library_of_Information/Library_of_Information.htm#hbook))

## **ARTICLE 139 CLAIMS**

Under Article 139, Uniform Code of Military Justice (UCMJ), commanders may direct collection and pay a claim for property that military personnel willfully damage or wrongfully take, if the claim results from riotous, violent or disorderly conduct.

### **SCOPE OF ARTICLE 139 CLAIMS**

Assertable Claims

Property claims only; not personal injury or wrongful death

Must involve willful misconduct; not performance of legally authorized duties; or

Must arise from violent, disorderly conduct; not conduct involving simple negligence or, for example, bad checks or private indebtedness

Article 139 claims are entirely separate and distinct from disciplinary action taken under any other article of the UCMJ, or any other administrative action that may be appropriate

### **PROCEDURES**

The claim must be submitted to an appropriate commander within 90 days of the date of the incident, unless the commander determines good cause for a delay

The claim should be submitted to the commander of the military organization or unit of the alleged offending member or members; however, it may be presented to the commander of the nearest military installation

Initially, the claim may be presented orally, but it must be written and state a sum certain before final action may be taken

The claim is sent directly, or through channels, to the appointing commander, who is the officer exercising special court-martial convening authority over the offender. The appointing commander appoints a board of officers to investigate the claim

After evaluating all available evidence, which may include interviewing the individual against whom the claim was asserted (in accordance with Article 31 rights and the right to counsel), the board

Determines if the claim falls under Article 139, UCMJ

Identifies the offenders; and

Determines liability and damages

The board may recommend

Assessing damages against the identified service member or members (deducting from the assessment any voluntary or partial payments already made)

Assessing damages against members who were present during the incident, if authorities cannot individually identify the offenders; or

Disapproving the claim

#### ACTION BY THE APPOINTING COMMANDER

Determine if the claim falls under Article 139, UCMJ

Set the amount to be assessed against each offender (but not more than the amount fixed by the board) and direct the Accounting and Finance Office to withhold the specified amount from each offender's pay and to pay the claimant. [Note: AFLSA/JACC must approve any damages in excess of \$5,000 against an offender for a single incident]

Notify the offender(s) and claimant of the action taken

#### APPEAL AND RECONSIDERATION

The appointing commander's action may not be appealed by the claimant or the offender(s)

The commander who originally ordered the assessment may reconsider and change the decision if the findings later prove to be wrong (even if offender is no longer a member of that command)

A successor in command may change or cancel the assessment only on the basis of newly discovered evidence, fraud, or obvious error of law or fact

#### **References:**

AFI 51-502, *Personnel and Government Recovery Claims*, 1 March 1997

AFLSA/JACC, *Claims Handbook*, Chapter 6, 30 September 1997 (available at

[https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE/JAC/jacc/Library\\_of\\_Information/Library\\_of\\_Information.htm#hbook](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jacc/Library_of_Information/Library_of_Information.htm#hbook))

## **AVIATION CLAIMS**

These claims occur in a variety of ways, including: noise and overpressure claims from low overflights and sonic booms, and accidents involving active-duty, AFRES, ANG, Aero Club, and Civil Air Patrol aircraft.

When any claim involving an Air Force aircraft is made, refer the claimant to the Legal Office at the base nearest the claim site

The Legal Office will fully investigate and adjudicate the aviation claim

## **SONIC BOOM AND LOW OVERFLIGHT CLAIMS**

Sonic boom damage

Overpressures based upon speed, altitude and location of aircraft relative to claimant's property, in pounds per square feet (psf) will determine whether claimed damage could have been caused by sonic boom

Sonic booms not selective - encompass entire area

Sonic booms are instantaneous, few seconds only

Window, glass and bric-a-brac are first type of damage

Low overflight damage

Noise generally does not cause damage to property

Noise can cause cattle and horse stampedes, startling of chickens, silver foxes, minks, cracking of exotic bird eggs, injuries to ostriches

Adjudication of claims

If cause of damage determined to be military flight activity, claim may be payable for "noncombat activity" under the Military Claims Act (see AFI 51-501, Chapter 3) or the National Guard Claims Act (see AFI 51-501, Chapter 5, Sec B)

"Noncombat activity" is an activity other than combat, war, or armed conflict that is particularly military in nature and has little parallel in civilian pursuits

No showing of negligence required for noncombat activity

Causation and amount of damages are only issues

Sonic boom & low overflight litigation

Claims may be brought under the Federal Tort Claims Act

Negligence, causation, and damages must be proven

## **AEROSPACE CLAIMS**

Air National Guard Claims

Determine status of crewmembers or ANG personnel involved in mishap

Title 32 – federally funded training orders (e.g. IDT or AT training)

Title 10 – federal active duty orders

State duty (e.g., disaster response, riot control, emergency situation)

U.S. is only liable for negligence of ANG members performing duty under Title 10 or Title 32 at time of incident

All ANG aviation claims are routinely adjudicated under the noncombat provisions of the National Guard Claims Act

Air Force Reserve Claims

Crewmembers have same status as active duty personnel

All AFRES aviation claims are routinely adjudicated under the noncombat provisions of the Military Claims Act

Aero Club Claims

Participation in Aero Club activity is a recreational activity, and the negligence of Aero Club member or participant is outside scope of their employment

U.S. is not liable for negligence of Aero Club member or participant engaged in recreational activity

All Aero Club members and participants are covered under NAFI liability insurance for their negligence in causing a mishap

Look to NAFI insurance to pay third party claims caused by the negligence of Aero Club members or participants, engaged in recreational activity

Not cognizable under Air Force claims statutes

Third party claims caused by the negligence of Aero Club employees (nonappropriated fund employees) or military members working at the Aero Club in their official capacity are cognizable under the Federal Tort Claims Act (FTCA)

Aero Club claims settled under the FTCA are paid by NAFI

Active duty and AFRES military members are barred by *Feres* doctrine from receiving compensation under Air Force claims statutes for their death or injuries arising out of their participation in an Aero Club activity

### Civil Air Patrol (CAP) Claims

Civil Air Patrol is a federally chartered, nonprofit civilian corporation, which has been designated as a voluntary civilian auxiliary of the Air Force

Its mission is to provide aerospace education and training to its senior and cadet members, provide volunteer emergency services, and to promote civil aviation in the public sector

Air Force is authorized to use the services of the CAP in fulfilling the noncombat missions of the Air Force (designated as Air Force assigned missions)

Typical Air Force assigned missions include search and rescue, route reconnaissance, cadet orientation flights, specified training and proficiency flights

CAP is instrumentality of U.S. when performing Air Force assigned missions

Third party claims arising out of activities of CAP while performing Air Force assigned missions are cognizable under Federal Tort Claims Act

Senior CAP members or CAP cadets (18 years or older) are covered under Federal Employee Compensation Act for their death or injuries incurred while in the performance of an Air Force assigned mission

U.S. is not liable for third party claims arising out of CAP corporate activities

### **References:**

Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680

Military Claims Act, 10 U.S.C. 2733

National Guard Claims Act, 32 U.S.C. 715

AFI 51-501, *Tort Claims*, 9 Aug 2002

AFMAN 51-505, *Tort Claims Manual*, Draft (available at [https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE/JAC/jact/RefPage.htm](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jact/RefPage.htm))

## **CARRIER RECOVERY CLAIMS**

### **BASIS FOR CARRIER RECOVERY (CR) CLAIMS**

The basis for a CR claim is the failure of a carrier, warehouse, or contractor to adequately protect goods entrusted to them for shipment

A carrier must deliver goods in the same amount and condition as when it took possession of them

A carrier's liability may, however, be limited by its contract with the government

The Air Force is entitled to collect up to the carrier's or warehouse's contracted liability depending on the type of shipment

The claimant assigns to the United States all claim rights against the carrier or contractor which creates a right of recovery on behalf of the United States

### **PRINCIPLES OF RECOVERY**

Carrier is generally liable for loss or damage occurring while goods are in its possession

Government must prove a transit or storage loss through written exceptions to damage taken at the time of delivery or within 75 days. The claimant must submit DD Form 1840R to the claims office within 70 days of delivery so that the claims office can review the form and mail it to the carrier within 75 days of delivery

At the time the claimant is paid, the claims office will make a demand on the carrier in an amount based on the type of shipment

#### **References:**

AFI 51-502, *Personnel and Government Recovery Claims*, 1 March 1997

AFLSA/JACC, *Claims Handbook*, Chapter 3, 30 September 1997 (available at

[https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE/JAC/jacc/Library\\_of\\_Information/Library\\_of\\_Information.htm#hbook](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jacc/Library_of_Information/Library_of_Information.htm#hbook))

## **HOSPITAL RECOVERY CLAIMS**

The Air Force may recover the cost of providing medical care under the Federal Medical Care Recovery Act (FMCRA) and the Coordination of Benefits statute (COB). The Air Force may recover pay given during a period of disability caused by tort under the FMCRA.

### **FEDERAL MEDICAL CARE RECOVERY ACT (FMCRA)**

Under this statute, the government's recovery is predicated on "circumstances creating tort liability"

Usually, the four common law elements of tortious conduct (duty, breach, causation, damages) have to be present before consideration may be given to asserting a hospital recovery claim under the FMCRA

The FMCRA applies even in no-fault jurisdictions. In a no-fault state, if there was initially tort liability but the no-fault statute precludes recovery against the third party who tortuously caused the injury, the government may pursue a FMCRA claim against the alternative system of no-fault compensation as a third party beneficiary

At the same time, any defenses available under state law, including contributory negligence, may be interposed to defeat the government's claim

In general, a federal statute of limitation of three years applies under the act. Since the U.S. has an independent statutory right of recovery, a release signed by the injured party is usually not effective in extinguishing the government's claim

All successful collections for treatment provided by an MTF are deposited into the O&M account of the military medical treatment facility (MTF) rendering treatment

### **COORDINATION OF BENEFITS (COB)**

Under this law, Congress allows military hospitals to pursue recoveries from statutorily defined plans. These include health insurance policies/plans, auto insurance providing for medical treatment, workers' compensation coverage, and similar plans, policies, and programs

Successful recoveries of these claims are deposited directly into the treating MTF's O&M account

### **References:**

AFI 51-502, *Personnel and Government Recovery Claims*, 1 March 1997

AFLSA/JACC, *General Claims Handbook*, Chapter 5, 30 September 1997 (available at [https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE/JAC/jacc/Library\\_of\\_Information/Library\\_of\\_Information.htm#hbook](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jacc/Library_of_Information/Library_of_Information.htm#hbook))

## **PROPERTY DAMAGE TORT CLAIMS IN FAVOR OF THE UNITED STATES**

Claims on behalf of the U.S. for property damage by a tortfeasor require the base to be pro-active and aggressively look for these claims which are known as “G” claims or “Government” claims. This does not include hospital recovery claims.

### **ASSERTABLE CLAIMS**

Claims personnel may assert claims against a tortfeasor for loss or damage to government property in these instances

If the loss or damage to government property is for \$100 or more. If the loss or damage is less than \$100, assert the claim if it can be collected easily

If it is based on a contract and the contracting officer does not intend to assert a claim under the contract. Document the contracting officer's decision not to assert a claim for the file

For property loss or damage, if the claim arises from the same incident as a hospital recovery claim. Process the two claims separately, but investigate them together

If the tortfeasor or his insurer presents a claim against the government arising from the same incident, assert a claim. Process both the pro-Government and anti-Government tort claims together

Due to the unique nature of product liability issues and claims litigation, obtain AFLSA/JACC approval before asserting a claim using a products liability theory of recovery

### **NONASSERTABLE CLAIMS**

Claims personnel do not assert a claim for loss or damage of government property in these instances

For reimbursement against military or civilian employees for claims paid by the United States due to that employee's negligence

For loss or damage that a nonappropriated fund employee causes to government property while on the job, or caused by a government employee with accountability for the property under the Report of Survey system

Under the Report of Survey system military members and civilian employees may be held pecuniarily liable for loss, damage or destruction of property caused by their negligence. With some exceptions, the usual limit of liability is one month's pay. However, the Report of Survey manual, AFMAN 23-220, para 3.2.4 and 3.3.6, indicates assertion of a tort property damage claim instead of a report of survey is appropriate if the military member or civilian employee damages government property with their private automobile

For loss or damage to nonappropriated fund property that is assertable under other parts of AFI 51-502

For monies to be recovered from a foreign government or any of its political subdivisions. AFLSA/JACC may authorize exceptions to this rule

## STATUTE OF LIMITATIONS

The United States must file a lawsuit for loss or damage of government property, based in tort, within three years after the date when a responsible official of the United States knew or reasonably should have known the material facts that resulted in the claimed loss. (*See* 28 U.S.C. 2415b.) Suits based in contract, or upon some other theory or upon state law, may have a different statute of limitations period. The SJA ensures the correct governing statute is applied

## COLLECTING CLAIMS

Claims personnel collect tort claims in favor of the government

The settlement authority may accept a third party's offer to repair or replace the damaged property. The third party repairs or replaces the property to the satisfaction of the accountable property officer

When a party refuses to pay voluntarily, settlement authorities implement off-set action to collect claims, if all parties have agreed upon the tortfeasor's liability or the claim is subject to liquidation. The United States may administratively off-set a liquidated tort claim against an amount that it owes to the claimant

When two or more tort-feasors are jointly and severally liable, settlement authorities may divide the payment between the tort-feasors. Take care that a compromise with one tortfeasor does not release the claims against the remaining responsible parties

A settlement authority may waive prejudgment interest (where statute, contract, or regulation do not require it) to encourage payment. Inform the tortfeasor that the United States will seek such interest in the event of litigation

## DEPOSTING COLLECTIONS

Claims personnel deposit collections. (*See* 31 U.S.C. 3302, 10 U.S.C. 2831)

Deposit collections for loss, damage, or destruction to Air Force family housing, caused by abuse or negligence, to the DOD Military Family Housing Management Account

Deposit collections for loss, damage, or destruction to other real property to the appropriate funds account of the organization responsible for the repair, maintenance, or replacement of the real property. However, these funds may not be reused without their appropriation by Congress

Deposit collections for loss, damage, or destruction to property of an Air Force Revolving Fund to the appropriate Revolving Fund account

Pay or deposit recoveries involving NAFI property to the appropriate NAFI

Deposit all other collections for which there is no statutory exception to the US Treasury Miscellaneous Receipts Account

**References:**

AFMAN 23-220, *Reports of Survey for Air Force Property*, 1 July 1996

AFI 51-502, *Personnel and Government Recovery Claims*, 1 March 1997

AFLSA/JACC, *General Claims Handbook*, Chapter 4, 30 September 1997 (available at [https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE/JAC/jacc/Library\\_of\\_Information/Library\\_of\\_Information.htm#hbook](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jacc/Library_of_Information/Library_of_Information.htm#hbook))

## RENTAL VEHICLES

### INTRODUCTION

Vehicles rented on government orders are for official use only

“Use of a special conveyance is limited to *official purposes*, including transportation to and from duty sites, lodgings, dining facilities, drugstores, barber shops, places of worship, cleaning establishments, and similar places required for the traveler's subsistence, health or comfort.” JFTR, para U3415G and JTR, para C2101

“Official Purposes” is a different standard than “scope of employment”

“Official purposes” is a standard in the JFTR/JTR, and is used to determine whether or not a renter will be reimbursed for damage to a rental vehicle

“Scope of employment” is a legal standard under the claims statutes, and will be used to determine whether or not the United States will defend you in a lawsuit

Within NATO Status of Forces countries, there is yet a third standard, “in the performance of official duty,” which bears on both claims and foreign criminal jurisdiction questions

Use must be reasonable, but even if reasonable, may still not be in scope of employment

Case interpreting Hawaii law (*Clamor v. United States*, 240 F.3d 1215 (9th Cir. 2001)) held that a Navy civilian, TDY to Pearl Harbor, who was returning to his off-base quarters at the end of the duty day, was not in the scope of his employment when he had an accident while still on the naval station

The Navy considered the employee to be using the vehicle for “official purposes,” so the damage to the rental car could be paid by the government

Because the Navy civilian was found not to be within the scope of employment, he had to rely upon his private insurance to cover the injuries to the person in the other car

Some question now whether members are in the scope of employment if government meals are directed on orders, and purpose of trip is to go off-base for meals

For the sake of the member/employee, commanders should factor into rental car authorizations whether or not the member/employee has a private automobile with liability insurance that could be relied upon in the event the member/employee were in an accident and found to be outside the scope of employment

Can't split rental between official and personal use

When renting a vehicle pursuant to an authorization on orders, it is mandatory to obtain rental vehicles through the Commercial Travel Office (CTO). JFTR, para U3415B and JTR, para C2101

Generally, CTO will reserve a vehicle from a company participating in the Military Traffic Management Command (MTMC) negotiated agreement

Look for Change 185 to the JFTR and Change 439 to the JTR, effective 1 May 02, stating “per TRANSCOM policy, [the CTO] reserves a rental vehicle from a company that subscribes to the MTMC rental car agreement”

MTMC Agreement specifies the agreement is in effect when the vehicle is rented and operated on official business

Therefore, it violates MTMC Agreement to rent for official and personal purposes

Vehicles obtained pursuant to the MTMC Agreement may only be used for official purposes

If one wants to use a rental vehicle for personal purposes, one must rent another vehicle at their own expense

## **MILITARY TRAFFIC MANAGEMENT COMMAND (MTMC) RENTAL VEHICLES AGREEMENT**

Major rental car companies subscribe to a Memorandum of Understanding (MOU) with MTMC. The MOU sets rates and conditions of the rental

Rental rates include insurance coverage for the United States at no additional charge

Liability coverage for federal drivers: \$100,000 per person, \$300,000 per accident and \$25,000 property damage for each occurrence

Limited comprehensive and collision coverage

Coverage only if there is not credible evidence of a driver’s negligence

Driver must not be engaging in prohibited activities: DUI, off-road use, pushing or towing another vehicle, carrying passengers for hire, using the vehicle for illegal purposes, obtaining the vehicle fraudulently, using the vehicle in tactical exercises or in a race, crossing international borders without permission of the rental company, leaving the keys in the vehicle (and it is stolen), and operation of the vehicle by an unauthorized driver

Some foreign countries have a mandatory deductible (called nonwaivable excess fees in the MTMC Agreement). If so, even if the AF driver is not negligent, US must pay the first \$500 of damage

Travel orders must reflect rental vehicle authorized

Agreement is not valid when using an IMPAC card

Must rent from a participating company and location

While most rental car companies subscribe to the Agreement, a particular location can opt out

Rental agency should be notified of all persons who are going to be driving vehicle

While not mandatory under the MTMC Agreement, it might relieve the renter of personal liability if another driver uses the vehicle on other than official business

Rental agency can't charge for adding other drivers

A contractor is not your "fellow employee" and may not drive a car you rent on official business

Car agreement available at <http://www.mtmc.army.mil/CONTENT/656/agree.PDF>

Applies to cars and mini-vans

MTMC Truck Rental Agreement effective Sep 00. Available at <http://www.mtmc.army.mil/CONTENT/899/truck.pdf>

Applies to cargo vans, pick-ups, and utility and straight trucks. Gross weight must not require a Class C driver's license

Trucks not necessarily listed with the Commercial Travel Office (CTO). Must call company or go to MTMC Web page: <http://www.mtmc.army.mil/frontDoor/0,1383,OID=3--215-220--972,00.html>

Driver must be 21 years old

Unlike cars, if rent a different truck than one with MTMC rate, MTMC Agreement does not apply

May apply to Do-It-Yourself (DITY) moves, but coverage under the Agreement does not extend to spouse driving vehicle, nor to detour (i.e. driving out of the way to see parents)

Some states do not consider PCS moves to be in scope of employment, so government would not defend member for negligence causing damage or injury to another

Members should be cautioned not to rely on MTMC Truck Agreement for complete coverage

## **LIABILITY FOR DAMAGES TO THE RENTAL VEHICLE AND TO OTHERS: FOUR DIFFERENT SITUATIONS**

Rented on orders pursuant to MTMC Agreement

Rented on orders not under MTMC Agreement

Personal rental vehicle on official TDY

Rented pursuant to umbrella contract

Claims personnel DO NOT pay claims for damage to rental vehicles. Follow guidance below for each situation

### **RENTED ON ORDERS PURSUANT TO MTMC AGREEMENT**

Damages to the vehicle prior to 1 Nov 01 were covered by full comprehensive and collision coverage provided under the MTMC Agreement

Agreement amended 1 Nov 01. Now, if there is credible evidence of negligence on the part of the driver, collision insurance does not apply to damage to the vehicle

Renter may be personally liable if a fellow employee has the vehicle and is not using it for official purposes

Example: A unit sends 5 people TDY, and authorizes 1 rental car. One member actually rents the vehicle. Rental is charged on member's personal credit card (VISA government travel card, not IMPAC card). Personnel can get the keys at any time to use the vehicle. Another member takes the vehicle to a bar late at night, gets drunk, and crashes the car

MTMC Agreement specifically excepts DUI from coverage

Visa card coverage (see section 2 below) also specifically excepts DUI from coverage

DOD Financial Management Regulation, Vol. 9, para 040705 states government reimbursement to a rental agency is not authorized when there is willful and wanton negligence on the part of the driver

Since this is not a government rental, but a personal rental on the personal government travel card, the renter is liable under contract for the damage to the vehicle

Negligence claims for personal injury or property damage against the driver by third parties are covered under the liability insurance provided by the rental car company, up to the policy limits

So long as the driver was in the scope of employment, the Government will defend the driver. Within the US, the exclusive remedy is against the United States--the driver cannot be held personally liable. 28 U.S.C. 2679

#### RENTED ON ORDERS, NOT UNDER THE MTMC AGREEMENT

For damage to rental vehicle, the Government Travel Card currently carries collision coverage

The traveler must decline the rental car company's collision damage waiver insurance

Damage must be reported to the Visa Assistance Center immediately (NLT 20 days) at 1-800-VISA-911 (on reverse of card)

Covers collision or rollover, theft and theft-related charges, malicious vandalism, windshield damage due to road debris, and loss of use and towing charges due to covered damage

Does not apply if the vehicle is rented for more than 31 days; if used off-road; if driver is DUI; if damage results from hail, lightning, flood or other weather-related causes; or if damage is from failure to protect the car, i.e. leaving the car running and unattended

Does not apply to expensive, exotic, and antique autos; vans over eight passenger; trucks; motorcycles; limos; and recreational vehicles

If no travel charge card coverage, member usually pays rental company and claims reimbursement on the travel voucher under JFTR, para U3415.C2b (for military members) and JTR, para C2102.D.2 (for DOD civilians)

DFAS can also pay rental company directly

Travel claim comes to the legal office for review

For damage to another vehicle, property or personal injury, claims office adjudicates. So long as the driver was in the scope of employment, the United States will defend the driver. Within the US, the driver cannot be held personally liable

#### PERSONAL RENTAL VEHICLE ON OFFICIAL TDY

Damage to rental vehicle: driver is usually personally responsible

Damage to another vehicle, property or personal injury: if driver is in the scope of employment, the United States will defend the driver. Within the US, the driver cannot be held personally liable

#### RENTED PURSUANT TO CONTRACT

MTMC Agreement not applicable unless made a part of the contract

Will be subject to specific contractual provisions under Federal Acquisition Regulations (FAR 52.228-8; clause is required within the US); generally, United States liable for any damages to rental vehicle except fair wear and tear

Along with typical contracts for fleet rentals, rental with an IMPAC card is a government contract, and not a rental between the traveler and the company

Claims for damage to rental vehicles under contract are settled under contractual provisions as claims against the contract

Unlike vehicles rented on a personal charge card, a report of survey may be required for damage to a vehicle rented under a government contract. See, AFMAN 23-220

For damages to another vehicle or property, claims office adjudicates as a tort claim. Again, so long as the driver is in the scope of employment, the Government will defend the driver. Within the US, the driver cannot be held personally liable

### **IF THERE IS AN ACCIDENT**

Call the rental company and report

If rented on a government VISA card, call VISA and report immediately (1-800-VISA-911 in the US, collect 410-581-9994 outside the US; numbers on reverse of card)

If the police respond, try to get a copy of the accident report. If you can't get a copy of the report, find out how to get a copy later

If someone else is injured in the accident and you are TDY at or near a base, let the base legal office know of the accident. If not near a base, contact your base legal office upon return

Inform the SJA immediately if you become aware litigation is filed regarding a vehicle rented by an AF member/employee, even if the United States is not a named party in the suit

### **References:**

Joint Federal Travel Regulations, Volume 1 (JFTR), ch 3, para U3415 (Special Conveyance Use) (available at <http://www.dtic.mil/perdiem/trvlregs.html>)

Joint Travel Regulation, Volume 2 (JFR), ch 2, para C2101 (Special Conveyance Use) (available At <http://www.dtic.mil/perdiem/trvlregs.html>)

Federal Acquisition Regulation (FAR) sec 28.312 (Contract clause for insurance of leased motor vehicles) and subsec 52.228-8 (Liability and Insurance--Leased Motor Vehicles) (available at <http://www.arnet.gov/far/>)

AFMAN 23-220, *Reports of Survey for Air Force Property*, 1 July 1996

AFI 51-501, *Tort Claims*, 9 August 2002

## **TORT CLAIMS**

### **INTRODUCTION**

Under certain circumstances, federal law makes the United States liable for property damage, personal injuries, and death that results directly from the negligent or wrongful acts or omissions of government personnel acting within the scope of their employment

Federal law authorizes the United States to pay for property damage, personal injuries, and death that directly results from noncombat activities of United States armed forces

Normally, to receive compensation for their loss, an injured person or entity must present a written request for payment of a specific amount of money (claim) within two years of the accident or incident that created the loss

In some cases, denial of a claim or failure to resolve a claim within six months after it is presented to the Air Force creates a right to sue the United States in federal District Court

Installation legal offices process claims against the Air Force and help defend the Air Force when claims are litigated

### **CLAIMS AND CLAIMANTS**

Claims arising from alleged negligent or wrongful acts of government personnel are tort claims

Common tort claims: GOV-POV accident, slip and fall on base, unlawful detention or search, medical malpractice, aircraft accident, mishap with rental car while TDY

Claimant may be individual, organization, or company that suffered loss because of alleged negligent or wrongful act or omission by government personnel

Claimant may be agent, legal representative, or someone with subrogation rights of the injured party

### **PAYABLE CLAIMS**

Claim must demand a specific amount of money

Claim must allege damage to real or personal property, personal injury, or death

Damage must be direct result of negligent or wrongful act or omission of government personnel acting within the scope of employment

A negligent act means that a person departed from the conduct expected of a reasonably prudent person under similar circumstances

Government personnel include Air Force military and civilian employees, Civil Air Patrol members if under Air Force direction and control, and Air National Guard military members in federal status

JA makes determination of whether an employee acted within scope of employment after reviewing relevant facts, circumstances, and applicable law

Ordinarily, a person is within the scope of employment if the actions in question were directed by competent authority and were serving some governmental purpose when the negligent act or omission allegedly occurred

NOT a "line of duty" question

Generally, the extent of government liability is about the same as that of a private person

For claims arising in the United States and its territories, liability is determined based on law of the place where the alleged negligent act or omission occurred

For claims arising in foreign countries, liability is based on general principles of American tort law

Foreign rules and regulations are relevant but not controlling unless made controlling by international agreement or United States military regulation or policy

The principle of absolute, strict, or "no fault" liability does not apply

If damage is direct result of noncombat activity, claim may be paid without regard to negligence or other fault

"Noncombat Activity" is a term of art that means any activity, other than combat, war or armed conflict, that is particularly military in character, has little parallel in the civilian community, and has been historically considered as furnishing the proper basis for claims

Common noncombat activities

Operation of military aircraft/spacecraft/missiles

Practice bombing or firing of heavy guns and missiles

Movement of tanks

## **CLAIMS NOT PAYABLE**

Claims specifically excluded by statute

## Examples of excluded claims

Damages, injuries, or death that stem from the performance of or failure to perform a discretionary function by a federal agency or government employee

Intentional torts (acts that the person intends to commit) such as assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights

Exclusion does not apply to claims arising out of medical, dental or health care functions

Exclusion does not apply to claims arising out of acts or omissions of investigative or law enforcement officers

Claims alleging a government "taking" of air space over land

Claims arising from damage to United States Government property

Claims for personal injury, death or property damage incurred "incident to service" by a military member

Claims for personal injury or death incurred "in performance of duty" by a civilian employee of United States

If a civilian appropriated fund employee suffers personal injury or death, the exclusive remedy is Federal Employees' Compensation Act (5 U.S.C. § 8116; 5 U.S.C. §§ 792, 8101 *et seq.*)

If a civilian nonappropriated employee suffers personal injury or death, the exclusive remedy is the Longshore and Harbor Workers' Compensation Act (5 U.S.C. § 8173; 33 U.S.C. §§ 910-50)

## **PAYMENT**

Installation JA accepts and investigates tort claims

Based on relevant facts and law, installation JA either settles a claim, denies the claim, or forwards the claim to AFLSA/JACT for action

Installation JA may pay claims filed in any amount when payment is for \$25,000 or less

If JA approves claim for \$2,500 or less, payment comes from Air Force claims funds

If JA approves claim for more than \$2,500, payment comes from the Judgment Fund Group of the Department of the Treasury. Installation JA may deny claims of \$25,000 or less

Installation JA may not pay or deny certain claims and must forward them to AFLSA/JACT for disposition

Medical malpractice

Legal malpractice

On-the-job personal injury or death of a Government contractor's employee

Admiralty and maritime claims (e.g., claims involving MWR watercraft, damage from aircraft parts that are salvaged from lakes, rivers, and oceans)

Civil Air Patrol claims

If installation JA denies a claim, claimant may appeal or request reconsideration, depending on which statute dictates processing of the claim

Installation JA can grant appeal or reconsideration request

Installation JA must forward any appeal or reconsideration request it does not grant to AFLSA/JACT for final action

In certain cases, claimant may sue the Air Force within six months after final action is taken on the claim

Final action is the denial of claim or, when applicable, denial of a reconsideration request

Six months of no action is deemed a denial

Suit is in federal District Court

Department of Justice (DOJ) defends Air Force in litigation

Installation JA works with AFLSA/JACT to help DOJ defend litigation

**References:**

10 U.S.C § 2733 (Military Claims Act)

28 U.S.C. §§ 1346(b), 2401, 2671-2680 (Federal Tort Claims Act)

AFI 51-501, *Tort Claims*, 9 Aug 2002

AFMAN 51-505, *Tort Claims Manual*, Draft (available at

[https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE/JAC/jact/RefPage.htm](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jact/RefPage.htm))

*Chapter 13*

***CIVILIAN PERSONNEL  
AND  
FEDERAL LABOR LAW***

## OVERVIEW OF THE CIVILIAN PERSONNEL SYSTEM

The area of labor and personnel relations is covered by an assortment of statutes, executive orders, and regulations and is administered by a myriad of administrative bodies located in a variety of federal departments and independent agencies and is a complicated area of the law.

### THE WORKFORCE STRUCTURE

- Six categories
  - Competitive Service
    - All positions not specifically exempted
    - Most employees enter federal service after passing a competitive exam
  - Excepted Service—usually exempted from competing for jobs by OPM regulations
  - Senior Executive Service (SES)
    - Reserved for civil servants above GS-15
    - Considered general officer equivalents
  - Probationary Employees
  - Hybrid military/civilian position
    - National Guard Technicians
    - Air Reserve Technicians
  - Non-Appropriated Fund employees
- Significance of categories: varying degrees of protection in adverse personnel actions

### PAY SYSTEMS

- Appropriated Fund Employees
  - General Schedule (GS)
    - GS-1 through GS-18
    - Statutory; same pay scale nationwide

- Automatic pay increases for “acceptable” performance
- General Manager
  - Statutory, same pay scale nationwide
  - “Merit Pay” increases
- Federal Wage Survey
  - Wage Grade (WG)/Wage Leader/Wage Supervisor
  - Pay reflects private sector pay rates in locality for same type of work
  - Manner of computing pay set by statute
- Non-Appropriated Fund (NAF) Employees
  - Morale, Welfare and Recreation employees
  - Pay rates determined by management and may be negotiable with unions

#### ADMINISTRATIVE AND ADJUDICATIVE BODIES

- Merit Systems Protection Board (MSPB)
  - Adjudicates cases brought by the Office of Special Counsel (whistleblower claims or allegations of mismanagement)
  - Hears appeals by certain civilian employees of agency actions in misconduct or performance cases where the employee was disciplined by reduction in grade, removal, suspension for more than 14 days or furlough for 30 days or less for misconduct
  - MSPB has the full authority to mitigate or completely reverse agency disciplinary actions
  - Hears appeals concerning reduction-in-force (RIF)
- Equal Employment Opportunity Commission (EEOC)
  - Adjudicates claims of unlawful discrimination based on race religion, national origin, sex, color, disability, age and reprisal
  - If illegal discrimination found by EEOC, it may order back pay, retroactive personnel actions, expungement or correction of records, reinstatement, promotion, payment of attorney fees, and compensatory damages

- Federal Labor Relations Authority (FLRA)
  - Administers the interaction between federal agencies, labor organizations and employees
    - Decides unfair labor practice (ULP) cases filed by either the agency or the union
    - Decides appeals of certain arbitration awards and negotiability appeals
    - Has authority to direct the Air Force to comply with its orders
- Federal Service Impasses Panel (FSIP)
  - Resolves negotiation impasses between agencies and labor organizations
- Federal Mediation and Conciliation Service (FMCS)
  - Aids federal agencies and labor organizations in resolving negotiation impasses; provide parties with lists of arbitrators; provides mediators for alternative dispute resolution
- Office of Personnel Management addresses personnel management issues such as civil service retirement programs, insurance, examinations, and classification appeals
- Office of Special Counsel investigates and prosecutes allegations of violations of merit principles, prohibited personnel practices and violations of Hatch Act

## **LITIGATION RESPONSIBILITIES**

- Administrative litigation (FLRA, MSPB, EEO, unemployment compensation, etc.)
  - Installation SJAs
    - Provides legal reviews and advice to commanders, CCPO, and EEO officials concerning all labor and employment law issues
    - Provides management representation in MSPB hearings, arbitration, EEO cases, unemployment compensation hearings, and other cases
    - Requests assistance from HQ AFLSA/CLLO
  - Central Labor Law Office (CLLO)
    - Provides representation before FLRA in ULP and representation cases (unless specifically delegated to installation)
    - Handles ALL class complaints of discrimination before EEOC

- Provides representation in other cases at any level on an available basis
- Provides legal advice, assistance, and training to judge advocates and civilian attorneys and to personnel experts
- Federal court litigation (any case filed within the U.S. federal court system)
- The Department of Justice "has the statutory responsibility to represent the Air Force and Air Force officials who are being sued in their official capacities....This responsibility extends to litigation in foreign courts." AFI 51-301, para 1.2
- AFLSA or HQ USAF/JAI, on behalf of TJAG, ordinarily determines who may appear as an attorney or counsel for the Air Force in a civil judicial or administrative action, foreign or domestic

**References:**

5 U.S.C. §§ 5101-5115, Classification  
5 U.S.C. §§ 1201-1204 (MSPB)  
5 C.F.R. Part 1201, Appendix II (MSPB regulations)  
AFI 36-704, *Discipline and Adverse Actions*, 22 July 1994  
29 C.F.R. Part 1614 (EEOC regulations)  
AFI 36-1201, *Discrimination Complaints*, 25 July 1994  
5 U.S.C. § 7101, *et seq*, Federal Service Labor-Management Relations Statute  
AFI 36-1203, *Administrative Grievance System*, 1 May 1996  
AFI 36-701, *Labor Management Relations*, 27 July 1994  
AFI 51-301, *Civil Litigation*, 1 July 2002

## **OVERVIEW OF FEDERAL LABOR-MANAGEMENT RELATIONS**

Labor law is simply about relationships: The rules that govern how employees and managers should work together to accomplish the mission. The statutory and regulatory basis for these rules and their interpretation are described below.

- The Civil Service Reform Act of 1978 (CSRA) is the foundational authority that governs the rights and privileges of federal employees. Others include

- Title VII: Federal Service Labor Management Relations Statute (FSLMRS)

- FSLMRS covers certain civilian employees of the Air Force. Among others, the statute excepts the following categories

- Active duty members

- Supervisors and management officials, and

- Aliens or non-U.S. citizens employed outside U.S.

- Air Force Guidance (AFI 36-701)

### **EMPLOYEE RIGHTS**

- FSLMRS recognizes certain employee rights

- The right to form, join or assist any union, or to refrain from any such activity, freely and without fear of penalty or reprisal (no right to strike)

- Serve as representative of union

- Present union views to management

- Engage in collective bargaining about conditions of employment (COE) through chosen representatives

### **MANAGEMENT RIGHTS**

- FSLMRS similarly recognizes certain rights that are reserved to management. When the agency exercises a reserved management right, the agency is not required to bargain over the substance of that decision. However, the agency is required to bargain over any legitimate proposals that the union submits concerning the impact or implementation of the agency's decision to exercise a reserved management right. Some of the reserved management rights include the right to

- Determine agency mission
- Determine agency budget
  - Determine agency organization
  - Determine number of employees
  - Determine internal security practices
  - Hire, assign, direct and retain employees
  - Suspend, remove, reduce in grade or pay, or take disciplinary action
  - Assign work
  - Make determinations on outsourcing
  - Determine the personnel by which agency operations will be conducted, and
  - Fill positions and promote employees

#### UNION REPRESENTATION RIGHTS AND DUTIES

- Union entitled to negotiate collective bargaining agreement (CBA) covering employees in unit
  - Installation represented by base negotiating team
  - Both sides must negotiate in good faith (duty to approach negotiations with sincere resolve to reach agreement)
    - Union may designate its representative during the negotiations

Union entitled to be present during *formal discussions* between one or more representatives of the Air Force and one or more employees in the bargaining unit (or their representatives) concerning any grievance or any personnel policy or practices or other general conditions of employment

- There are a number of factors that can be considered to determine if the discussion is formal. Some of the factors include: Who held the meeting; Where was the meeting held; How long did the meeting last; Was there a formal agenda; Was attendance mandatory; How was the meeting conducted? Please note, some meetings may be formal even though they are not intended to be
- Discussion is synonymous with *meeting* and does not require debate or argument

-- Check with the Civilian Personnel Office (CPO) and/or SJA before conducting such discussions to see if union should be notified

- Union entitled to be present during an investigatory interview of a bargaining unit employee if the employee reasonably believes that the examination may result in disciplinary action against the employee, and the employee requests representation. This is known as a “Weingarten” Right. Generally, management does not have to advise the employee of this right at the beginning of each interview unless the collective bargaining agreement between management and the union requires it

- Union entitled to information “reasonably available and necessary” for full and proper negotiation

-- Need not request pursuant to Freedom of Information Act -- the standard for releasing information is different from the FOIA standard

--- The union must demonstrate a specific need for the information sought

--- Undue delay, failing to explain a denial, or failing to advise the union the information does not exist, may be grounds for an unfair labor practice (ULP)

-- Union cannot be charged for the information

-- Need not release information if it contains guidance to management officials relating to bargaining

-- Must provide the information to the union even if readily available from another source

- Union duty of fair representation

-- When the union decides to represent unit employees in any manner that affects the COE, it must represent them fairly

--- No discrimination allowed

-- Must represent all employees in bargaining unit whether or not they are union members

## UNION RIGHT TO OFFICIAL TIME

- Union representatives are entitled to wages when on official time to negotiate collective bargaining issues

-- Union has a statutory right to official time for as many negotiators as are on the management negotiating team, although the union has the right to negotiate official time for additional negotiators as well

- Official time for all negotiations
- Ground rules negotiations
- CBA negotiations
- Mid-term negotiations
- Impact and implementation bargaining
- No official time for internal union business (collecting dues, soliciting new members, etc.)
- Official time must be granted for any employee participating in any phase of a Federal Labor Relations Authority (FLRA) proceeding if the FLRA determines the employee to be necessary
- Official time for other purposes is bargainable and the CBA should outline who is entitled to the official time and how much time they are entitled to

#### **UNION RIGHT TO DUES ALLOTMENTS**

- Air Force must process dues allotments in a timely fashion or it will be considered an unfair labor practice
- If Air Force fails, it must reimburse union and Air Force cannot recoup money from employee

#### **AGENCY UNFAIR LABOR PRACTICES**

- Most common agency unfair labor practices (ULP)
- To interfere with, restrain, or coerce employees in exercising their FSLMRS rights
- Lack of illegal motivation or anti-union animus is NOT a defense
- To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment
- To sponsor, control, or assist a union
- To discipline or otherwise discriminate against an employee for filing a ULP or testifying in a ULP proceeding
- To refuse to bargain in good faith
- To fail or refuse to cooperate in impasse procedures or decisions

- To enforce a rule or regulation which conflicts with a preexisting CBA
- To otherwise fail or refuse to comply with any provision of FSLMRS

## **UNION UNFAIR LABOR PRACTICES**

- MAJCOMs have authority to file ULP charges against a union, however, AFI 36-701 permits this authority to be delegated to installations
  - Not frequently used by Air Force
  - ULPs by union are similar to agency ULPs, and include
    - To coerce, discipline, or fine a union member as punishment to hinder or impede employee's work performance
    - To discriminate regarding union membership on basis of race, creed, color, sex, age, handicap, marital status, national origin, or political affiliation
    - To call, participate, or condone a strike, work stoppage, or slowdown; non-disruptive informational picketing is permitted

## **UNFAIR LABOR PRACTICE PROCEDURES**

- Charge filed with FLRA regional office

Investigation by FLRA regional office attorney/agent

- Will conduct the investigation in person or by interviewing witnesses over the phone
- Air Force must make bargaining unit employees available for interview
- Investigators are not always neutral and detached
  - Often they will amend charges to conform to their investigation
- NEVER permit management officials to be interviewed without notifying the legal office. With the exception of some bases within AFMC, JAACL/CLLO is designated as the agency representative for ULP charges. For those cases in which CLLO is designated as the agency representative, CLLO must be notified before management officials are interviewed by the FLRA
- Legal counsel can present a written or oral position statement and explore settlement options
- Regional director of the FLRA determines whether to issue a complaint

- Hearing before Administrative Law Judge (ALJ)
- FLRA General Counsel represents charging party (generally the union) and has burden of proof
- CLLO or SJA represents the base
  - ALJ issues written decision (may take 6 months or longer)
- Exceptions to ALJ decision
  - Appeal is taken to FLRA in Washington, D.C.
- FLRA decision may be appealed to either U.S. Court of Appeals for the D.C. Circuit or the circuit having geographic jurisdiction over the installation

**Reference:**

AFI 36-701, *Labor Management Relations*, 27 July 1994

## COLLECTIVE BARGAINING

The Federal Service Labor-Management Relations statute (5 U.S.C. §§ 7101-7135) is contained in the Civil Service Reform Act of 1978. This Act grants certain Federal employees the right to join or form labor unions and to engage in collective bargaining through their chosen representatives. Air Force labor-management relations policies and procedures are set forth in AFI 36-701.

The Air Force must bargain with bargaining unit employees through their duly elected representative (union) over all conditions of employment (COE), which are defined as personnel policies, practices, and matters affecting working conditions. The Act does not require bargaining with appropriated fund employees over the following subjects

- Matters regarding certain political activities
- Classification of positions
- Matters provided for by federal statute, which includes, but is not limited to
  - Pay
  - Vacations
  - Health benefits
  - Holidays
  - Retirement plans
- Proposals that conflict with government-wide rules or regulations
- Proposals that conflict with “reserved management rights” under the Act, including among other things, the mission of the agency, the budget, internal security practices, the number of agency employees, the assignment of work, the ability to hire, fire and discipline employees
- Management is not required to bargain over matters already covered in the contract (or collective bargaining agreement)
- To the extent a matter arises concerning a COE that is not covered in the contract, the union can request (and should be permitted to engage in) mid-term bargaining
- Union may bargain concerning conditions of employment not only at time the collective bargaining agreement is negotiated, but also at “mid-term” unless the collective bargaining agreement (CBA) contains a "zipper" clause that bars bargaining for the life of the agreement

- Air Force must bargain in good faith
- Must bargain before changing COE even if the change is made during life of CBA

Parties may establish a COE by consistently, over an extended period of time, engaging in a certain practice, and a labor contract clause can be modified or even overturned by such a COE created in this manner (often called a "past practice")

- This refers to matters that are already considered conditions of employment and the past practice has merely changed the way the condition of employment was originally handled
- It is not possible for a past practice to create a condition of employment where the subject matter underlying the practice does not pertain to a COE

## TYPES OF BARGAINING

Bargaining can occur in one of three contexts

- Bargaining leading to a "labor contract" of fixed duration and covering a variety of topics or bargaining in the absence of a collective bargaining agreement when one party wants to change a COE

- Impact and Implementation (I & I) Bargaining

- I & I bargaining concerns the procedures to be used in exercising management's rights (i.e. right to determine agency mission) and the appropriate arrangements for employees affected by exercise of management's rights

- But the change must have more than a minimal foreseeable impact (often called a *de minimus* impact) on the group of employees that would be affected by the change

- Several things may require I & I bargaining, such as a change in procedures for turning in leave slips, a change in employee duty hours, or over time pay issues, to name a few

- Procedure: Give the union notice in writing of the change in COE and afford it a reasonable period of time to submit written I & I proposals

- Mid-term bargaining: Union demand to bargain over a condition of employment that has not already been addressed in the collective bargaining agreement

## PERMISSIVE BARGAINING

- Under the Civil Service Reform Act (Pub. Law 94-454), management is allowed to determine whether to bargain on certain subjects. If management refuses to bargain, this decision is unilaterally binding on the union. "Permissive" subjects include

-- Management's right to determine the numbers, types, and grades of employees assigned to any subdivision, project, or tour of duty

-- Management's right to determine the technology, methods, and means of performing work

## **NEGOTIABILITY**

- Determining whether an issue is bargainable is often a confusing and highly complex matter in the federal sector labor law arena

-- If commanders are presented with a demand that a dispute or issue be dealt with through formal bargaining, the safe response is merely to advise the union representative that he/she will ask the Civilian Personnel Office and Staff Judge Advocate to review the request. This area is sufficiently sensitive that wing staff organizations will coordinate a decision to declare a proposal "nonnegotiable" with MAJCOM DPC and JA. JACL/CLLO should also be notified of any decision to declare a proposal nonnegotiable

-- Depending on the substance of the proposal, it could be determined to be outside the duty to bargain or nonnegotiable for several reasons. For example, it could be inconsistent with law (outside the duty) or affecting a reserved management right (nonnegotiable)

When management declares a proposal "nonnegotiable," the union may appeal to the Federal Labor Relations Authority (FLRA)

-- 15-day time limit to appeal

-- Agency has 30 days to submit its position or withdraw its decision not to negotiate

-- Decision by the FLRA is often made based on the written submission of the parties without a hearing

Regardless of whether negotiations are deemed "substantive" or "I&I," union negotiators who are also federal employees have a right to be in an "official time" status during the negotiations (receive pay and benefits even though not "working")

### **Reference:**

AFI 36-701, *Labor Management Relations*, 27 July 1994

## **UNACCEPTABLE PERFORMANCE BY CIVILIAN EMPLOYEES**

### **INTRODUCTION**

The Civil Service Reform Act (CSRA) of 1978 was enacted to improve government efficiency, give authority to supervisors and managers, and adequate protection to employees. The Act deals with unacceptable performance and its provisions have been implemented in the Air Force by AFI 36-704, *Discipline and Adverse Actions*. This outline describes the rules for handling employee performance problems.

- The CSRA requires
  - The appraisal and rating of employees' job performance are based on written performance elements and standards, and
  - The performance appraisal rating is used as a basis for decisions to pay, reward, assign, train, promote, retrain, or remove employees

### **APPEALS AND GRIEVANCES**

- The substance of performance elements and performance standards may NOT be appealed to the Merit Systems Protection Board or grieved under the Air Force grievance system provided for in AFI 36-1203, except to the extent that the employee alleges the standards in and of themselves violate the statutory requirements pertaining to them. Similarly, disputes concerning the identification of the critical elements of a position and establishment of performance standards are nongrievable and nonarbitratable under negotiated grievance and arbitration procedures
- Employees who are not members of a bargaining unit resolve disputes on ratings pursuant to AFI 36-1203. Bargaining unit employees resolve disputes on ratings through the negotiated grievance procedure of the local collective bargaining agreement (CBA)
- Most employees may appeal a demotion or removal for unacceptable performance to the MSPB. Bargaining unit employees must choose either to appeal to the MSPB or use the CBA's grievance procedure, but cannot do both
- Allegations of discrimination may be processed under either AFI 36-1201 or the negotiated grievance procedure, but not both

### **PERFORMANCE AND APPRAISAL PROCESS**

- Development of the performance plan
  - Most employees are required to have a performance plan

- AF Form 860, *Civilian Performance Plan*, is completed within 30 days of accession and it documents the critical position performance elements and standards for evaluation of overall performance for the position. AF Form 1003, *Core Personnel Document*, can be used for this purpose also
- Each performance plan must contain the critical elements to describe the performance requirements of the position
- A critical element is a job responsibility so important that failure to perform that element would make the employee's overall performance unacceptable
- As a general rule, seven elements should be sufficient, though there must be at least one in the performance plan
- Performance standards must be developed for each critical performance element, describing, at a minimum, acceptable performance – to include characteristics such as quality, quantity, timeliness, and behavior
- Additional non-critical performance elements and performance evaluation requirements to judge the performance are also included in the plan
- Although the employee should be given an opportunity to provide feedback, the supervisor makes the ultimate decision
- Once the plan is approved, the employee is informed of the job requirements and the plan, given an opportunity to sign the performance plan, and is given a copy

#### Annual performance appraisal

- The normal appraisal period for most employees starts on 1 April and ends 31 March
- At the beginning of the appraisal period the supervisor and the employee meet to discuss the performance elements and standards in the plan
- At least one progress review, usually at the midpoint of the period, is also required and must be documented on the AF Form 860B, *Civilian Progress Review Worksheet*. This review is confidential between the reviewer and employee
- If the rating official or the employee are newly assigned, the performance plan will be reviewed and discussed (normally within 30 days)
- A copy of any such review is provided to the employee
- At the end of the appraisal period (within 30 calendar days), the supervisor must complete the rating form, AF Form 860A

--- The supervisor evaluates the employee's performance on each critical element to determine if "meets standards" or "does not meet standards." A rating of "does not meet standards" on any critical element results in an overall rating of unacceptable performance

--- The employee is entitled to a copy of the form

## **DEALING WITH PERFORMANCE PROBLEMS**

- All supervisors should conduct periodic performance reviews

-- Performance reviews are accomplished at the end of the cycle or "out-of-cycle"

-- The employee must have been in the position for 90 days or more before an out-of-cycle evaluation can be done

- At any time during the performance cycle that the employee's performance in one or more critical elements becomes unacceptable, the supervisor must inform the employee of the critical element for which performance is unacceptable, in what way it is unacceptable, and what is required to bring it back to an acceptable level

-- This notice should be accomplished in writing (check with Civilian Personnel Office and SJA for preparation and review) and provide the employee a period of time within which to improve

--- Called the Performance Improvement Period (PIP) or Opportunity Period (AFI 36-1001)

--- The employee's performance must be unacceptable; it is impermissible to place an employee on a PIP when their work has been only marginal

--- The length of the PIP depends on the duties involved and the nature of the deficiencies; generally, 30-60 days will be sufficient

-- An employee may have the right to appeal an appraisal to the next higher level supervisor but the reconsideration must comply with proper grievance procedures

-- The supervisor must help the employee improve during the PIP through counseling, coaching, OJT, and other methods

When unacceptable performance in one or more critical elements continues after the PIP has expired, demotion or removal is authorized

- If performance on a PIP rises to an acceptable level, then a new rating is completed and forwarded in accordance with instructions

If the employee's performance improves during a PIP, but thereafter falls to unacceptable levels again, another PIP may be initiated within one year after the date of the beginning of the previous PIP

Probationary employees are covered by different procedures

-- The standards and procedures for probationary employees can be found in AFI 36-1001, Chapter 3, and for supervisors and managers in Chapter 4

-- The probationary period for an employee is one year long

--- The supervisor certifies performance in writing no later than the 10<sup>th</sup> month of probation

--- Failure to complete certification on time results in the employee passing probation by default

--- If the supervisor recommends not keeping the employee, the CPF must be contacted before the end of the period concerning the proper course of action

---- Written notification is required if the employee does not pass the probationary period

---- The employee is permitted a reasonable period of time to respond and submit supporting documentation.

-- The probationary period for a supervisor or manager is no more than one year

--- The probationary period is required whenever a civilian employee first assumes either a supervisory or management position

---- There are exceptions to this requirement based on the individual's previous experience as a supervisor or manager

--- Advanced notice of the probationary period must be given to the would-be supervisor or manager and a performance plan concerning the probationary period is also required

--- If the probationary period is not successfully completed, the employee is returned to a non-managerial or non-supervisory position

---- They must be given written notice of this decision which must include the facts and reasons that motivated the decision and information on how the Air Force will deal with the employee's placement rights

---- When an employee is returned to a non-supervisory or non-managerial position, ensure that the appropriate procedures are followed concerning grade and pay

## **PROCEDURAL REQUIREMENTS**

- Anytime a commander/supervisor takes action to remove or reduce the grade of an employee who is not performing adequately (called Chapter 43 cases because the procedures for these actions can be found in Chapter 43 of Title 5 of the United States Code) certain procedures must be followed
  - The supervisor should coordinate with Civilian Personnel Flight first
  - The employee is entitled to 30 calendar days advance written notice of the proposed action, which includes
    - Specific instances of unacceptable performance
    - The critical elements of the position the employee failed to perform properly
  - The employee has the right to be represented by an attorney or other representative
  - The employee must be given a reasonable period of time to provide a written or oral response
  - Within 30 days after the expiration of the notice period, the employee must be informed of the decision in writing (Note: The supervisor can extend this period for another 30 days)
    - The final decision must specify the unacceptable performance on which the reduction in grade or removal is based
      - A higher level manager must concur with the final decision
    - It must inform the employee of his or her appeal rights and whether he or she is eligible for disability or retirement
- After demoting or removing an employee, pertinent documents are kept in accordance with AFMAN 37-139 and must be available for review by the employee or his representative. Included among those documents are:
  - A copy of the notice of proposed action
  - The employee's reply and/or a summary of the oral reply
  - Notice of the decision and the reasons therefore
- Documentation supporting the personnel action

## **ACTION REQUIRED WHEN A MEDICAL CONDITION AFFECTS PERFORMANCE**

- Supervisors will not always know whether the employee's health is impaired or whether it is causing a performance problem (If the supervisor suspects the employee's performance is affected by drugs or alcohol abuse, or by some other medical condition, follow the provisions of AFI 36-810)
  
- When a medically based performance problem exists or might exist, the supervisor must inform the employee his or her performance is suffering, advise the employee to supply medical documentation of the condition that is or could be affecting work, and explain what documents are required and when they should be provided
  - The employee will be informed as to exactly what documentation is required and the amount of time granted to provide it. If not provided on time, the supervisor may grant an extension or proceed with the process (Medical documentation is defined in 5 C.F.R. Part 339, Section 339.102)
  
  - Any documentation provided will be reviewed by the supervisor and an Air Force or other federal medical officer
    - The employee should provide the needed documentation and
  
  - Based on the length of service and position of the employee, the employee will be furnished information concerning disability retirement
  
  - The information will be reviewed by the supervisor and a qualified physician; such a review may lead to a medical examination
  
  - The Air Force follows the rules set forth in 5 CFR Part 339 for medical examinations. Basically, Air Force-directed medical examinations are severely limited and may be ordered only when
    - The employee occupies a position that has physical/medical standards (also known as fitness for duty exams)
  
    - The Air Force needs to determine whether employee who claims worker's compensation may be accommodated in another job, or
  
    - The Air Force needs to determine qualifications of employee for reassignment rights because of a RIF (reduction in force)
  
    - The Air Force may always offer a medical exam to supplement medical documentation, but acceptance is optional with the employee

- The Air Force always has an obligation to reasonably accommodate a handicapped employee. Supervisor must coordinate with the appropriate civilian personnel official and SJA prior to taking any action

**References:**

5 U.S.C. Ch. 43

AFI 36-1001, *Managing the Civilian Performance Program*, 1 July 1999

AFI 36-1203, *Administrative Grievance System*, 1 May 1996

AFI 36-704, *Discipline and Adverse Actions*, 22 July 1994

AFI 36-1201, *Discrimination Complaints*, 25 July 1994

AFI 36-810, *Substance Abuse Prevention and Control*, 22 July 1994

AFMAN 37-139, *Records Disposition Schedule*, 1 March 1996

## **CIVILIAN EMPLOYEE DISCIPLINE**

Federal law and Air Force instructions enable commanders to take disciplinary action against civilian employees for misconduct that affects the workplace or mission accomplishment.

Certain adverse actions create appeal rights for the employee.

- Disciplinary action or adverse action must be taken without regard to marital status, political affiliation, race, color, religion, sex, national origin, or age. Adverse action based on physical handicap is not taken when the employee can effectively perform assigned duties

- Disciplinary action or adverse action must be taken only when necessary, and then promptly and equitably

- Disciplinary actions and adverse actions are personal matters and are carried out in private

- An adverse action is removal, suspension, furlough for 30 days or less, or reduction in grade or pay

- Adverse actions may or may not be for disciplinary reasons—for example, it is possible to take adverse action for unacceptable performance (see *Unacceptable Performance* outline)

- These adverse actions give a civilian employee the right to appeal

- Disciplinary action is an action taken by management to correct an employee's delinquency or misconduct. Included are

- Admonishment or reprimand

- Suspension

- Removal

- Reduction in grade or pay

- Some disciplinary actions are also adverse actions

## **AUTHORITY AND REQUIREMENTS**

All Air Force commanders (and supervisors) are delegated authority to take disciplinary and adverse action when necessary

- AFI 36-704 covers all competitive and excepted service employees

- AFI 34-301 covers non-appropriated fund employees

Management may take a disciplinary or adverse action only for such cause as will promote the efficiency of the service

Management may not take an action that would result in a prohibited personnel practice. A prohibited personnel practice is an adverse action taken against an employee for an illegal or inappropriate reason (such as reprisal or discrimination)

Burden of Proof: Management must be prepared to support disciplinary and/or adverse action by a *preponderance of the evidence* (i.e., more likely than not), and must be capable of proving, before the MSPB or a federal sector arbitrator, the following

- The reason(s) for the action taken (i.e., that the alleged misconduct occurred and the action was taken in response to that misconduct)

- The connection between the misconduct, the adverse action taken and the employee's job (i.e., that the action taken will promote the efficiency of the service)

- Known as the "nexus" and it must be shown in each case

- There has to be a connection between what the employee did and the ability of the Air Force to do its job. In other words, the Air Force has to show what the employee did was harmful or that the action taken to discipline the employee was necessary to help the Air Force do its job

- The penalty imposed is appropriate to the offense

## **PROCEDURES**

Management procedures (unless there is a local collective bargaining agreement that contains other provisions)

- Gather the facts

- Interview the employee if necessary, but remember the employee has rights (called *Weingarten* rights) to have union representation if the employee believed disciplinary action could result from questioning from his employer and he/she requested a union representative. (See *Civilian Employee Interrogation* outline)

- Consult with the Civilian Personnel Officer (CPO) and the SJA to consider options and determine what action is appropriate

CPO will prepare and the SJA will review the notice letter of adverse and/or disciplinary action for signature by the "Proposing Official" (normally a first or second level supervisor)

- The notice letter must be signed by the proposing official and inform the employee of the following (some of the items listed below are considered nonmandatory but prudent practice dictates the inclusion of all of these items)

- Notice of the precise action being proposed (i.e., suspension, removal, etc.)
- The reason(s) for the action, which includes the type of misconduct and a brief factual description of the misconduct (keep it simple and straightforward; there are additional specific requirements when the proposed action is furlough)
- A statement of the employee's right to review the material or evidence relied upon to support the reason(s) for action
- A description of the arrangements the employee can make to review the evidence or include a copy of the evidence
- Date the proposed action is to take place
- Notice of the right to respond orally, in writing or both, and to furnish documentary evidence; include the name and office of the person to whom the response should be sent
- Amount of official time for preparation of a response
- Right to representation (union representative, private attorney, or other person); and
- Additional non-mandatory information mentioned in the instruction as might be necessary based on the particular situation or that might be necessary pursuant to the collective bargaining agreement
- The employee is permitted to respond
- The employee gets a reasonable amount of time, but not less than seven days to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer
- The "Deciding Official" makes the final decision
- Usually the supervisor one level up from the proposing official (but may be the same person)
- In most cases, the final decision is made thirty (30) days after the notice is given to the employee
- Must be in writing (prepared by CPO and reviewed by SJA) and served on the employee. It must include, among other things
  - The specific decision
  - The specific reasons for the decision

- The date of the decision and the effective date of the action
- Information concerning the employee's appeal rights
  - The signature of the Deciding Official
- Additional nonmandatory information described in the instruction may also be included if the situation dictates or that might be necessary pursuant to the collective bargaining agreement
- The Deciding Official must consider employee's response
- The Deciding Official must also document his/her consideration of the *Douglas* factors governing appropriate penalty selection:
  - Douglas factors are those factors that management must consider before taking disciplinary action. They include, for example, the seriousness of the misconduct, the work record of the employee, and other similar considerations. *See* AFI 36-704
    - Use the CPO and SJA to assist in preparation
- A decision letter must be sent to the employee

## **APPEALS**

- If employee is a bargaining unit (union) member, he/she may file
  - A grievance under the negotiated grievance procedure of the local collective bargaining agreement
  - An Equal Employment Opportunity (EEO) complaint if the employee is alleging discrimination
  - An appeal within 30 days with the regional office of the Merit Systems Protection Board (MSPB), but the action must involve
    - A removal
    - Suspension for more than 14 days
    - Reduction in grade or pay
    - Furlough of 30 days or less
- Appeals can result in an administrative, trial-type hearing before

- Federal sector arbitrator
- The MSPB
- The Equal Employment Opportunity Commission (EEOC)
- If an appeal is filed, Air Force management officials will probably be required to testify
- Failure to meet the burden of proof described above could result in mitigation and/or reversal of the penalty imposed along with the employee receiving back pay, reinstatement, and attorneys' fees

**References:**

5 U.S.C. Ch. 75

AFI 34-301, *Nonappropriated Fund Personnel Management and Administration*, 25 July 1994

AFI 36-704, *Discipline and Adverse Actions*, 22 July 1994

## **EQUAL EMPLOYMENT OPPORTUNITY (EEO) COMPLAINT PROCESS**

### **INFORMAL COMPLAINT**

- **Timing:** Persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, or disability or who believes s/he has been subjected to sexual harassment or retaliated against for participating in the complaint process must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory, or in the case of personnel action, within 45 days of the effective date of the action
- **Tolling:** Initial contact beyond 45 days will be permitted if the employee was not notified of and was otherwise not aware of the 45-day limit, or did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, or was prevented by circumstances beyond his control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Equal Employment Opportunity Commission (EEOC). Normally, the employee can be deemed to be on constructive notice of the time limits if management has included the time limit information on the EEO posters that are posted around the base
- **Initial Counselor Interview:** Counselors must advise individuals in writing of their rights and responsibilities
  - Counselors shall advise aggrieved persons that, where the agency agrees to offer ADR in the case, they may choose between participation in the alternative dispute resolution program and the counseling activities. The time period for conducting ADR is 90 days
- **Final Interview:** If the matter has not been resolved, the counselor shall inform the aggrieved person in writing, of the right to file a discrimination complaint within 15 days of the notice of final interview
  - Counselors shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling
  - The aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days
- Where the aggrieved person chooses to participate in an alternative dispute resolution procedure, the pre-complaint processing period (informal complaint processing), shall be 90 days

### **FORMAL COMPLAINT**

- **Written complaint:** Complaint must be submitted in writing within 15 days of final interview notice. Complainant may amend at any time prior to conclusion of investigation (like or related claims only). Employee may also amend his complaint on motion to judge after request for hearing

- Dismissals of complaint: Prior to a request for a hearing in a case, the agency can dismiss an entire complaint for the following reasons
  - Failure to state a claim (Generally, an employee states a claim when he articulates that he has been aggrieved by an employment policy or practice due to his protected status; i.e., race, religion, disability etc. This ability to articulate a claim does not mean the employee wins on the merits, it simply allows the employee to continue processing his case in the EEO forum)
  - Identical complaint
  - Not against the proper agency
  - Untimely at either formal or informal stage
  - Pending civil action in a United States District Court
  - Raised in negotiated grievance procedure or in an appeal to the Merit Systems Protection Board (MSPB)
  - Issue is moot, or issue is a proposal to take a personnel action or other preliminary step to taking a personnel action
  - Complainant cannot be located
  - Failure to prosecute
  - Spin-off complaints (Spin-off complaints are complaints about the process. These complaints are generally expressed in terms of not processing the case fast enough or failing to interview all of the requested witnesses etc. The employee can raise his concerns about the processing of the complaint with the EEO counselor and can also raise them with an EEOC judge if there is a request for a hearing, but the spin-off complaint itself must be dismissed)
  - Abuse of Process
- Appeal of dismissal: A complaint dismissed in whole by the agency may be appealed, within 30 days of receipt, to the EEOC's Office of Federal Operations (OFO)
- Partial Dismissals: When an agency dismisses some but not all of the claims in a complaint, it must notify the complainant in writing and must explain the rationale for the decision and shall notify the complainant that those claims will not be investigated. This determination is reviewable by the administrative judge (AJ) if a hearing is requested on the remainder of the complaint
- Investigation: The Office of Complaint Investigations (OCI), which is a component of the DoD, will conduct the investigation. The OCI investigator collects the exhibits gathered by the

agency representative and the complainant, interviews the witnesses, drafts the affidavits for the witnesses to sign, and writes a report

- Complainant decides on course of action: Within 30 days of receipt of the investigative file, Complainant must
  - Request a final decision from the agency head based on the record
  - Request a hearing and decision from an EEOC AJ

## **EEOC HEARING**

- Request for Hearing: Complainants make requests for a hearing directly to the EEOC office indicated in the agency's acknowledgment letter. The Complainant must send a copy of the request for a hearing to the agency EEO office
- Discovery: The parties may engage in discovery before the hearing. AJ may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents
  - Grounds for Objection: A party may object to requests for discovery that are irrelevant, over burdensome, repetitious, or privileged
- Evidence: The AJ shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the AJ shall exclude irrelevant or repetitious evidence
- Witnesses: Agencies shall provide for the attendance at a hearing of all Federal government employees approved as witnesses by an AJ
- Alternatives to testimony: Written statement under penalty of perjury
- Record of hearing: The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts

## **POST HEARING**

- Decision: Within 180 days of receipt of the complaint file from the agency, the AJ will issue a decision on the complaint, and will order appropriate remedies and relief where discrimination is found
- Final Agency Action After Hearing: When an AJ has issued a decision, the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the AJ's decision

- Complainant's Appeal of Final Agency Action: If a complainant is going to appeal, s/he must do so within 30 days of receipt of a dismissal, final action or decision
- Request for Reconsideration: A decision issued by the EEOC/OFO is final unless the Commission reconsiders the case
- Timing of Request for Reconsideration: A party may request reconsideration within 30 days of receipt of a decision of the Commission
- Grounds for Reconsideration
  - The appellate decision involved a clearly erroneous interpretation of material fact or law; or
  - The decision will have a substantial impact on the policies, practices or operations of the agency

## **REMEDIAL ACTIONS**

- Nondiscriminatory placement
- Back pay reduced by interim earnings; employee must be ready, willing, and able to work to be entitled to back pay
- Front Pay
- Expunge from the agency's records any adverse materials relating to the discriminatory employment practice
- Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling)
- Fees and costs: Attorney's fees and costs shall apply to allegations of discrimination prohibited by Title VII and the Rehabilitation Act. Finding of discrimination raises a presumption of entitlement to an award of attorney's fees
- Compensatory Damages: Compensatory damages include damages for past pecuniary loss (out of pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm). There is a cap of up to \$300,000.00 on future pecuniary damages, and nonpecuniary damages. The \$300,000.00 cap does not include past pecuniary damages, back pay, front pay, attorney fees, or lost benefits
- Injunctive Relief

## MISCELLANEOUS ISSUES IN THE ADMINISTRATIVE COMPLAINT PROCESS

- Official time: Reasonable time to prepare and attend—normally considered in hours, not days or weeks; does not allow official time for witnesses to prepare, but allows for official time when their presence is authorized or required by Commission or agency officials in connection with a complaint
- Requirement for Exhaustion of Administrative Remedies Before Seeking Judicial Review
- The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (commonly known as the “No FEAR Act”)
  - The No FEAR Act was enacted on 15 May 2002, and became effective 1 October 2003
  - The purpose of the act is to improve agency accountability for antidiscrimination and whistleblower laws by requiring federal agencies to reimburse the Treasury’s Judgment Fund for settlements and judgments paid to employees as the result of such complaints, and by establishing extensive agency reporting requirements. Previously most settlements and judgments in favor of federal employees who sued agencies in discrimination and whistleblower cases were paid from a government-wide “judgment” fund
  - Agencies must provide to their employees written notification of discrimination and whistleblower protection laws
  - Federal agencies and the EEOC must disclose and post statistical complaint data

### **References:**

29 C.F.R. Part 1614  
AFI 36-1201, *Discrimination Complaints*, 25 July 1994  
EEO Management Directive 110 (1999)  
Public Law 107-174

## CIVILIAN EMPLOYEE INTERROGATION

In 1975, the U.S. Supreme Court, in *N.L.R.B. v. Weingarten*, established a right for an employee to have union representation if the employee believed disciplinary action could result from questioning by his employer and if the employee requested the presence of a union representative. In the federal sector, employees have the right for labor union representation as well. This section outlines the employee's rights during an interrogation. These rights are commonly known as *Weingarten* rights.

The union's and the employee's statutory right to union representation in connection with an investigation is applicable when four conditions are present

- A meeting is held in which management questions a bargaining unit employee
- The examination is in connection with an investigation (need not be an OSI, Security Forces, or even a formal investigation)
- The employee reasonably believes that discipline could result from the examination; and
- The employee requests representation
- Other guidelines concerning this rule
  - It does NOT apply to an actual counseling session
  - The role of the union representative during the interview is to
    - Clarify the facts and the questions
    - Help the employee express his/her views
    - Suggest other avenues of inquiry
      - Suggest other employees who may have knowledge of the facts, and
      - Insure the employer does not initiate or impose unjust punishment
    - There may also be a right for the union representative and the employee to confer in private, but this depends on the nature of the case
  - Individuals being investigated may not serve as representatives for other employees being investigated until their own investigations are completed
    - An employee may waive his/her *Weingarten* rights

- Management cannot tell a union representative to remain silent or not to offer advice

- Employer may place reasonable limitations on union rep's role to prevent adversary confrontation, but aggressive, unreasonable management behavior interferes with right to union representation; this is an Unfair Labor Practice (ULP)

- Once an employee requests a union representative, management may

- Grant the request

- Suspend the interview, and/or

- Give the employee the choice of having an interview without a union representative or having no interview

Civilian employees also have a legal obligation to account for the performance of their duties, and a failure to provide desired information can serve as a basis for removal under certain circumstances

- An employee cannot be discharged simply because he/she invokes his/her Fifth Amendment privilege against self-incrimination; nor can statements coerced by a threat of removal be used against the employee in a subsequent prosecution

- An employee can be removed for not replying if he/she is adequately informed both that he/she is subject to discharge for not answering and that his/her replies cannot be used against him/her in a criminal case

- Any desire to offer immunity to an employee must be coordinated with the SJA who will consult with (and possibly get approval from) the Department of Justice and/or U.S. Attorney

An employee also has the right to be advised of the consequences of participating or not participating in an interview for a third party proceeding (unfair labor practice hearing, arbitration, MSPB hearing, etc.), and failure to do so can be an unfair labor practice by management. These rights are known as *Brookhaven* rights

- Under *Brookhaven* rights, the employee must be advised

- The purpose of the interview

- That no reprisal will take place if the employee refuses to participate; and

- Participation is voluntary

- The interview cannot be coercive in nature

- Questions must not exceed the scope of the legitimate purpose of the inquiry and

cannot otherwise interfere with the employee's statutory rights

**References:**

5 U.S.C. § 7114(a)(2)(B)

*NLRD v. Weingarten*, 420 U.S. 251 (1975)

*IRS and Brookhaven Service Center*, 9 FLRA 930 (1982)

*Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968)

*Kalkines v. U.S.*, 472 F.2d 1391 (Ct. Cl. 1973)

## BASE CLOSURE CIVILIAN PERSONNEL ISSUES

Base closures have considerable potential for civilian personnel controversy and litigation.

Federal employee unions must be notified at losing sites and given an opportunity to negotiate with the Air Force over the impact of the closure decision and the manner of implementing the closure decision—called Impact and Implementation (I & I) bargaining

-- The decision to close base is not negotiable, but it may be necessary to bargain concerning the impact and implementation of the decision

-- I & I bargaining obligation with unions can take considerable time and effort and must be fulfilled before closure can be implemented

--- Unions must be given enough time to seek information, prepare proposals, and initiate bargaining

--- Bargaining can be protracted, negotiability questions can arise, impasses can be resolved by outside help (all very slow)

--- Completing closure before bargaining is finished may result in unfair labor practice (ULP) litigation based on unilateral change and bargaining in bad faith

--- Injunctive relief against Air Force is possible

--- Administrative litigation can result in *status quo ante* remedy (i.e., returning the circumstances to the way they were before the action by the Air Force) requiring Air Force to go back to square one

--- While Air Force should ultimately prevail on right to close and when to close, the best course of action is to avoid litigation by early notification to affected unions

Additionally, federal employee unions at gaining sites may also have to be notified if there is more than a *de minimis* impact on employees at gaining location from moving employees to that location, and given opportunity to bargain over I & I of moving employees. Notification to unions at gaining locations is subject to the same concerns, although impact on the closure process not as severe

- In addition to Freedom of Information Act (FOIA), unions have a statutory right to information necessary to accomplish representational responsibilities

-- Processing of such requests is separate and distinct from FOIA channels, base Civilian Personnel Office (CPO) is OPR (in the absence of CPO, check with the SJA's office)

-- With few exceptions, if information is normally maintained by agency and is reasonably available, it must be released upon request

Civilian employees must be formally notified of transfer of organization, have their options explained, and given a reasonable amount of time to respond as to whether they want to transfer with the function

-- Most movements will be "transfer of function," where entire organization and staff moved to different part of country

-- However, not all affected personnel may be needed for same or comparable job at gaining location, so reduction-in-force (RIF) would occur to eliminate personnel overage

-- In either case, considerable time is needed to ascertain what affected personnel will do, prepare necessary follow-on paperwork, such as PCS orders, RIF/separation notices

Civilian employees involuntarily terminated or reduced in grade as result of transfer have right to litigate action before various administrative agencies, usually with right of judicial review of decision

-- Civilian employees "released from competitive level" (RIF term of art meaning essentially reduction-in-force or removal) or removed for failing to transfer with function have numerous appeal avenues available

--- AF Equal Employment Opportunity channels (AFI 36-1201) if alleging violation of Title VII of 1964 Civil Rights Act

--- Negotiated grievance procedure for employees covered by collective bargaining agreement (both appropriated and nonappropriated fund employees)

--- Merit Systems Protection Board

--- Federal Labor Relations Authority if alleging violation of Federal Service Labor Management Relations Statute

--- Special agency procedures (AFI 34-301) for nonappropriated fund employees

--- Reinstatement and other equitable or "make whole" relief available to employees through any of above

--- Procedures vary in speed, cost to agency, and available judicial review by one or both sides

Civilian employees who have been PCS'd have right to file claim for some costs of selling home at old location/buying home at new location

-- Entitlement and procedures are covered in Joint Travel Regulations

-- Reimbursement cap limits amount paid and may affect ability of employees in high cost areas (parts of California) to recover costs otherwise allowable

Relocated civilian employees are entitled to file claim against Air Force for damage to household goods shipped pursuant to PCS orders

-- Entitlement and procedures are covered in AFI 51-502

-- Claims subject to dollar limitations and depreciation, resulting in possible unreimbursed losses

**References:**

AFI 34-301, *Nonappropriated Fund Personnel Management and Administration*, 25 July 1994

AFI 36-701, *Labor Management Relations*, 27 July 1994

AFI 36-1201, *Discrimination Complaints*, 25 July 1994

AFI 51-502, *Personnel and Government Recovery Claims*, 1 March 1997

## **AIR FORCE CIVILIAN DRUG TESTING PROGRAM**

Executive Order 12564 (17 September 1986), "Drug Free Workplace," formally announced the President's policy that the federal workplace would be free from drugs.

- President's Statement of Policy: Federal employees required to refrain from the use of illegal drugs; use of illegal drugs by federal employees, on or off duty, is contrary to the efficiency of the service; persons who use illegal drugs are not suitable for federal employment; each agency will develop a plan to achieve objectives of the Executive Order

Air Force plan was approved by Secretary of the Air Force on 24 January 1990

In January 1995, USAF Chief of Staff directed Air Force Surgeon General (AF/SG) to assume responsibility for the civilian (and military) drug testing program

Required elements of a civilian drug testing plan include

- An overall program coordinator appointed for each installation
  - Drug testing to detect and deter illegal drug use
  - Personnel actions initiated if illegal drug use is discovered
- Employee Assistance Program (EAP): Education and counseling program that includes referral to rehabilitation and treatment programs available in the local community

### **TYPES OF DRUG TESTING**

- Random drug testing
  - Only employees in "sensitive positions" which are also known as Testing Designated Positions (TDP) and include national security and public health or safety. Applicants for such positions are also tested
    - 30-day notice to TDP employees
- Probable cause / reasonable suspicion of illegal drug use
  - All Air Force employees can be tested
- Following accident or safety mishap
  - All Air Force employees can be tested
- Voluntary testing

- For Air Force employees not in TDP positions
- Volunteer for unannounced random drug testing
- Follow-up to counseling/rehabilitation

#### TESTING BASED ON REASONABLE SUSPICION OF ILLEGAL DRUG USE

Reasonable suspicion: An articulated belief that an employee uses illegal drugs drawn from specific and particularized facts and from reasonable inferences based on those facts

- Helpful to have evidence to support need for testing
  - Direct observation of drug use, possession, and/or physical symptoms of being under the influence of an illegal drug
    - A pattern of abnormal conduct or erratic behavior
  - Arrest or conviction for drug-related offense; or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking
  - Information provided by a reliable and credible source or independently corroborated
  - Newly discovered evidence that the employee has tampered with a previous drug test
- Procedure for reasonable suspicion testing includes
  - Supervisor documentation of supporting facts
  - Supervisor coordinates with SJA
  - Proper notification to employee required—must be done in writing
  - Test for THC, cocaine, PCP, opiates, and amphetamines

#### TESTING AS A RESULT OF A MISHAP OR ACCIDENT

- Toxicology testing is immediately considered following a mishap, if required or deemed necessary. The testing will be accomplished promptly and in accordance with *The Air Force Civilian Drug Testing Plan* for civilian personnel. *The Air Force Civilian Drug Testing Plan* is available from the civilian personnel office
- DOD civilians will be subject to testing when their action or inaction may have contributed to the mishap subject to the limitations and guidance in *The Air Force Civilian Drug Testing Plan*

## TESTING PROCEDURES

- Testing procedures are different from those used for testing military members
- The use of Department of Health and Human Services guidelines for drug testing is required
- The AF collects the sample and a contract lab tests the sample
  - Bottles, labels, individual shipping containers provided by contract lab
  - Samples suspected of being adulterated are also sent to lab
- Normally civilian employees are not observed when providing samples, unless
- Reason to believe employee has in the past adulterated or will attempt to adulterate a sample
  - Drug test is result of accident or safety mishap investigation
  - Testing related to rehabilitation program
- Medical Review Officer (MRO) verification of test results is required
  - AF physician typically designated MRO
- Interviews employee to determine if there is a medical reason for the test result (usually positive)
- MRO makes final determination of positive or negative result

## CONFIDENTIALITY REQUIREMENTS

- Absent employee consent or a statutory exception, results of a drug test may not be disclosed
- Drug test results can be disclosed pursuant to EO 12564 (under 5 U.S.C. § 7301) for the following reasons
  - To the MRO for medical review
  - To administrator of EAP
  - To management official (i.e. supervisor) for disciplinary action
- Drug test results can be disclosed as part of rehabilitation records for
  - Medical emergency

- Research without personal identification
- Court order
- Results cannot be used for law enforcement purposes
- Can disclose for security requirements (e.g. SSFs, clearances)

### **PERSONNEL ACTIONS ON FINDING OF ILLEGAL DRUG USE**

- Required actions upon MRO certification of positive result (i.e., illegal drug use)
  - Removal from TDP
  - Disciplinary action may be initiated
  - Consider safe harbor provisions: Final disciplinary action generally not permitted
- If employee voluntarily admits drug use prior to identification
- Goes to counseling or rehabilitation
- Signs agreement (called Last Chance Agreement) to refrain from further drug use; and
- Refrains from further use of illegal drugs
  - Referral to EAP for counseling/rehab as appropriate
- The range of disciplinary actions includes
  - Reprimand to removal for drug use or failure to take test
  - Mandatory removal
    - For refusing rehabilitation or counseling
    - If second drug use offense
    - If employee altered or attempted to alter sample
- As with any kind of disciplinary action taken against a civilian employee, SJA involvement may be necessary under AFI 36-704

**References:**

AFI 36-810, *Substance Abuse Prevention and Control*, 22 July 1994

AFI 36-704, *Discipline and Adverse Actions*, 22 July 1994

AFI 91-204, *Safety Investigations and Reports*, 12 April 2004

AFI 31-101, *Air Force Installation Security Program*, 1 March 2003

AFI 31-501, *Personnel Security Program Management*, 1 August 2000

DODD 1010.9, *DoD Civilian Employee Drug Testing Program*, 23 August 1998

DODD 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, 2 January 1992

## **FAMILY & MEDICAL LEAVE ACT**

The Family and Medical Leave Act of 1993 (FMLA) is intended to balance the demands of the workplace and the needs of families, and to promote the stability and economic security of families, thereby promoting the national interest in preserving family integrity. The FMLA seeks to accomplish these goals by allowing employees to take reasonable amounts of unpaid leave for various medical and personal reasons.

- Federal employees are covered by the FMLA. It does not apply to active duty military personnel or to intermittent or temporary employees
- The Family Friendly Leave Act (FFLA), which expanded leave opportunities for federal civilian employees, is now a matter of regulation
  - The FFLA regulations provide additional leave to civilian employees under certain conditions

### **LEAVE ENTITLEMENT UNDER THE ACT**

- Entitlements under the Act may not be diminished by any collective bargaining agreement or any other employee benefit plan; conversely, an agency must comply with any employment policy or collective bargaining agreement that provides for a greater family or medical leave entitlement than under the FMLA
- Each employee may use up to 12 workweeks of unpaid leave during any 12-month period for specified reasons
  - May be taken in conjunction with, or substituted with, other available paid time off (annual leave, sick leave, advanced leave, or other leave without pay)
    - May be taken as a block or intermittently (under certain conditions)
  - The FFLA regulations augment the amount of leave available under the FMLA by up to 13 days (104 hours)
- Procedures for determining the type of leave to be used are complicated, making consultation with the JAG crucial
- FMLA entitlement may be used for the following purposes
  - The birth and care of a child of the employee
  - The placement of a child with the employee for adoption or foster care
    - The care of a spouse, child, or parent who has a serious health problem, or

--- The FFLA regulations expand coverage to include the care of any family member with a serious health condition

--- Family member means: Spouse and parents; children (including adopted children) and their spouses; parents; brothers, sisters, and their spouses; and any individual related by blood *or affinity* whose close association with the employee is the equivalent of a family relationship

-- A serious health condition of the employee that makes the employee unable to perform the essential functions of his/her position

-- The FFLA regulations expanded coverage to include family care (including, for example, routine medical appointments and childhood educational activities) and bereavement associated with death of a family member

#### NOTICE OF INTENT TO USE LEAVE UNDER THE FMLA

- The employee must provide notice to supervisor not less than 30 days prior to when the need for leave is foreseeable

-- If circumstances preclude providing the 30-day notice, it is the employee's responsibility to give the agency as much notice as possible

- Notice may be provided in person, in writing, by telephone, by any electronic means, or in emergencies, through a third party such as a spouse or other responsible person

#### MEDICAL CERTIFICATION

- Supporting documentation must include a statement that the employee is "needed to care for" the individual and that the patient requires assistance for care, safety, or transportation needs and the employee's presence would be beneficial or desirable for the care of the individual

- In the case of leave for his/her own serious health condition, the Air Force can require medical certification from the employee's health care provider, which must include, among other things, a statement that the employee has a serious health condition that makes it impossible to perform the essential functions of the position. The Air Force can also require periodic reports as to the employee's status and intent to return to work

- If the agency doubts the certification, it may require a second medical certification; however, it must select and pay for the services of the health care provider. If the second opinion differs, the agency and employee must jointly agree on a third provider who will provide a final and binding opinion

- If the employee is unable to provide the certification prior to commencing the leave, then the agency must grant leave on a provisional basis. If ultimately the employee is unable to provide

the required certification, then the leave granted should be charged to the employee's paid leave account

#### RETURN TO WORK

- An employee, absent from work under the FMLA, is entitled to be returned to the same position or to an equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment
- If the employee has not fully recovered at the time they return to work, additional leave may be taken, to include annual or sick leave, donated leave, or additional leave without pay

#### **References:**

The Family and Medical Leave Act, 5 U.S.C. 6381 - 6387

5 CFR 630.401

5 CFR Part 630, Subpart L

## UNEMPLOYMENT COMPENSATION

### INTRODUCTION

Since 1955, federal employees have been eligible for state unemployment benefits. This section outlines the authority for the program and the procedures that should be followed.

- Benefits are paid by the states, applying applicable state unemployment compensation law, BUT

- Department of Labor (DOL) reimburses the states on a quarterly basis

- Since 1980, federal agencies reimburse the DOL for payments to state agencies

- Air Force pays approximately \$5 million annually in unemployment compensation

### THE CONCERN

- If an employee is successfully removed because of either misconduct or unsatisfactory performance, the AF may still be required to pay unemployment compensation

- Eligibility

- Monetary eligibility -- to qualify for unemployment benefits, an employee must have earned a certain amount during a certain period of time

- Separation -- the employee must have been separated through no fault of his own

- Availability -- applicant must be able and available to accept work, and must be actively seeking work

- It takes a team effort of the SJA, CPO and Accounting and Finance to defeat meritless unemployment compensation claims

- Unemployment compensation matters should be considered an important part of all personnel actions resulting in termination

### PROCEDURES

- Vary from state to state, but generally the procedure is as follows

- A form (SF-8, Notice to Federal Employees About Unemployment Insurance) is given to employee by the civilian personnel office upon separation

- Claim filed by former federal employee with appropriate state agency

- The former employee may file a claim anywhere, if he chooses, but benefits are paid by the state of the employee's last duty assignment
- If the employee was overseas, he must return to the US to file, and his state of residence will pay any appropriate benefits
- State agency sends Form ES-931, *Request for Wages and Separation Information*, to the federal agency requesting "federal findings" (*i.e.*, the facts reported by a federal agency pertaining to an individual as to)
  - Whether the individual performed federal civilian service for the agency
  - The period of such service
  - The individual's wages
  - The reasons for termination
- Air Force has four workdays after receipt
  - To return the forms correctly completed or notice that the time limit cannot be met and an estimated completion date, and
    - To retrieve retired records
- If federal findings are not received within 12 days, the state agency may make an entitlement determination without the findings (subject to redetermination if subsequently received)
  - Federal findings are NOT binding on the state agency. The forms should be completed in a manner that maximizes the likelihood that the Air Force's views will be adopted with respect to eligibility, ineligibility, and disqualification
  - Delays in this regard could hurt the Air Force's ability to appeal the state's determination
- State agency makes initial determination
  - Either party may appeal and request a hearing
  - At the hearing, the Air Force may have to relitigate the basis for the termination, even if the Air Force's position has already been upheld by the Merit Systems Protection Board or by an arbitrator
  - Witnesses are necessary – in other words, a commander who removed the employee may have to testify as to her reasons for that action

--- If a party fails to appear for the hearing, the other party MAY win by default, although some states require the employer to put on its case proving misconduct even when the claimant fails to appear

-- Examiner issues a written decision

-- An administrative appeal can be made from examiner's decision

-- Judicial review held in state court

- Time limits in state unemployment compensation cases are usually very short and strictly enforced

**References:**

DODD 1400.25-M, *Department of Defense Civilian Personnel Manual (CPM)*, Chapter 850, Unemployment Compensation, 25 July 1997

5 U.S.C. §8501 et seq.

20 C.F.R. Part 604 and Part 609

## WHISTLEBLOWER PROTECTION ACT

In 1989 Congress amended the Civil Service Reform Act of 1978 with the Whistleblower Protection Act (WPA) of 1989. The Act substantially strengthened the protection for whistleblowers in the federal government.

- The Act made the Office of Special Counsel (OSC) independent of the MSPB and specifically charged the OSC with protecting the employee-whistleblower
- If the OSC fails or refuses to act on the complaint, the individual has an independent right to bring the case him/herself before the Merit Systems Protection Board as an Independent Right of Action (IRA) appeal
- The whistleblower has a right to obtain attorneys fees and costs associated with litigation

### INDIVIDUAL ACTIONS, PROTECTIONS, AND BURDEN OF PROOF

- Employees (including former employees and applicants) who believe they have suffered reprisal (a negative or “prohibited personnel” action in some form) for disclosing matters of gross mismanagement, gross waste of funds, abuse of authority or a violation of law, rule or regulation, must first seek the assistance of OSC before bringing an individual action
  - If OSC notifies the employee that its investigation is over and that the OSC will not act, the employee has 60 days to file an appeal alleging reprisal with MSPB
  - If requested by the OSC, the MSPB will grant a 45-day postponement (“stay”) of a personnel action (such as a removal) taken against a whistleblower
  - If the employee receives no notice from OSC within 120 days of filing a complaint, the employee then may file an appeal with the MSPB
- The following employees are protected by the WPA
  - Persons who make protected disclosures
  - Persons who suffer a retaliatory personnel action because they are believed to have made protected disclosures, even if they have not actually done so, or
  - Persons who suffer a retaliatory personnel action because of their relationship to someone who has made protected disclosures
- To establish a basic (“prima facie”) case of whistleblowing, the employee (or OSC acting for the employee) must prove by a preponderance of the evidence only that the whistleblowing was a contributing factor in the personnel action taken or threatened against that employee

- Preponderance of the evidence means “more likely than not”
- If a prima facie case is established, then the agency must prove by clear and convincing evidence that it would have taken the same personnel action regardless of the whistleblowing
- Clear and convincing is defined as that measure or degree of proof that will produce in the mind of the fact-finder a firm belief or conviction as to the truth of the allegation
- The standard falls somewhere between preponderance of the evidence and the beyond a reasonable doubt standard
- Mere harassment and threats, even without any formally proposed personnel action, can constitute a prohibited personnel action under 5 U.S.C. § 2302(b)(9), "triggering" the protection of the Act

## OUTCOMES

- An individual who has committed a prohibited personnel practice by taking a reprisal action against a whistleblower may be disciplined
  - OSC files written complaint with MSPB and acts as a prosecutor
  - The employee is entitled to a hearing before the MSPB
- MSPB may impose the following sanctions on the individual that took the prohibited personnel action
  - Removal
  - Reduction in grade
  - Debarment from federal service for up to 5 years
  - Suspension
  - Reprimand, or
  - Civil penalty not to exceed \$1,000
- An employee may appeal an adverse decision to U.S. Ct of App for the Federal Circuit
- The whistleblowers who win their cases may have the retaliatory personnel action, for example the suspension, demotion, or removal, completely overturned
- OSC may recommend disciplinary action to be taken against a member of the armed forces to the head of his/her agency

**Reference:**

5 U.S.C. §§ 1201, *et seq.*

## WORKPLACE SEARCHES

The general rule is that a government search of private property without proper consent is unreasonable and unconstitutional under the Fourth Amendment unless the search has been authorized by a valid search warrant. The question is: When can the government employer conduct a search of an employee's workplace without a search warrant?

- In the leading case on workplace searches, *O'Connor v. Ortega*, the Supreme Court recognized that government employees may have a reasonable expectation of privacy in their work areas and may be protected from warrantless searches by the government employer

- In that case, the Supreme Court went on to rule that the warrant requirement was inappropriate when the burden of obtaining a warrant was likely to frustrate the governmental purpose behind the search. The Court recognized that employers frequently need to enter the offices and desks of employees for legitimate, work-related reasons wholly unrelated to illegal conduct

- The Court concluded that the standard to be applied is "reasonableness under the circumstances." Whether the search is a non-investigatory, work-related intrusion or an investigatory search for evidence of suspected work-related employee misconduct, the proper approach (assuming that the search is reasonable and not arbitrary) is to balance the employee's legitimate expectations of privacy against the government's need for supervision, control, and efficient operation of the workplace

- Accordingly, the more control the employer exercises over workplace areas, the lower the employee's expectation of privacy, the lower the resulting right to privacy, and the less need there would be for the employer to obtain a search warrant in order to conduct a search

### BOTTOM LINE

- Government offices are provided to employees for the purpose of facilitating the work of an agency. Employees may avoid exposing personal belongings at work by simply leaving them at home

- Government searches to retrieve work-related materials or to investigate violations of workplace rules do not violate the Fourth Amendment. Hence, supervisors are generally not required to obtain a search warrant whenever they wish to enter an employee's desk, office, or file cabinet

- Personal handbags, luggage, and briefcases are not usually considered part of the workplace and, therefore, a search warrant or authorization is required before searching them

ALWAYS CONSULT WITH THE SJA BEFORE PROCEEDING WITH ANY SEARCH AND SEIZURE ACTION

**Reference:**

*O'Connor v. Ortega*, 480 U.S. 709 (1987)

## *Chapter 14*

# ***ENVIRONMENTAL LAW***

## **ENVIRONMENTAL LAWS: OVERVIEW**

- Federal statutes now cover virtually all major environmental issues
- Although most statutes provide a method for exemption, this usually requires personal action by the President or the Secretary of Defense and, as a result, exceptions are rare
- Most federal environmental statutes also waive the federal government's immunity from state and local pollution control regulations, including permit and other procedural requirements as well as substantive pollution control standards
- Most subject the AF to state and local enforcement. Federal facilities are explicitly subject to fines and penalties for hazardous waste and drinking water violations
- Most waivers also abrogate the criminal immunity of AF personnel, subjecting them to criminal liability for deliberate or reckless pollution control violations
- Federal environmental statutes usually establish a joint federal-state system of pollution control. In addition, state authority allows delegation to local regulatory agencies
- The typical role of the federal government is to establish the basic pollution control standards and to ensure that the states achieve those standards
- States frequently are delegated authority for establishing discharge levels for particular sources of pollution, integrating the individual controls into an overall plan that will achieve the federal standards, and enforcing the controls on a day-to-day basis
- Thus, three levels of enforcement authority typically apply
- The U.S. Environmental Protection Agency (EPA) retains authority to enforce when it has not delegated that authority to the relevant state or when it learns of violations that are not being prosecuted by a delegated state
- State or local enforcement agencies have primary responsibility for taking administrative or judicial actions for most violations
- When federal and state or local enforcement authorities have failed to abate violations, private citizens can initiate civil enforcement proceedings in a federal district court

### **References:**

AFI 32-7040, *Air Quality Compliance*, 9 May 1994  
AFI 32-7041, *Water Quality Compliance*, 10 December 2003  
AFI 32-7042, *Solid and Hazardous Waste Compliance*, 12 May 1994  
AFI 32-7044, *Storage Tank Compliance*, 13 November 2003

## **AIR FORCE FEE/TAX POLICY**

- The major federal environmental statutes contain waivers of sovereign immunity
  - The waivers in most statutes authorize state and local environmental regulatory agencies to charge federal facilities reasonable fees (also called service charges) in connection with administration of the state program
  - Such assessments are payable, if
    - Sovereign immunity has been waived
      - The assessments are reasonable, and
      - The assessments are not “taxes” (assessment of a tax on the federal government by a state violates the U.S. Constitution and cannot be paid)
  - The current Air Force Fee/Tax policy is as follows
    - Charges denominated as fees by environmental regulators will be presumed to be payable
    - If publicly available information clearly establishes that a compelling legal basis exists for nonpayment on constitutional grounds, payment should be deferred and MAJCOM assistance obtained. Examples of such grounds for nonpayment include fees that are discriminatory against the federal facility, fees that will be used for a purpose that cannot possibly provide a benefit to the facility, and fees from which the government is immune
    - A decision to refuse payment must be made by the MAJCOM, with the coordination of AFLSA/JACE and SAF/GC, and the concurrence of SAF/IEE (formerly SAF/MIQ)
    - This policy does not prevent a federal facility from disputing the amount of the fee

### **References:**

SAF/MIQ Memorandum, *Environmental Fee/Tax Policy Action Memorandum*, 17 November 1989

AFLSA/JACE Memorandum, *Fee/Tax Report and Philosophy*, 17 December 1990

AFLSA/JACE Memorandum, *Air Force Fee/Tax AFCEE/MAJCOM Coordination*, 13 October 1992

AFI 51-301, *Civil Litigation*, 1 July 2002

## **CLEANUP OF CONTAMINATION FROM PAST ACTIVITIES**

### **COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)**

- Also known as “Superfund,” CERCLA provides a means of assessing parties responsible for releases of hazardous substances (HS) and authorizes EPA to order cleanup by those responsible parties
- Establishes “strict” liability for all prior generators and handlers of hazardous substances, as well as the current and past owners and operators of sites where releases occur
  - Most courts have ruled that any responsible party can be required to pay the total cost of cleanup, regardless of the amount that a liable party contributed to the contamination
  - CERCLA renders the responsible parties liable for the cost of cleanup as well as for damages to natural resources
- DoD’s cleanup program, the Installation Restoration Program (IRP), predates CERCLA and was codified as the Defense Environmental Restoration Program, 10 U.S.C. § 2701 *et. seq.*
- CERCLA §120 provides for involvement in DoD cleanup by state and federal regulators
- The IRP mirrors CERCLA’s response action stages that include
  - Discovery
  - Preliminary assessment and Site Inspection (PA/SI)
  - Remedial Investigation/Feasibility Study (RI/FS) to determine nature and extent of contamination and evaluate opinions for cleanup
  - Record of Decision (ROD) selecting cleanup method; and
  - Remedial Design, Remedial Action, and usually monitoring
- DoD facilities are analyzed by the EPA for possible placement on the National Priorities List (NPL), which is a list of the most seriously contaminated sites, presumably requiring the earliest cleanups
  - For sites on the NPL, AF must enter into Interagency Agreements or Federal Facility Agreements (IAAs or FFAs) with EPA
  - States are encouraged to also sign IAAs and FFAs

- Approved model FFA is on the JACE website. No deviation from model is permitted without approval from HQ USAF/ILEV
- For sites not on the NPL, regulatory involvement comes primarily from the State
- CERCLA also establishes release-reporting requirements
- Releases of hazardous substances must be reported to the National Response Center
- Installations must also submit a pollution incident report within AF channels
- A 1993 Executive Order requires installations to comply with 1986 amendment to CERCLA known as Emergency Planning and Community Right-to-Know Act (EPCRA), which requires
  - Emergency notification to state and local authorities of releases of hazardous substances
  - Emergency planning with state and local authorities for responding to releases
  - Submission of data prepared in accordance with the Occupational Safety and Health Act (OSHA) to local authorities; and
  - If statutory quantity thresholds are met for listed materials, must prepare annual inventory (Toxic Release Inventory or TRI), which provides information to EPA about the amount of listed materials possessed, used, transferred and released

## **CURRENT ISSUES**

- How much authority will states have to control the process?
  - By Executive Order 12580, DoD is lead agency for environmental restoration activities on military installations; HOWEVER, states have begun to assert that they can regulate these cleanups as part of their Resource Conservation and Recovery Act (RCRA) corrective action authority. The states' position is supported by one federal appeals court decision, which held that Colorado could regulate the Army's Rocky Mountain Arsenal IRP cleanup. EPA further asserts it has oversight authority at DoD-lead sites. Carefully review any and all FFAs and Records of Decision and ensure JACE gets a copy to review through your MAJCOM/JAV
- How clean is clean enough and who will decide this?
  - RCRA standards are quite strict and the substantive standards apply to all IRP cleanups; however, there is a growing national consensus towards risk-based cleanups and away from "clean to pristine"
  - AF creates Restoration Advisory Boards (RABs) at each base involved in a cleanup
    - The boards are composed of base officials as well as representatives from local communities, EPA and state agencies, as well as interested environmental groups

--- Boards are intended to increase community awareness and solicit input regarding IRP efforts

--- Both the AF and the Army are currently involved in litigation surrounding the installation commander's authority over RAB proceedings

**References:**

AFI 32-7020, *Environmental Restoration Program*, 7 February 2001

AFI 32-7042, *Solid and Hazardous Waste Compliance*, 12 May 1994

AFPAM 32-7043, *Hazardous Waste Management Guide*, 1 November 1995

AFI 32-7060, *Interagency and Intergovernmental Coordination for Environmental Planning*,  
25 March 1994

*Management Guidance for the Defense Environmental Restoration Program*, September 2001

*United States Air Force Remedial Project Manager's Handbook*, May 2000

## CONTROLS ON AIR FORCE DECISION-MAKING: NEPA

The National Environmental Policy Act (NEPA) requires federal agencies to evaluate environmental impacts as part of their overall planning and decision-making process. It also requires that the public be informed of, and involved in, the decision-making process.

- The Environmental Protection Committee (EPC) implements this process at base level
- The wing commander appoints the EPC chairperson; normally the vice wing commander. The base civil engineer serves as secretary to the EPC
- Other functions normally represented are environmental planning, natural and cultural resources, biomedical engineering, logistics, operations, plans, judge advocate, public affairs, comptroller, personnel, nonappropriated fund activities, weather, and safety
- Representatives of the major hazardous waste generators as well as the Defense Reutilization and Marketing Office (DRMO) should also be included
- Under NEPA, the AF must prepare an Environmental Impact Statement (EIS) for a "major federal action significantly affecting the quality of the human environment"
- Requirement of a "major" action refers to the impact on the environment, not to the size of the project; thus, even a small project can qualify as "major"
- EIS required for a proposed action to be undertaken jointly with state or private parties
- The AF must also prepare an EIS for a private action essentially under AF "control" (*e.g.*, actions that require Air Force permission)
- Consider whether environmental effects are significant based on context and intensity
- For proposed actions where impacts are uncertain, an Environmental Assessment (EA) is prepared, resulting in a Finding of No Significant Impact (FONSI), or an EIS
- A reviewing court's focus will be whether the Air Force has taken a "hard look" and made a good faith assessment of potential impacts
- The term "human environment" includes the natural and physical environment, as well as the relationship of people with that environment. Therefore, social and economic effects by themselves do not trigger the need for NEPA documentation. If social and economic impacts are interrelated with natural and physical impacts, then they should be addressed in an EIS or EA. Additionally, these effects may fall within the scope of Executive Order 12898 on Environmental Justice, which requires federal agencies to consider the effects of proposed projects upon minority and low-income populations

- The heart of NEPA is the identification and analysis of alternatives. The impacts of alternatives must be analyzed in comparison to the proposed action in a balanced manner, and must include a No Action alternative. A reasonable range of alternatives that would also satisfy the purpose and need of the proposed action must be analyzed
- The EPC reviews and makes recommendations on appropriate NEPA documentation
- The base civil engineer, with the assistance of the EPC, is responsible for managing the environmental impact analysis process (EIAP), which implements NEPA requirements
- Before doing an EA, check to see if the proposed action is "categorically excluded" (or CATEXed) from the requirement to conduct environmental analysis
- NEPA requires the EIS to be a "detailed statement" addressing five areas
- The environmental impacts of the proposed action, including beneficial as well as adverse impacts, and direct, indirect and cumulative impacts
- Unavoidable adverse environmental effects should the proposal be implemented
- Alternatives to the proposed action, including No Action
- The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
- Irreversible and irretrievable commitments of resources should proposal be implemented
- The presence of classified information does not exempt the AF from its NEPA responsibilities, but it may modify the public's right to participate in the NEPA process. Classified documents in an EIS must be prepared, safeguarded, and disseminated to decision-makers or others according to the normal requirements that apply to classified information
- NEPA is a procedural law. The AF must ensure that environmental concerns are given "appropriate consideration," but NEPA does not require the Air Force to rank environmental concerns above mission goals. However, most of the subject areas considered as part of the NEPA analysis have separate substantive requirements of their own. For example
- The AF must also ensure that all reasonable measures are taken to mitigate adverse environmental impacts associated with an action that the AF has chosen to implement. An EIS or EA/FONSI should clearly identify mitigation plans

**References:**

40 C.F.R. § 1500, *et. seq.*, Council on Environmental Quality Regulations  
 AFI 32-7061, *The Environmental Impact Analysis Process*, 12 March 2003, completely revised, adopts 32 C.F.R. Part 989, Environmental Impact Analysis Process (EIAP), as the controlling document on the Air Force EIAP

AFI 32-7005, *Environmental Protection Committees*, 25 February 1994

## **ENVIRONMENTAL COMPLIANCE ASSESSMENT AND MANAGEMENT PROGRAM<sup>1</sup>**

The Environmental Compliance Assessment and Management Program (ECAMP) is a comprehensive self-evaluation and program management system designed to ensure compliance with environmental laws and regulations at Air Force installations.

### **OBJECTIVES**

- Improve AF environmental compliance and environmental management worldwide
- Build supporting financial programs and budgets for environmental compliance requirements

### **APPLICATION**

- Applies to all installations within the U.S., unless exempted by MAJCOM due to significant interference with military effectiveness
- Overseas installations must conduct assessments to measure compliance with applicable standards
- Inspections address compliance with state and federal requirements in areas such as air, hazardous materials and wastes, noise, solid waste, water quality, pesticides, petroleum, oil, lubricants, and natural and cultural resources

### **PROGRAM STRUCTURE**

- MAJCOMs coordinate and conduct external assessments, while installations coordinate and conduct internal assessments
- ECAMP Process:
  - MAJCOMs or contractor personnel conduct external assessment at least once every 3 years
  - Installations conduct their own internal assessments annually, except when external assessments are conducted
  - Pre-assessment activities include a pre-visit questionnaire to collect data and to familiarize the assessment team with the installation and its operation. Helps to define assessment scope and team responsibilities. Also provides a review of the relevant regulations and assessment protocols

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<sup>1</sup> The term ECAMP is being expanded by some MAJCOMs to include Occupational Health and Safety. Therefore, some MAJCOMs now refer to the program as the Environmental, Safety, and Occupational Health Compliance Assessment and Management Program (ESOH CAMP).

- Assessment activities include information collection regarding environmental compliance, management effectiveness and other matters through record searches, interviews with installation personnel, and site surveys
- Post-assessment activities include an outbrief, preparation of Preliminary Environmental Findings (PEF) and base preparation of a Management Action Plan (MAP) to address problems uncovered during the assessment
- Final ECAMP report incorporates the PEFs and MAP. As a matter of policy, EPA has stated that they will not request copies of reports. Department of Justice may consider ECAMP as a mitigating factor in deciding whether to pursue a criminal prosecution
- Typical issues that arise include
  - Failure to treat vehicle antifreeze as hazardous waste (HW)
  - Pharmaceuticals may be acutely hazardous waste and require additional treatment
  - Waste amalgam and bite-wing X-rays are usually HW
  - The AF is ultimately responsible for contractor-generated waste
  - Lead acid batteries that crack or spill are HW; and
  - Print shops, photo labs, etc. generate HW that often is not handled as such
- ECAMP follow-up
  - Installations, through the Environmental Protection Committee (EPC)<sup>2</sup>, should ensure appropriate actions are taken to remedy problems. This may include programming and budgeting for funds and documenting all steps taken

**Reference:**

AFI 32-7045, *Environmental Compliance Assessment & Management Program*, 1 July 1998

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<sup>2</sup> The EPC has been changed by some installations to include Occupational Health and Safety; therefore, at these bases the EPC is known as the Environmental, Safety, and Occupational Health Committee (ESOHC).

## ENVIRONMENTAL LAW OVERSEAS

A combination of DoD policy, the provisions of applicable U.S. law, and international agreements between the U.S. and the host nation generally govern compliance overseas.

- Treaties, Status of Forces Agreements (SOFAs), and International Agreements
- Often ambiguous as to applicable standards
- But to highlight some aspects of international treaty obligations
- The Basel Convention governs trans-boundary movement of hazardous wastes (HW).
- Applicable to AF. The U.S. has signed but not ratified
- Limits waste-handling options in countries with inadequate disposal facilities
- The Environmental Modification Convention prohibits significant impairment of the environment during hostilities
- The 1993 Supplementary Agreement with Germany contains several provisions that the U.S. is obligated to observe
- The U.S./South Korea SOFA includes provisions that address environmental protection
- U.S. Laws
- Generally do not have extraterritorial application unless expressly stated
- The National Environmental Policy Act (NEPA) has limited overseas application (*e.g.*, where a sovereign country does not exert jurisdiction)
- Some laws have extraterritorial application, such as the National Historic Preservation Act
- Executive Orders
- Executive Order (E.O.) 12088 directed compliance with host nation environmental pollution control standards of general applicability
- E.O. 12114, as implemented by DoDD 6050 requires environmental analysis of overseas actions with potential for significant environmental impacts
- Environmental reviews or studies are required for major federal actions significantly affecting the environment of a foreign nation **not** involved in the action and for actions that produce a product that is strictly regulated in the U.S.

- Also required for actions that significantly affect natural and ecological resources of global importance; or if the action affects the global commons
- DoD and AF Guidance
- DoDI 4715.5 prescribes overseas compliance rules for environmental programs
- The Overseas Environmental Baseline Guidance Document (OEBGD), includes environmental management practices and appoints an Environmental Executive Agent (EEA) for each host nation
- Sets environmental standards based on generally accepted standards for similar installations in the U.S.
- Provides the foundation for development of final governing standards (FGS)
- Provides environmental compliance and conservation standards where no FGS have been established
- Final Governing Standards (FGS)
- Country-specific substantive standards applicable to DoD operations
- Based on more stringent of either: OEBGD, applicable host nation law, and applicable international agreements
- Temporary waivers of FGS available if compliance at installation would
  - Seriously impair operations
  - Adversely affect relations with host nation; or
  - Require substantial expenditure of funds for physical improvements at an installation that has been identified for closure or at an installation that has been identified for a realignment that would remove the requirement
    - Set compliance standards and priorities for environmental compliance funds
- Cleanup / Restoration
- DoDI 4715.8 and AFI 32-7006, Chapter 2, specify DoD policy regarding cleanup of environmental contamination caused by past DoD activities
- OEBGD or FGS (whichever is applicable) controls cleanup of spills and leaking underground storage tanks from current operations

--- Otherwise, for past DoD activities, response depends on whether overseas installation is currently in use and is not slated for return or already returned to host country or whether there is an imminent and substantial endangerment to human health and safety off the installation resulting from current operations

**References:**

AFI 32-7006, *Environmental Program in Foreign Countries*, 29 April 1994

AFI 32-7005, *Environmental Protection Committee*, 25 February 1994

AFI 32-7061, *The Environmental Impact Analysis Process*, 12 March 2003, completely revised, adopts 32 C.F.R. Part 989, Environmental Impact Analysis Process (EIAP), as the controlling document on the Air Force EIAP

E.O. 12088, *Federal Compliance with Pollution Control Standards*, 43 Fed. Reg. 47707 (October 13, 1978)

E.O. 12114, *Environmental Effects Abroad of Major Federal Actions*, 44 Fed. Reg. 1957 (January 4, 1979)

DODD 6050.7, *Environmental Effects Abroad of Major Department of Defense Actions* (March 31, 1979)

DODI 4715.5, *Management of Environmental Compliance at Overseas Installations* (April 22, 1996)

DODI 4715.8, *Environmental Remediation for DoD Activities Overseas*, (February 2, 1998)

## LIABILITY UNDER ENVIRONMENTAL LAWS

Individual employees, as well as the Air Force, itself, may be held liable for environmental law violations. While the AF is subject to civil and administrative liability, individuals may also be held criminally liable in their personal capacities.

- Individual Liability

- Civil Liability

- Department of Justice representation may be available to an individual who commits a violation while acting within the scope of employment

- Representation is not automatic; the individual must submit a written request to DOJ, and DOJ will determine whether it is in the interest of the US to provide representation

- Often, the US is substituted for the individual, who then is released from personal liability

- Criminal Liability

- Every major environmental law has criminal provisions that can be applied to active-duty members, reservists, civilian personnel, and contractors

- Generally applied for knowing or willful violations or for wanton disregard of the law or public safety. In some cases, negligence can form the basis for criminal charges

- Sanctions can include a monetary fine and time in jail

- Military members may also be subject to UCMJ prosecution

- In 1990, 3 Army employees (SES-4, GS-15, and GS-14) were found guilty of storing and disposing hazardous wastes (HW) in knowing violation of the Resource Conservation and Recovery Act (RCRA) and sentenced to three years probation each

- In this case, “knowing” meant that employees disposed of harmful substances. Prosecution did not have to show that they knew the substances were “hazardous wastes” or that the disposal was illegal

- DOJ did not provide representation and forbade the Army from doing so. Attorneys’ fees reached \$108,000 for each defendant

- There have been other criminal prosecutions of military members and civilian employees, with the majority of the prosecutions resulting in convictions

- For example, a manager of an Army wastewater treatment plant convicted of nine felony counts for violating a permit and falsifying reports, was sentenced to eight months in jail
- A Navy fuels division director repeatedly instructed subordinates to pump fuels through a line that he knew would leak. He was sentenced to ten months confinement
- An airman was convicted by courts-martial of dereliction of duty after he caused an overflow of jet fuel. He then attempted to conceal his mistake. He was sentenced to one-month restriction to base and a reprimand
- In addition to prosecution by DOJ, individuals may be prosecuted by states under state law
- Under the "responsible corporate officer doctrine," supervisors may be criminally liable for the acts of subordinates despite a lack of knowledge regarding the specific violations
- Factors DOJ considers in deciding whether to prosecute include
  - Voluntary disclosure of violation before the regulators discovered it
  - Cooperation with regulators
  - Good faith self-auditing program-- (See e.g., ECAMP article)
  - Internal disciplinary action; and
  - Subsequent compliance efforts, such as ECAMP follow-up
- Organizational Liability
- Administrative and Civil Fines and Penalties
  - An administrative fine or penalty is enforced within the regulatory body that assesses it. The amount is typically lower than the amount of a civil penalty
  - A civil penalty is imposed through a court order
  - Historically, under the principle of "sovereign immunity," the federal government and its agencies cannot be sued without congressional consent
  - In many statutes, sovereign immunity is waived for substantive and procedural requirements, but not for the payment of penalties. If sovereign immunity has not been waived for payment of fines and penalties, then payment would violate fiscal law
  - Negotiations over environmental enforcement actions must be coordinated with MAJCOM and JACE, particularly when negotiation involves payment of a penalty

- Most statutes authorize payment of reasonable fees. (*See Fee/Tax Chapter*)
- Most statutes also allow EPA to delegate its enforcement authority to qualified states. States' requirements are at least as stringent as the federal requirements
- Additional Issues Related to Commanders' Liability
  - Direct participation in the violation of an environmental statute is just one way in which a Commander could be subject to prosecution
  - By not acting promptly to correct an environmental violation, the commander may also be subject to prosecution even though he/she had no direct involvement
  - If violations of the law do occur, immediately begin to engage staff judge advocate and the appropriate regulatory authorities to establish good faith in the compliance resolution process

**References:**

AFI 51-301, *Civil Litigation*, 1 July 2002

AFLSA/JACE, *Coordination and Settlement of Notices of Violation*, 12 May 1997

AFLSA/JACE, *Air Force Policy on Payment of Fines and Penalties for Violations of the Clean Air Act (MIQ Policy Dated 20 September 1996)*, 3 October 1996

SAF/MIQ Memorandum, *Air Force Policy on Payment of Fines and Penalties for Violations of Clean Air Act*, 20 September 1996

## **MEDIA RELATIONS AND ENVIRONMENTAL INCIDENTS**

Numerous federal statutes require reporting releases or discharges into the environment to local, state, or federal regulatory agencies. Every installation should have contingency or disaster plans that address the required notifications. Given the variety of overlapping jurisdictions and regulations, the requirements may be substantially different at different installations.

## **PUBLIC AFFAIRS INVOLVEMENT**

The Public Affairs Office (PA) maintains a program to involve the public in AF environmental activities and decisions, particularly within the Environmental Impact Analysis Process (EIAP), the Installation Restoration Program (IRP), and the Air Installation Compatible Use Zone (AICUZ) program

## **ENVIRONMENTAL IMPACT ANALYSIS PROCESS**

- PA responsibilities include
  - Coordinating news releases and media queries with EM, JA, SG, and others before releasing environmental information
  - Identifying potentially controversial actions for which individuals and agencies should be given the opportunity to review the Draft Final Environmental Assessment; and
  - Preparing a news release announcing a Finding of No Significant Impact or other key decision documents and milestones

## **INSTALLATION RESTORATION PROGRAM**

- PA responsibilities include
  - Serving as the focal point for public affairs aspects of proposed IRP actions
  - Advising on the public affairs aspects of the AF responsibilities for the development, implementation and participation in the Restoration Advisory Board (RAB)
  - Ensuring all concerned community parties are in the communication channel; and
  - Conducting, during IRP remedial actions, community interviews to solicit concerns, informational needs, and desired levels of involvement. This includes
    - Preparing an IRP community relations plan for MAJCOM approval and establishing an information repository accessible to the general public; and

--- Developing, coordinating, and distributing news releases and fact sheets on IRP progress and proposed actions

#### **AIR INSTALLATION COMPATIBLE USE ZONE (AICUZ PROGRAM)**

- The base community planner manages the AICUZ program, but the PA officer releases the AICUZ report and acts as an information conduit between the base and the community
- In the event noise complaints occur, PA will handle complaints directly; providing timely, responsive, and factual answers to maintain good media and community relations; and will refer all claims for damages to the base claims office

#### **Reference:**

AFI 32- 4002, *Hazardous Material Emergency Planning & Response Program*,

1 December 1997

AFI 35-101, *Public Affairs Policies and Procedures*, 26 July 2001

## **NATURAL & CULTURAL RESOURCE PRESERVATION LAWS**

In addition to the National Environmental Policy Act (NEPA), several federal laws present additional environmental planning responsibilities. In many instances, these requirements can be accomplished in conjunction with NEPA. For example, documents prepared or consultations conducted pursuant to these laws may become part of the NEPA document itself, or of the administrative record setting forth the decision-making process.

Two areas that provide additional environmental requirements for federal agencies are

- Natural Resource Stewardship--This includes responsibilities under the following statutes
  - The Endangered Species Act
  - The Sikes Act; and
  - The Migratory Bird Treaty Act
- Cultural Resource Stewardship--This includes responsibilities under the following statutes
  - The National Historic Preservation Act
  - The Archeological Resources Protection Act
  - The Native American Graves Protection and Repatriation Act; and
  - The American Indian Religious Freedom Act

### **ENDANGERED SPECIES ACT (ESA)**

- Requires AF to insure that actions are not likely to jeopardize the continued existence of any endangered or threatened species, or to destroy or adversely modify their critical habitat
  - An endangered species is a plant or animal species or subspecies that is in danger of extinction throughout all or a significant part of its range
  - A threatened species is a plant or animal species or subspecies that is likely to become endangered within the foreseeable future throughout all or a significant part of its range
  - A critical habitat is a specific land area essential for the conservation of a species
- Before taking action likely to jeopardize the existence of a protected species or to destroy or adversely modify its habitat, must formally consult with U.S. Fish and Wildlife Service (FWS)
  - If uncertain of effect of action on protected species or its habitat, can have informal consultation with FWS. FWS will decide if formal consultation is required
  - If consultation is necessary, will include evaluation of potential effects, reasonable and prudent mitigation measures, and ways to avoid a jeopardy determination
  - Formal consultation concludes in 90 days. FWS then has 45 days to issue a Biological Opinion (BO), which results in either a “No Jeopardy” opinion or a “Jeopardy” opinion

- For a “No Jeopardy” opinion, FWS issues an “Incidental Take Statement,” excusing actions that would otherwise constitute a “take” and specifying permissible impact that action may have, reasonable and prudent measures to minimize impacts, and required terms and conditions
- For a “Jeopardy” opinion, the AF will modify its proposed action by adopting measures that will result in a “No Jeopardy” opinion

## **SIKES ACT**

- Under the Sikes Act, each military installation was required to prepare Integrated Natural Resource Management Plans (INRMPs) by November 2001. INRMPs are detailed plans that integrate military training requirements with natural resource conservation needs. INRMPs require consultation with FWS and the State fish and game authority, and are also subject to public comments and five-year reviews

## **MIGRATORY BIRD TREATY ACT (MBTA)**

- The MBTA protects migratory birds as well as their habitats and flyways. It prohibits unlawful, or unpermitted, taking or killing of migratory birds
- For 80 years, federal agencies were not considered a “person” subject to the permit requirements of the MBTA. Recently, *Humane Society v. Glickman* (217 F.3d 882 (D.C. Cir. 2000)) held that federal agencies are not exempt from these requirements
- Currently, MBTA permitting categories do not cover many DoD activities. DoD required by Executive Order 13175 to enter into a Memorandum of Understanding (MOU) with FWS within 2 years. MOUs must include conservation measures, and provide for minimization of intentional takes, identification of unintentional takes, and advance notice to FWS of takes

## **NATIONAL HISTORIC PRESERVATION ACT (NHPA)**

- Like NEPA, the NHPA is a planning statute. It ensures that historic properties are considered during federal project planning. It requires the AF to identify and take appropriate measures to preserve historical and archaeological resources under its control
- Before approving the expenditure of funds on any "undertaking" or issuing a license, the AF is required to take into account the effect on any district, site, building, structure, or object that is included in, or eligible for inclusion in the National Register of Historic Places (NRHP), and to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment
- The NRHP is an inventory of resources administered by the National Park Service (NPS)
- A property will be considered eligible for listing if it meets one of the following criteria
  - Association with events that have made a significant contribution to history

- Association with lives of persons significant in our past
- Embodiment of distinctive characteristics of a type or method of construction or representation of a master's work or possession of high artistic values (architecture); or
- Potential to yield information important to history or prehistory (archeology)
- If a district, site, building, structure, or object is eligible for listing, must comply with identification, evaluation and consultation requirements, even if the resource is not yet listed
- If determined that undertaking will adversely affect historic properties, should consult with the State Historic Preservation Officer (SHPO), or if applicable, the Tribal Historic Preservation Officer (THPO), to find ways to make undertaking less harmful. Consultation leads to a Memorandum of Agreement (MOA), outlining measures to avoid, or mitigate adverse effects
- Preservation is not required in every case. The SHPO/THPO or ACHP can provide expert advice, but has no veto power
- Consultation should be completed before funds are expended or licenses issued
- Failure to provide a reasonable opportunity to comment can result in "foreclosure" letter, making defense to legal challenge more difficult
- AF required to assume responsibility for preservation of historic properties it owns or controls and is also required to adaptively reuse historic properties, to the maximum extent feasible

### **ARCHEOLOGICAL RESOURCES PROTECTION ACT (ARPA)**

- Designed to protect archeological resources on federal and Indian lands, the ARPA requires identification of these resources on each installation. FOIA does not apply to this information
- Applies to past human life, resources over 100 years old, and retrievable scientific information. Does not include fossils, surface collected arrowheads, rocks, coins, bullets or minerals
- Unauthorized excavation prohibited. Therefore, private persons must obtain permits to excavate on AF land. This does not include AF contractors, however, all contracts should contain ARPA language for protecting archeological resources
- Must notify tribes before issuing permit if harm to tribal, religious, or cultural site may result
- AF policy is to refer requests for permits to the NPS for approval or disapproval

- DoD regulations require installation commanders to establish public awareness programs

### **NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT**

- Gives tribes the right to control the disposition of remains of lineal descendants
- Requirements include creating an inventory of Native American cultural items in the possession of the AF, repatriating such items, and consultation with potentially affected Tribes prior to intentional excavation or removal after inadvertent discovery
- Cultural items include human remains, funerary objects, sacred objects and objects of cultural patrimony (having an ongoing importance to a group or culture)
- Intentional excavation requires permit and consultation or consent of appropriate tribe
- In the event of an inadvertent discovery of cultural items, must stop activity for 30 days and reasonably protect the items. Then, must provide notification and begin consultation
- Scientific testing, investigation and curation are NOT authorized
- Consultation with Tribes conducted on a government-to-government basis, because Indian Tribes are sovereign nations

### **AMERICAN INDIAN RELIGIOUS FREEDOM ACT (AIRFA)**

- AIRFA promotes religious freedom by affirming the right of access to sacred places
- Promotes consultation with American Indian religious practitioners if a place of religious importance to American Indians may be affected by a federal undertaking
- Executive Order 13007 (May 1996), *Indian Sacred Sites*, accommodates access to and ceremonial use of Indian sacred sites. The AF should avoid affecting the physical integrity of such sites and should maintain confidentiality of their location, where appropriate

## **CULTURAL RESOURCE PRESERVATION DUTIES**

- To carry out these duties at the base level
- The base CE designates an individual with a background in history, architecture, archaeology, or natural resources to serve as the base historic preservation officer
- The wing CC may establish a Historic Preservation Committee or assign this function to another installation committee such as the Environmental Protection Committee

### **References:**

AFI 32-7061, *The Environmental Impact Analysis Process*, 12 March 2003  
AFI 32-7064, *Integrated Natural Resources Management*, 1 August 1997  
AFI 32-7065, *Cultural Resources Management*, 1 June 2004

## **NOISE AND LAND USE**

Issues regarding noise pollution and land use have the potential to directly affect the ability of AF installations to accomplish their mission and the manner in which that mission is accomplished. Limited noise regulations are established under the Federal Noise Control Act (FNCA).

### **FEDERAL NOISE CONTROL ACT (FNCA)**

- The FNCA exempts aircraft, military weapons, and equipment designed for combat use from noise regulation under the Act
- Although the FNCA generally subjects government agencies to state and local noise control regulation, the courts have determined that state and local regulation of aircraft noise is preempted by the FAA regulation
- The FNCA requires AF to comply with state and local noise stationary source regulations to the same extent as any other person

### **AIR INSTALLATION COMPATIBLE USE ZONE (AICUZ) PROGRAM**

- Local governments ordinarily establish land use regulations. The AF supports and encourages local zoning and other land use controls that ensure the base environs, especially private lands adjacent to runways, remain compatible with continued AF operations
- Without proper land use controls, new development near airfields may increase the potential for injuries and damage due to aircraft accidents, and the number of noise complaints. Also, future changes in operations (*e.g.*, beddown of new aircraft, changes in flight paths) may result in lawsuits by private landowners claiming the Air Force has “taken” their land
- To assist local governments in establishing suitable land use regulations in the vicinity of the base, the DoD has established the AICUZ program
- The AF develops and provides to local authorities, a zoning proposal designed to ensure continued compatibility between the installation and neighboring civilian communities
- The first step in preparing an AICUZ proposal is to identify areas that are affected by aircraft noise or that have a high accident potential
- The AF uses this information to assess compatibility of land uses with current and projected AF operations and to make a recommendation to the local zoning authority
- The AF has no authority to implement the AICUZ proposal or to control or regulate off-base land uses. The AF simply presents the proposal to the local zoning authority, which has the authority to approve or reject the AF proposal

- Presentation of the AF AICUZ proposal requires tact and discretion
- AF representatives should be particularly careful to avoid threatening the local community with reprisals if the Air Force proposal is not accepted
- The installation commander is responsible for ensuring that the AICUZ proposal is presented to local zoning officials in a professional and persuasive manner
- Minimize potential for lawsuits by maintaining close consultation with the SJA

**References:**

Noise Control Act of 1972, 42 U.S.C. §§ 4901-18

AFI 32-7063, *Air Installation Compatible Use Zone Program*, 17 April 2002

## **CLEAN AIR ACT**

The Clean Air Act (CAA)(42 U.S.C. §§ 7401 to 7671q) is one of the most comprehensive and complicated environmental statutes. This guide is intended to be an introduction to the Act; specific questions or issues should be referred to your SJA. Federal facilities, including Air Force installations, are subject to the substantive requirements of the CAA as a result of a waiver of sovereign immunity in the Act.

### **AIR QUALITY EMISSIONS LIMITATIONS**

- The primary air pollutants regulated by the CAA are called “criteria pollutants.” Currently, there are six (6) criteria pollutants: Ozone (O<sub>3</sub>), Carbon Monoxide (CO), Sulfur Dioxide (SO<sub>2</sub>), Particulate Matter (PM<sub>10</sub> & PM<sub>2.5</sub>), Lead (Pb), & Nitrogen Oxides (NO<sub>x</sub>)
- The US is divided into Air Quality Control Regions (AQCR) to control these pollutants. AQCRs usually consist of several counties but, depending on the area, it may only be one county or even a portion of a county
- For each criteria pollutant, EPA has established a health-based National Ambient Air Quality Standard (NAAQS). This standard establishes a bright line between healthy air and polluted air
- An AQCR that tests lower than this standard is considered to be in “attainment” for that pollutant. An AQCR that tests over this standard is considered to be in “non-attainment” for that pollutant
- State Implementation Plans (SIPs)
- States have primary responsibility for assuring NAAQSs are met within the state
- The states are required to create a planning document (called a State Implementation Plan or SIP) setting forth the means to achieve or maintain air quality within its AQCRs. States are required to submit SIPs to EPA for approval
- Once approved, SIP requirements are enforceable by both the State and the EPA
- A state’s SIP is required to set forth enforceable emissions limitations and timetables, technological or process changes, monitoring requirements, and an enforcement program
- In “non-attainment” areas, Federal entities are prohibited from supporting or taking any action that does not conform to a SIP. Before undertaking any action which impacts air quality (e.g. construction activity), in “nonattainment areas,” an analysis must be conducted to demonstrate that the proposed action will not hinder attainment of air quality standards

## **NEW SOURCES OF AIR EMISSIONS**

- In addition to meeting emissions limits under a state's SIP, new pollution sources (or major modifications of existing sources that increase pollution emissions) must meet New Source Performance Standards (NSPS) or New Source Review Standards
- New (or modified) sources must incorporate approved, environmentally safe, equipment to restrict emissions
- Large new sources are subject to preconstruction review and permitting
- The nature of the permitting requirement varies depending on whether the new source is a "major" or "minor" source. Determining whether a source is "major" depends on whether the source is in an attainment (clean) or nonattainment (dirty) area. In attainment areas, a major source is one with the potential to emit up to 250 tons of any one criteria pollutant per year. In a nonattainment area, potential to emit as little as 10 tons per year may make your source "major" and, thus, require a permit [Note: it is the "potential" to emit, not the actual or planned level of emissions that triggers the permit requirement]

## **HAZARDOUS AIR POLLUTANTS (HAPS)**

- In addition to the regulation of emissions of criteria pollutants, the Clean Air Act also regulates the emission of HAPs, also referred to as air toxics. These pollutants cause or may cause cancer or other serious health effects, such as reproductive effects or birth defects, or adverse environmental and ecological effects
- Under the 1990 amendments to the Clean Air Act, 189 specific air toxics are to be regulated. Examples of toxic air pollutants include benzene, which is found in gasoline; perchlorethylene, which is emitted from some missile operations; and methylene chloride, which is used as a solvent and paint stripper by a number of industries
- Any stationary source having a potential to emit 10 tons per year (tpy) of a listed HAP or 25 tpy of any combination of HAPs is considered a "major source" subject to regulation, including permits
- Major HAP sources must install technology that will result in the maximum degree of HAP emission reduction that is achievable. This technology is called Maximum Available Control Technology (MACT) standards.

## **OPERATIONAL PERMITS**

- Title V of the Clean Air Act requires that an operational permit be obtained for any "major" stationary source of a criteria or hazardous air pollutant [note: see discussion of what constitutes a "major source" under "New Sources of Air Emissions" and "Hazardous Air Pollutants"]

## **MOBILE SOURCES**

- In addition to addressing stationary sources of pollution (for example, boilers, fueling systems, heat plants, etc), the Clean Air Act also addresses mobile sources (such as automobiles)
- Mobile source controls normally take the form of requirements on manufacturers to meet tailpipe emissions standards (generally not of concern at the installation level), or requirements to use low polluting fuels or clean fuel vehicles (which may apply to installation vehicle purchase or use)
- Aircraft emissions are not regulated pursuant to the mobile source program

## **STRATOSPHERIC OZONE PROTECTION**

- Generally, the Clean Air Act phases out the production of ozone depleting substances. Other laws and regulations regulate the continued use of these substances
- Ozone-depleting substances are still used as fire suppressants, refrigerants, and inerting agents in combat aircraft fuel tanks
- Any use, storage, or handling of these substances is highly regulated
- In the absence of adequate substitutes, the EPA is authorized to grant exemptions to the consumption of specific ozone depleting substances

## **ENFORCEMENT**

- Regulators, under the CAA, have all the common environmental enforcement rights - inspections, fines, injunctions, and criminal sanctions
- The CAA also provides for citizen suit rights
- Sovereign Immunity for fines and penalties
- DoD does pay fines imposed by EPA
- Presently, it is the position of the Department of Justice that Congress has not waived immunity for payment of fines and penalties imposed by states. So DoD does not pay fines to states under the CAA except under limited circumstances
- As with all areas of the CAA, please consult your SJA regarding CAA fines

### **Reference:**

42 U.S.C. §§ 7401 to 7671q

## SOLID AND HAZARDOUS WASTES

The Resource Conservation and Recovery Act (RCRA) imposes requirements for the management of hazardous wastes (HW) and non-hazardous solid wastes. The Act also provides for regulation of underground storage tanks (USTs).

### HAZARDOUS WASTE MANAGEMENT: SUBTITLE C

- RCRA imposes comprehensive requirements on those who generate, transport, treat, store, or dispose of HW. This includes most, if not all, AF installations
  
- Hazardous Wastes are those solid wastes that are specifically listed as hazardous or that exhibit a characteristic (ignitability, corrosivity, reactivity, or toxicity) that make them hazardous. The Act excludes certain categories of waste from its coverage
  
- Although used oil destined for disposal or recycling is not a listed HW, RCRA imposes management requirements for used oil from generation to reuse or disposal. Used oil that exhibits a hazardous characteristic and is not recyclable must be managed as HW
  
- RCRA creates a system that regulates and tracks HW "cradle-to-grave"
  
- HW is tracked by a manifest initiated by the generator. When waste is transferred to entities that transport, treat, store or dispose of it, the Uniform Hazardous Waste Manifest is annotated to show that it passed into their possession and was properly managed
  
- Transporters must properly label HW and deliver it to a designated treatment, storage, and disposal (TSD) facility and must comply with Department of Transportation (DOT) requirements for containers, labeling, placarding of vehicles, and spill response
  
- RCRA also sets strict requirements for storing and handling wastes and for personnel training, equipment, inspections, and emergency response planning. Most of these requirements must be documented and the records kept for inspection
  
- HW must be accumulated in accordance with specific requirements--containers must be properly marked, closed, and kept secure from unauthorized access or tampering
  
- An initial accumulation (also called "satellite") point is a designated location at or near the point of generation of HW. At this location, waste cannot exceed 55 gallons of HW or 1 quart of acutely hazardous waste. Once this limit is exceeded, the container must be moved to an accumulation site or permitted TSD facility within 3 days

--- An accumulation site is used to temporarily store hazardous wastes until they are shipped to a TSD facility. For those generating large quantities of hazardous waste, the waste may be retained at an accumulation site for up to 90 days. For small quantity generators (defined by the Act and regulations), waste may be stored longer

#### SOLID WASTE RCRA, SUBTITLE D

- The Act establishes minimum requirements for controlling and monitoring solid waste disposal. States are given responsibility for the regulation of nonhazardous (municipal) solid wastes
- Municipal solid waste includes containers and packaging, food scraps, and yard trimmings. It does not include medical and hazardous wastes, construction and demolition debris, municipal sludge, and ash from power plants and incinerators

#### UNDERGROUND STORAGE TANKS (USTs): RCRA, SUBTITLE I

- The Act covers tanks, including connecting underground pipes, when the volume of the tank and its underground pipes is 10 percent or more beneath the surface of the ground
- Tanks that meet this definition are covered if they contain a regulated substance. This includes any hazardous substance (defined under the Comprehensive Environmental Response, Compensation, and Liability Act--CERCLA) or petroleum or substances that are derived from crude oil. Tanks containing HW are regulated under Subtitle C
- Existing tanks must be brought up to specified performance standards or closed. If a tank has leaked, owners and/or operators must take corrective action, including cleaning up the area around the tank. New tanks must meet specified standards, and the appropriate regulatory agency must be notified before a new tank is installed

#### STATE PROGRAMS

- The Environmental Protection Agency may approve a state to regulate HW, solid waste, and/or USTs in lieu of the federal program. The state's program must be at least as stringent as the federal requirements and can be more stringent
- Waivers of sovereign immunity in RCRA require federal facilities to comply with state and local requirements, both substantive and procedural. The scope of the waiver is broader for HW and solid waste programs than it is for underground storage tank programs

## AIR FORCE INSTALLATIONS

- Installations must develop a Hazardous Waste Management Plan (HWMP). The HWMP incorporates a Waste Analysis Plan, which is the primary document used to identify all waste streams generated at the installation
- DoD requires that by 2005, all installations will divert the amount of solid waste being sent to a disposal facility by 40% from a FY 1998 baseline (called the “pollution prevention measure of merit”)

### **References:**

AFI 32-7042, *Solid and Hazardous Waste Compliance*, 12 May 1994

AFPAM 32-7043, *Hazardous Waste Management Guide*, 1 November 1995

AFI 32-7044, *Storage Tank Compliance*, 13 November 2003

AFI 32-7060, *Interagency and Intergovernmental Coordination for Environmental Planning*, 25 March 1994

OSD Memorandum, *New DoD Pollution Prevention Measure of Merit*, 13 May 1998

HQ USAF/ILEV Memorandum, *Non-Hazardous Solid Waste Diversion Rate Measure of Merit (MoM)*, 25 January 1999

## CONTROL OF TOXIC SUBSTANCES

- The Toxic Substances Control Act (TSCA) regulates the manufacture, processing, and distribution of chemicals that pose unreasonable risk of injury to health or environment
  - Authorizes EPA to screen existing and new chemicals to identify potentially dangerous products or uses. The EPA can take action ranging from banning the production, import, and use of a chemical to requiring that a product bear a warning label
  - Prohibits manufacturing and distribution of polychlorinated biphenyls (PCBs)
    - PCBs were common components in hydraulic fluids, lubricants, insecticides, and heat transfer fluids and were used in electrical equipment (*e.g.*, transformers, capacitors)
    - Old transformers and capacitors containing PCBs may be found on installations, as might PCB-contaminated soil. Other sources of PCBs or PCB contamination may be past insecticide spraying, ceiling tile coatings, and certain painted surfaces
      - Generally, installations focus on PCB elimination
- TSCA also regulates asbestos
  - Asbestos was widely used in thousands of products because it is strong, flexible, will not burn, insulates effectively, and resists corrosion (*e.g.*, floor tiles, insulation, sealants)
  - The inhalation or ingestion of asbestos fibers can cause disabling or fatal diseases
  - Requirements cover, among many things, remediation of asbestos hazards, implementation of proper work practices, and training in proper handling
  - Installations are most likely to encounter asbestos when maintaining, repairing, renovating, or demolishing buildings
- TSCA also requires studies of federal buildings to determine the extent of radon contamination. The Act does not require monitoring or abatement of radon
- Also addresses lead hazards, including requirements for the identification, reduction, disclosure, and management of lead-based paint
  - Lead, especially lead-based paint (LBP), is a major concern on installations. LBP was common prior to 1950, and many buildings, including military family housing, contain lead. Lead-contaminated soil and dust are also a problem. Must address lead hazards during maintenance, repair, renovation, and demolition of buildings
  - Lead hazards are also an important issue when property is transferred or sold

- Lead exposure can cause serious health effects, particularly in children
- TSCA seeks to reduce the lead hazard to young children by focusing on child-occupied facilities and “target housing” (housing built before 1978)
- TSCA does not contain a general waiver of sovereign immunity, but the waiver for LBP is extensive, requiring DOD to comply with federal, state, and local requirements
- EPA and DOD have agreed that lead-contaminated soil outside a housing unit will be governed by TSCA and its implementing regulations rather than CERCLA
- DOD requires military installations to comply with the disclosure regulations related to LBP in military family housing

**References:**

- Office of the Under Secretary of Defense Memorandum, *Lead-Based Paint Policy for Disposal of Residential Real Property*, 7 January 2002, with attached Field Guide, *Lead-Based Paint Guidelines for Disposal of Department of Defense Residential Real Property*, December 1999
- Office of the Under Secretary of Defense Memorandum, *Disclosure of Known Lead-Based Paint (LBP) and/or LBP Hazards in DOD Family Housing*, 18 February 1997
- HQ USAF/CEV Memorandum, *Policy and Guidance on Lead-Based Paint (LBP) Final Disclosure Rule*, 19 August 1996
- HQ USAF/CEV, *Air Force PCB-free Status and Clarification of “Target” PCB Equipment*, 15 May 1996
- USAF/CEV Memorandum, *Polychlorinated Biphenyl (PCB) Pollution Prevention Program*, 27 February 1996
- Office of the Under Secretary of Defense Memorandum, *Asbestos, Lead Paint and Radon Policies at BRAC Properties*, 31 October 1994
- HQ USAF/CC Memorandum, *Air Force Policy and Guidance on Lead-Based Paint in Facilities*, 24 May 1993

## **CLEAN WATER ACT/SAFE DRINKING WATER ACT**

In general, the Clean Water Act (CWA) regulates surface water quality and the Safe Drinking Water Act (SDWA) regulates the quality of drinking water. The rights to the use of both surface water and groundwater are governed by state law and are not addressed by these acts.

### **CLEAN WATER ACT**

- The CWA states that it is unlawful to discharge pollutants from a point source to surface waters without a permit
- The statute defines "pollutant" very broadly to include almost any manmade addition to a body of water, including residue from dredge and fill projects and pollutants from storm water that drains from facilities
- The surface waters covered by the Act encompass all "waters of the United States, including the territorial seas." But, it does not include isolated wetlands
- The Act regulates discharges from a "point source," which is defined as "any discernible, confined and discrete conveyance" that discharges or may discharge pollutants
- Examples of point sources are pipes, ditches, tunnels, conduits, wells, containers, rolling stock, and vessels
- This definition excludes two major sources of pollution from the Act's coverage
- Infiltration of ground water that does not have a distinct hydrological connection with surface water; and
- Surface runoff that does not come from a point source (e.g., farmland runoff)
- Under the CWA, there are two primary permitting systems--the Section 404 program, which regulates dredge and fill activities, and the National Pollution Discharge Elimination System (NPDES), which regulates the discharge of other pollutants into waters of the United States
- NPDES program (§ 402)
- EPA has delegated the authority to most states to operate the NPDES program
- Each state retains the authority to adopt more stringent limitations than those established by EPA
- EPA retains a veto authority over delegated states
- The EPA regional office issues permits in states that have not been delegated authority

- The NPDES program addresses discharge from both traditional point sources (such as sewage treatment plants) and storm water discharges
- The NPDES program regulates two very broad types of dischargers, direct and indirect
  - Direct: Discharge effluent directly from a facility to surface water. Such discharges will require a permit as discussed above
  - Indirect: Discharge to a wastewater treatment works rather than directly into surface water
  - Though no NPDES permit is required for indirect dischargers, they must pretreat wastewater before introducing it into a treatment works
- Dredge and Fill Activities (§ 404)--In conjunction with EPA, the U.S. Army Corps of Engineers administers a second permit program that regulates dredge and fill activity
  - EPA has responsibility for developing guidelines for the Corps to use in specifying disposal sites. The EPA also has authority to limit the use of a disposal site approved by the Corps when the discharge into that area will have an unacceptable adverse impact
  - In some circumstances, a state may be delegated primary jurisdiction over dredge and fill permits within its boundaries
  - Clearing and construction in wetlands requires that the AF obtain a dredge and fill permit
  - Failure to obtain a permit can delay projects; require the AF to restore land to its prior natural condition; and/or subject AF personnel to criminal liability
- The CWA also mandates that each state develop a plan to reduce nonpoint source pollution that contributes to water quality control problems in the area
- Enforcement
  - The CWA waives sovereign immunity, subjecting federal agencies to state and local regulations
  - The waiver applies to both substantive and procedural requirements, including permits and reasonable service charges, but does not authorize the payment of civil or administrative fines and penalties

## **SAFE DRINKING WATER ACT**

- The Safe Drinking Water Act (SDWA) sets standards for public water systems (PWS) and prohibits underground injection that endangers drinking water sources
- Standards apply to PWS that have 15 connections or serve 25 people for at least 60 days/year
- The Act exempts from its coverage any PWS that receives all of its water from another PWS; that consists only of distribution and storage facilities (and does not have any collection or treatment facilities); that does not sell water to any person; and that is not a carrier conveying passengers in interstate commerce
- Many PWS do not qualify for this exemption simply because they engage in minor treatment of their water (e.g., adding chlorine to maintain disinfection levels). The EPA has allowed the regulatory authority to modify the monitoring requirements imposed on such "consecutive PWS". This matter must be evaluated based on the law and regulations of the permitting authority
- The Act specifies maximum contaminant levels for drinking water as well as treatment, testing and reporting requirements enforceable by states with EPA oversight
- The 1996 amendments to the Act rewrote the waiver of sovereign immunity. As a result, federal facilities are now subject to punitive civil fines and penalties

### **Reference:**

AFI 32-7041, *Water Quality Compliance*, 10 December 2003

## **RESPONDING TO AN ENFORCEMENT ACTION**

The Enforcement Action (EA) is an administrative enforcement mechanism used by a state or federal regulatory agency to provide notice of noncompliance with either statute or regulation. It is used for most environmental statutes. Enforcement actions are sometimes called Notices of Violation (NOV), Notices of Non-Compliance (NON), Notices of Deficiency (NOD), Compliance Agreements (CA), or Consent Orders (CO).

EAs are often issued after an inspection, with or without notice, by a regulatory agency

- EAs can be issued without an inspection based upon reports filed with the regulatory agency (effluent limitations, spills, etc.). Also, a failure to report can result in an EA
- EAs must receive priority treatment and must be reported to higher headquarters
- Depending on the nature of the violation, fines and penalties may be assessed
- Regulators may seek injunctions to shut down operations
- Violations can lead to criminal penalties (imprisonment and fines)
- Any violation can lead to more inspections by regulators
- JA has a regulatory requirement to immediately and independently notify MAJCOM/JA, the Regional Environmental Counsel, and AFLSA/JACE
- CE has a regulatory requirement to immediately notify the MAJCOM/CE and the Regional Environmental Office

## **EA PROCESS AND AVOIDANCE**

- The U.S. Environmental Protection Agency (EPA) and the states may assess fines and penalties for some violations (the following discussion assumes EPA proposed penalties)
- The EPA "complaint" triggers a very formal administrative process
- Must file answer within 20 days; failure to respond to any given allegation is an admission of its truth
- Ensure that a coordinated effort is made to preserve evidence and document site conditions, as it may be some time before the hearing
- Pursue settlement efforts while hearing is pending

EAs are avoidable and manageable

- Be prepared for inspections by regulators
- Treat inspections like operational readiness inspections
- Know your weak areas
- Conduct pre-inspections
- Complete the "easy fixes;" don't wait to be directed
- "Neatness" really does count
- Select and brief an escort team to go with inspectors
- Know the areas most likely to produce violations
- Hazardous waste management plans
- Personnel training records
- Documentation of "cradle-to-grave" management of hazardous waste, to include return manifests showing that wastes destined for disposal sites actually arrived
- Labeling and condition of hazardous waste barrels
- Security
- Contingency plans and emergency procedures
- Air and water discharge monitoring reports, compared with actual permit limitations to be sure they were not exceeded
- If you get an EA, use all of the available resources to resolve it
- Notify others (MAJCOM, JA, AF Regional Compliance Office, Public Affairs)
- Cooperate with regulating agency
- Use available resources and other offices (experience, interpretation, advice)
- Timely response is imperative
- Regulators may propose compliance agreement. If so, involve your Staff Judge Advocate (SJA) immediately. NEVER SIGN A COMPLIANCE AGREEMENT WITHOUT SJA COORDINATION

- EAs for each base are tracked in a quarterly report briefed to CSAF and the Deputy Assistant Secretary of the Air Force (Environment, Safety, and Occupational Health) (SAF/IEE)

## **BOTTOM LINE**

- Preparation is the key to avoiding EAs
- Prompt, cooperative action is the key to resolving EAs

### **References:**

AFI 32-7040, *Air Quality Compliance*, 9 May 1994

AFI 32-7041, *Water Quality Compliance*, 10 December 2003

AFI 32-7042, *Solid and Hazardous Waste Compliance*, 12 May 1994

AFPAM 32-7043, *Hazardous Waste Management Guide*, 1 November 1995

AFI 32-7044, *Storage Tank Compliance*, 13 November 2003

AFI 32-7060, *Interagency and Intergovernmental Coordination for Environmental Planning*,  
25 March 1994

AFI 51-301, *Civil Litigation*, 1 July 2002

*Chapter 15*

***INTERNATIONAL  
AND  
OPERATIONS LAW***

## INTRODUCTION TO INTERNATIONAL & OPERATIONS LAW

Commanders increasingly need to understand the legal implications of being assigned, deployed or involved beyond U.S. borders. Therefore, this article provides a brief summary of the broadest area, international law. It then provides the key rules associated with international agreements. Finally, it explains the terminology currently used to describe peace operations.

International law: Definition and general aspects

-- The Law of Nations. International law is that law which governs the conduct of countries, also known as "states," and of recognized international organizations, but historically not that of individuals

--- Increasingly, individuals are the subjects of international law; primarily when considering international human rights law

-- This law is vastly different from the kind of law we are used to in the United States

--- It is formed differently and the branches of government we generally associate with law do not exist in the same manner in the international legal system

-- The fact that international law is different does not make it any less binding. Violations of international law get worldwide attention and may have significant international ramifications

There are two main forms of international law: treaty law and customary law

-- Treaty law is a broad category of mostly written, but sometimes oral agreements entered into by authorized representatives of the parties, with each party being either a nation or a recognized international organization

--- The parties essentially enter into a contract over the subject matter of the treaty, and agree that international law shall govern the terms of the agreement

--- Parties include any state and any recognized international organization; for example, United Nations Organization (UNO), Organization of American States (OAS), International Committee of the Red Cross (ICRC)

---Other terminology may be used to describe treaty law such as convention, international agreement, covenant, pact, protocol, status of forces agreement (SOFA), memorandum of understanding (MOU), or memorandum of agreement (MOA)

---Some agreements, though entered into between foreign entities, will not be governed by U.S. requirements for international agreements. For example, it is a U.S. requirement to report international agreements to Congress. *See* AFI 51-701, *Negotiating, Concluding, Reporting, and*

*Maintaining International Agreements*, discussed below, to determine what type of international agreements fall outside of U.S. requirements

--- Here are some classic examples of treaty law

----United Nations Charter

----Disarmament Treaties

----NATO SOFA

----Outer Space Treaty; and

----Conventional Weapons Treaty

-- Customary law, also called international custom and customary international law

--- Customary law is that form of international law created by the general and consistent practice of nations such that states view the practice, or custom, to be legally binding

--- Customary law may take centuries to evolve, or it may be formed very quickly

----Example – the 3-mile limit: This is a law of sea custom, which states that a country's territorial sea extends outward three miles beyond the coast. Territorial sea retains all of the country's sovereign rights, the same as if on land. Over the centuries this custom evolved because a nation could defend its territory with coastal batteries, and the cannon could fly up to three miles out. Today, the "treaty" rule, found in the United Nations Law of the Sea Convention, recognizes up to a twelve-mile limit

----Outer space overflight: The customary law which states that a nation's space vehicles could overfly (in outer space) the territory of other nations without seeking prior consent became recognized as customary law within a few years of Sputnik

----Law of Land Warfare: Those international rules we generally associate with the Hague Conventions of 1907 evolved as custom but were then codified in treaties

----Law of the Sea: Most of the rules found in the U.N. Convention on the Law of the Sea, formed first as custom, were then codified in the Convention

#### International Agreements in the United States Air Force

-- AFI 51-701, *Negotiating, Concluding, Reporting, and Maintaining International Agreements*, generally regulates this area for all Air Force personnel

-- Remember that someone in your chain-of-command is directly responsible for obtaining the proper authority to negotiate and conclude international agreements

- With this firmly in mind, BE CAREFUL that your own words or conduct do not lead your foreign counterpart to believe that YOU are entering into an international agreement
- The files are full of well-intending commanders who independently struck deals, using U.S. money to fix foreign roads, or giving old communications gear to the host country's military, only to find out later they had no authority to act in these situations
- Definition of "international agreement" from AFI 51-701
  - Any agreement completed with one or more foreign governments or with international organizations
  - Signed or agreed to (oral agreements can be binding), by personnel of any DoD Component, or by representatives of the Department of State, or from other departments or agencies of the U.S. Government
  - Signifying the intention of the parties to be bound in international law
- Definition of "negotiation" is very broad under AFI 51-701
  - Communication by any means of a position or offer
  - On behalf of U.S., DoD, or of any officer or organizational element thereof
  - To an agent or representative of a foreign government
  - In such detail that acceptance would result in an international agreement
- Bottom line: Don't do anything that might be construed as a negotiation unless you have received advance authority. Note this very pointed AFI 51-701 warning about "maverick negotiations"
- "Air Force personnel will not make any unilateral commitment to any foreign government or international organization (either orally or in writing), tender to a prospective party thereto any draft of a proposed international agreement, before obtaining the concurrence of either the Assistant General Counsel, International Matters and Civil Aviation (SAF/GCI), or the responsible staff judge advocate as set forth below"

#### Peace Operations

- The present trend sees more and more nontraditional deployments of U.S. forces to trouble spots around the globe. These operations carry with them very complex legal implications
- Various terms describe such operations: Peace operations, military operations other than war (MOOTW), and preventive diplomacy

-- Legal model: The United Nations Security Council passes an authorizing resolution permitting certain armed forces to expel or take action against international law violators

--- The first Persian Gulf War is an example of this model

--- This model was also used in Bosnia and Haiti

-- In essence, the governing law for such operations, at least for the authorized armed forces involved, is United Nations law

-- Legal problems develop when the operational mission takes it through a territory where no apparent law exists. There is a temptation to presume that you are the law, or that the United Nations authorizing resolution gives you wide latitude to do more than feed people, protect your people, or stop warring factions

--- For example, in Somalia, with the original mission being to feed people, the UN forces had to operate in a seemingly lawless territory. In moving food from the port to the famine-hit people far inland, these forces had to take care not to enforce criminal laws that Somali police were supposed to enforce

--- Lesson Learned: Always consult with your deployed JAG, and up the chain if necessary, to determine precisely under what laws you operate

*Peace Operations under Joint Publication 3-07.3, Joint Tactics, Techniques, and Procedure for Peacekeeping Operations*

-- “Peace Operations” is an umbrella term describing operations authorized by the United Nations. The primary types of peace operations are peacekeeping operations and peace enforcement operations

-- Peacekeeping Operations: Authorized under Chapter VI of the U. N. Charter

--- The term generally refers to being invited into a country by the warring parties

--- Peacekeeping forces interpose themselves between enemy forces to prevent further fighting

--- Rules of engagement are designed for self-defense

-- Peace Enforcement operations: Authorized under Chapter VII of the U.N. Charter

--- Enemy forces have not invited peace enforcement troops

--- Peace enforcement means the U.N. forces must force a peace with actual combat likely

--- Rules of engagement are designed for going beyond mere self-defense; armed with operations designed to defeat the enemy

-- Chapter VI versus Chapter VII: The distinctions between these chapters are for the US State Department UNO personnel to figure out. The U.N. Charter did not forecast the current types of military operations, so characterizing peace operations according to the Charter is not of great practical significance to the military commander

--- Being generally familiar with the terminology, where it came from, and how it describes different ROE; are the relevant aspects of this area

-- Other Joint Publication 3-07.3 terminology

--- Peacemaking: Diplomacy, mediation, negotiation or other forms of peaceful settlement

--- Preventive diplomacy: Diplomatic actions taken in advance of a predictable crisis, aimed at resolving disputes before violence breaks out

--- Peace building: Nation building

**References:**

AFI 51-701, *Negotiating, Concluding, Reporting, and Maintaining International Agreements*,  
6 May 1994

Joint Pub 3-07.3, *Joint Tactics, Techniques, and Procedures for Peacekeeping Operations*,  
12 February 1999

U.N. Charter, 26 June 1945

## FISCAL LAW DURING DEPLOYMENTS

In an era marked by a rapidly-expanding operational tempo, which may involve deployments anywhere in the world, commanders must be aware of the basic rules regulating the activities U.S. forces may conduct during a deployment, and the funding to pay for those activities. The most significant basic concept is to distinguish between those items or services we may sell, grant, or loan to a foreign country (security assistance, which is administered by the U.S. Department of State, with assistance from the Department of Defense) and those activities U.S. forces conduct as part of an exercise in a foreign country, for which we are the primary beneficiaries and the foreign country receives only a minor and incidental benefit.

### - Deployment-Related Activities

-- Problems first surfaced during the Ahuas Taras (Pine Tree) exercise series in Central America in 1980s. The General Accounting Office investigated U.S. military activities and found U.S. forces had repeatedly violated basic fiscal restrictions, and in some cases had acted with no authority

-- NOTE: Deployment-related activity questions usually arise during

--- Combined (U.S. and foreign nation) exercises that are also

--- Joint (more than one U.S. armed force participating) and are

--- Located outside the U.S. (although CONUS exercises (e.g., Partnership for Peace (PFP) exercises) may be subject to some of the same constraints)

-- **ALSO NOTE: THE PRIMARY BENEFICIARY OF EACH ACTIVITY MUST BE THE U.S. FORCES INVOLVED. THE BENEFIT TO THE HOST COUNTRY MUST BE ONLY MINOR AND INCIDENTAL**

-- Major types of activities

--- Construction

---- A military construction project includes all military construction work necessary to produce a "complete and usable facility" or a "complete and usable improvement to an existing facility" (10 U.S.C. 2801). This eliminates the ideas of "project splitting" or "project incrementation" (a bunch of contracts using O&M funds, each for less than \$750,000, to accomplish a unified purpose) or "phasing" (do less than \$750,000 this year and again next year and again the next year, etc.)

---- Maintenance (recurrent work to prevent deterioration) and repair (restoration for use for a designated purpose) are not construction and not subject to these restrictions (although they may be subject to others)

---- The SECDEF must give the Appropriations and Armed Forces Committees at least 30 days prior notice of plan and scope of any proposed exercise when anticipated construction expenditures (temporary or permanent) will exceed \$100,000

---- Unspecified Minor Military Construction (UMMC) using MILCON funds

----- Each service has an annual "pot" (changes each year) to use for UMMC projects. Each service can spend no more than \$5,000,000 annually on exercise-related construction projects coordinated or directed by the JCS outside the United States

----- Each project must have an "approved cost" equal to or less than \$1,500,000. However, the maximum is raised to \$3,000,000 for a project "intended solely to correct a deficiency that is "life-threatening, health-threatening, or safety-threatening"

----- Funded costs include "out of pocket" expenses such as contract costs, TDY expenses, and the cost of fuel to operate equipment. They do not include military pay, equipment depreciation, or other "sunk costs" (but these still must be reported)

----- This activity uses military construction funds, not O&M funds

----- It is used to create enduring improvements and structures to be used during future JCS operations (e.g., assault landing strips, roads, hangers, barracks)

---- Construction of an "unspecified minor military construction project" which is not coordinated or directed by the JCS may be funded from exercise Operations & Maintenance (O&M) funds

----- This construction is limited to \$750,000 cost per project, except that not more than \$1,500,000 may be used for a project intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening

----- Funded costs include "out of pocket" expenses such as contract costs, TDY expenses, and the cost of fuel to operate equipment. They do not include military pay, equipment depreciation, or other "sunk costs" (but these still must be reported)

---- Notice must be given to Congress at least 21 days before commencing any project exceeding \$750,000

---- Exercise construction of "minor structures clearly of a temporary nature" may be funded from exercise Operations & Maintenance (O&M) funds. This is really not "construction," since it involves unit-owned equipment that is shipped as part of an exercise, erected on-site, disassembled, and shipped back home, but it has become part of the overall "construction" controversy

----- GAO recognized DoD's authority to do so in both its 1984 and 1986 Ahuas Tara II opinions

----- In debating 10 U.S.C. 2805(c), Congress took a very narrow view of "minor and temporary" (e.g., base camp facilities such as tent platforms, field latrines, and range targets, must be removed at the end of the exercise)

--- Training activities (often called either Deployments for Training (DFTs) or Joint Combined Exchange Training (JCETs)). The purpose of these activities must be to train our forces, with only an incidental benefit flowing to the forces we train

---- Familiarization (interoperability) and safety training is proper, but not if it rises to the level normally provided by security assistance projects (MTTs, TATs, etc.)

---- Special Operations Forces (including civil affairs and psyops forces) training of indigenous forces of "developing countries" authorized to pay or reimburse "incremental expenses" of the developing country because of Special Operations Force's own training requirements

--- Exercise activities and conferences

---- Military-to-military contact programs carried out by combatant commanders of unified commands to assist military forces of other countries to understand the appropriate role of military forces in a democratic society

---- Training Latin American forces, the basis for LATAM SMEEs (Subject Matter Expert Exchanges carried out by USAF and USA)

---- Using U.S. funds to pay for attendance of military personnel from developing countries at conferences, seminars, or similar meetings

---- Developing Countries Combined Exercise Program (DCCEP) pays "incremental expenses" of developing countries to participate in combined exercises

---- Expanded IMET (International Military Education and Training) program to teach defense resource management, civilian control of the military, military justice systems, and human rights

---- Exchange of training and related support with a friendly foreign country or an international organization

---- Military-to-military contacts program with nations of former Soviet Union and Eastern Europe

---- Regional Cooperation Programs

----- Partnership for Peace (PFP) - assistance to and cooperation with PFP countries

----- Cooperative Threat Reduction with States of Former Soviet Union ("Nunn-Lugar" Act)

--- Humanitarian and Civic Assistance (HCA) -- this activity includes two types

---- Earmarked funded HCA (using specifically appropriated funds) in conjunction with authorized military operations in a foreign country in order to promote security interests of U.S. and the foreign country, and to improve specific operational readiness skills of U.S. armed forces members who participate in the activities

----- The Secretary of State must specifically approve the HCA to be given to any foreign country and SECDEF has to report HCA activities to Congress NLT 1 March each year

----- HCA activities shall complement, and may not duplicate, any other form of social or economic assistance provided by the U.S. to the country concerned and must serve the basic economic and social needs of the people of the country

----- Funded HCA only includes certain specified activities

----- Medical, dental, and veterinary care provided in rural areas of a country (e.g., by Medical Readiness Training Exercises (MEDRETEs))

----- Construction of rudimentary surface transportation systems

----- Well drilling and construction of basic sanitation facilities

----- Rudimentary construction and repair of public facilities and

----- Detection and clearing of landmines, including necessary education, training, and technical assistance; however, U.S. military personnel may not participate in the physical detection, lifting, or destroying of landmines (unless for the concurrent purpose of supporting a U.S. military operation) or provide landmine detection and clearing assistance as part of a military operation that does not involve U.S. armed forces. Note that de-mining is funded differently than HCA – it is funded with OHDACA, not fenced or budgeted O&M

----- HCA cannot be furnished to individuals or groups engaged in military or paramilitary activities

---- "De Minimis" HCA. DoD can use other funding (not clearly specified) for minimal expenditures incurred in furnishing funded HCA. However, O&M funds may only be obligated for "incidental costs" of carrying out funded HCA

----- What is "incidental?"

----- It has to meet the "reasonability" standard - i.e., would a reasonable person consider it "incidental to the exercise"

----- Generally, it cannot be the sort of foreign assistance provided by the U.S. Agency for International Development (USAID). However, in certain cases U.S. forces can perform assistance and be reimbursed by USAID under the Economy Act

----- These activities should not significantly impact the deploying unit's readiness training

----- O&M funds expended for de minimis HCA should represent only a minor or reasonably small percentage of the exercise's total O&M funds

----- Examples provided by Congress

----- A unit doctor's exam of local villagers for few hours with administration of several shots and issuance of some medication would be appropriate, but not appropriate to dispatch a medical team for mass inoculations

----- Opening of an access road through trees and underbrush for several hundred yards would be appropriate, but asphaltting of any roadway would not be appropriate

**References:**

DoDD 2205.2, *Humanitarian and Civic Assistance (HCA) Provided in Conjunction with Military Operations*, 6 October 1994

DoDI 2205.3, *Implementing Procedures for the Humanitarian and Civic Assistance (HCA) Program*, 27 January 1995

Comptroller General Decisions, To the Honorable Bill Alexander, B-213137 of 1984 (63 Comp. Gen. 422) and January 30, 1986 (unpublished)

10 U.S.C. 401, 2801, & 2805

## FOREIGN CRIMINAL JURISDICTION

Air Force members serving or deployed at overseas locations are subject to criminal proceedings by both the host nation (HN) and by the United States (US) for offenses they have allegedly committed. Primary jurisdiction of the case is normally governed by the terms of the specific Status of Forces Agreement (SOFA) with the particular HN. In certain peace operations, especially those run by the United Nations, a Status of Mission Agreement (SOMA) may be used instead of a SOFA. In this discussion, SOFA will refer to both SOFAs and SOMAs.

The HN has jurisdiction over the member based on territorial sovereignty

The US always has court-martial jurisdiction over UCMJ offenses committed by its service members (the UCMJ applies “in all places”). Which nation gets to prosecute and retain custody of the member depends upon a variety of factors spelled out in the SOFA

SOFAs do not protect US personnel from HN jurisdiction; rather, SOFAs establish rules over which country can exercise jurisdiction in various situations

Military commanders generally have an obligation to place US personnel on “international hold” pending resolution of criminal cases within the HN

US personnel generally must be released to HN officials upon indictment by the HN (specific timing of release varies by country)

Counsel fees may be paid on behalf of US personnel; however, US personnel may, and do, face HN criminal proceedings as well as sentencing and confinement in HNs

Trial Observers, usually designated staff judge advocates, monitor HN criminal proceedings to determine whether US servicemembers are receiving fair trials

The major SOFAs (NATO, Japan, and Korea) contain similar formulas for determining which country gets to exercise jurisdiction over US personnel for criminal offenses

Exclusive jurisdiction belongs to

The US for crimes that are purely US military offenses (e.g., AWOL, disrespect, and disobeying orders)

The HN for acts that are crimes under the HN’s laws but not under US law (e.g., religious crimes, political crimes, and certain negligent acts that, under US law, do not rise to the level of criminal conduct)

Concurrent (shared) jurisdiction occurs when conduct is criminal under both US and HN law; jurisdiction is determined as follows

The HN has the primary right to try all concurrent cases, except

Official duty cases: When the offense arises out of an act in the performance of the US servicemember's official duty

*Inter se*: When the crime affects only US parties or US property

DoD policy is to maximize US jurisdiction in appropriate cases

Normally the US will request a waiver of jurisdiction from the HN

The procedures for and the likely success of a request for waiver vary depending on the HN and, frequently, the seriousness of the offense (the more serious the offense, the less likely it will be granted)

When a waiver is granted, the US is normally obligated to take appropriate action against the member and to report the results to the HN

Civilians and Dependent Family Members Accompanying the Force

Civilians and dependent family members accompanying US forces abroad are normally considered subject to the terms of the applicable SOFA

While the HN may exercise its jurisdiction, the US commander does not have UCMJ authority over these persons. Until very recently, the US had no way of obtaining jurisdiction over these personnel

If the HN waives primary jurisdiction to the US, the options of the commander are limited. (*See* articles entitled *Debarment* and *Family Member Misconduct*, Chapter 9, this Deskbook)

To remedy this problem, Congress passed the *Military Extraterritoriality Jurisdiction Act* (MEJA) of 2000. The Act extends U.S. jurisdiction to cover offenses committed by dependents and other civilians accompanying our forces if the criminal act is punishable by at least one year's confinement. MEJA can also extend jurisdiction over military personnel and contractors' employees who are not normally resident in the HN

Absence of a SOFA

The prevailing international view is that, in the absence of an agreement to the contrary, criminal jurisdiction rests exclusively with the HN

While the US has worldwide personal jurisdiction over servicemembers, the exercise of that jurisdiction without HN permission may be considered a breach of its territorial sovereignty

Particular emphasis has been placed on ensuring a SOFA or other agreement is entered into with all HNs

**References:**

10 U.S.C. 805, *Territorial Applicability of the Uniform Code of Military Justice*

10 U.S.C. 1037, *Counsel Before Foreign Judicial Tribunals and Administrative Agencies; Court Costs and Bail*

18 U.S.C. 3261, *et seq.*, *Military Extraterritoriality Jurisdiction*

DoDD 5525.1, *Status of Policies Information*, 7 August 1979

AFI 51-703, *Foreign Criminal Jurisdiction*, 6 May 1994

AFJI 51-706, *Status of Forces Policies, Procedures, and Information*, 15 December 1989

## THE LAW OF ARMED CONFLICT

One of the most critical subjects for today's military is the Law of Armed Conflict (LOAC), also known as the Law of War. As recent events have taught us, we cannot assume that every airman is fully aware of all his/her rights and responsibilities under the Law of Armed Conflict. Now more than ever, in the complex myriad of operational situations in which Air Force units are involved, commanders must ensure their personnel are trained and comply with the LOAC.

- What is LOAC?

-- "That part of international law that regulates the conduct of armed hostilities." Joint Publication 1-02 (2001)

-- LOAC has two main sources: Customary international law arising out of the conduct of nations during hostilities and binding upon all nations, and treaty law (also called conventional law) arising from international treaties and only binds those nations that have ratified a particular treaty

-- LOAC treaty law is generally divided into two overlapping areas: Hague Law (named for treaty negotiations held over the years at The Hague, Netherlands) and Geneva Law (named for treaty negotiations held over the years at Geneva, Switzerland)

--- Hague Law is concerned mainly with the means and methods of warfare (e.g., lawful and unlawful weapons, targeting)

--- Geneva Law is concerned with protecting persons involved in conflicts (wounded and sick; wounded, sick and shipwrecked at sea; POWs; civilians)

-- Purposes of LOAC

--- Limit the effects of the conflict (reduce damages and casualties)

--- Protect combatants and noncombatants from unnecessary suffering

--- Safeguard fundamental rights of combatants and noncombatants

--- Prevent the conflict from becoming worse

--- Make it easier to restore peace when the conflict is over

- Geneva Law

-- 1949 Geneva Conventions for the Protection of War Victims consist of four different conventions

--- Wounded and Sick (GWS)

- Wounded, Sick, and Shipwrecked at Sea (GWS Sea)
- Prisoners of War (GPW)
- Civilians (GC)
- The original parties to the 1949 Conventions negotiated two additional protocols in 1977. These protocols are not in effect for the United States, although the U.S. recognizes that many of their provisions reflect customary international law
- Protocol I (International Conflicts)
- Protocol II (Non-International Conflicts)
- Hague Law
- The Hague Peace Conferences of 1899 and 1907 resulted in the Hague Conventions of 1907; those conventions with continuing validity are
- Convention III, Relative to the Opening of Hostilities
- Convention IV, Respecting the Laws and Customs of War on Land with annexed regulations (the "Hague Regulations")
- Convention V, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land
- Convention VIII, Relative to the Laying of Automatic Submarine Contact Mines
- Convention IX, Concerning Bombardment by Naval Forces in Time of War
- Efforts in 1922-23 to create the Hague Rules of Air Warfare resulted in draft rules that never took effect, but are today viewed as reflecting, not customary law, but guidelines for proper conduct
- Other notable Hague Conventions
- Declaration concerning Expanding Bullets (1899)
- Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)
- Basic legal principles of LOAC
- Military necessity

--- Definition: Permits the application of only that degree of regulated force, not otherwise prohibited by the laws of war, required for the partial or complete submission of the enemy with the least expenditure of life, time and physical resources

--- Attacks must be limited to military objectives, i.e., any objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Examples include troops, bases, supplies, lines of communications, and headquarters

-- Distinction

--- This principle imposes a requirement to distinguish (also termed "discriminate") between military objectives and civilian objects

---- Civilian objects are such objects as places of worship, schools, hospitals, and dwellings

---- Civilian objects can lose their protected status if they are used to make an effective contribution to military action

---- In case of doubt whether a civilian object is being used to make an effective contribution to military action, the presumption should be that it is not used for military purposes

--- An attacker must not intentionally attack civilians or employ methods or means (weapons or tactics) that would cause excessive collateral civilian casualties

--- However, a defender has an obligation to separate civilians and civilian objects (either in the defender's country or in an occupied area) from military targets. Failure to separate them may lead to a loss of their protected status

-- Proportionality

--- Those who plan military operations must take into consideration the extent of civilian destruction and probable casualties that will result and, to the extent consistent with the necessities of the military situation, seek to avoid or minimize such casualties and destruction. Civilian losses must be proportionate to the military advantages sought

--- The concept does not apply to military facilities and forces, which are legitimate targets anywhere and anytime

--- Damages and casualties must be consistent with mission accomplishment and allowable risk to the attacking force (i.e., the attacker need not expose its forces to extraordinary risks simply in order to avoid or minimize civilian losses)

-- Humanity (also referred to as the principle of unnecessary suffering)

--- This principle prohibits the employment of any kind or degree of force that is not necessary for the purposes of war, that is, for the partial or complete submission of the enemy with the least possible expenditure of life, time and physical resources

--- Relevant Hague Regulations provisions

---- "The right of belligerents to adopt means of injuring the enemy is not unlimited" (Article 22)

---- "In addition to the prohibitions provided by special Conventions, it is especially forbidden

----- To employ poison or poisoned weapons

----- To kill or wound treacherously individuals belonging to the hostile nation or army

----- To employ arms, projectiles, or material calculated to cause unnecessary suffering" (Article 23)

--- Examples of lawful weapons

---- Incendiary weapons (but see below)

---- Fragmentation weapons and cluster bombs (CBUs)

---- Nuclear weapons (but some international treaties forbid placement in certain areas – outer space, ocean seabeds, Antarctica, certain countries or regions)

---- Shotguns (but must have hardened [also called "chilled"] shot) and silencers

---- Landmines (but see below)

--- Examples of unlawful weapons

---- Poisons or poisoned weapons

---- Bullets that expand or flatten easily in the human body ("dum-dum" bullets)

---- Any weapon the primary effect of which is to injure by fragments that, in the human body, escape detection by X-rays

---- Indiscriminate weapons

----- Biological and bacteriological weapons

----- Weapons incapable of being controlled

----- Chemical weapons (but see below)

--- Even lawful weapons may be used unlawfully. Examples: rifles to shoot POWs, strafing civilians, firing on shipwrecked mariners or downed aircrews

--- Recent treaty developments

---- Conventional Weapons Convention of 1980

----- Incendiary weapons are presently legal. Protocol III to the Conventional Weapons Convention places restrictions upon their use in certain instances

----- Land mines are addressed by the Conventional Weapons Convention, Protocol II, but it has a fairly limited scope. It primarily concerns marking minefields (including air-delivered mines) and removing mines at the end of a conflict. The United States and a number of other countries amended the Protocol in 1996 to require anti-personnel land mines (APLs) outside marked minefields to self-detonate within a limited time and to forbid non-detectable APLs. However, the Ottawa Convention (which entered into effect as of 16 March 1999) bans all anti-personnel land mines. The U.S. declined to sign the treaty because it would have required the U.S. to remove our minefields along the intra-Korean border, a major deterrent to a North Korean attack

----- Blinding lasers are addressed by Protocol IV of the Convention, which is not in effect for the United States. The Protocol is very limited in its scope; it only prohibits the use of lasers that are specifically designed to cause permanent blindness to unenhanced vision

---- The 1993 Chemical Weapons Convention, which entered into force 29 April 1997, outlaws all use of chemical weapons, including self-defense. It also bans the use of riot control agents "as a method of warfare" The 1993 Convention complements, but does not replace, the 1925 Geneva Gas Protocol, which permits parties which had ratified the Protocol to make a reservation preserving their right to use chemical weapons in response to a "first use" against them; the 1993 Convention does not permit such reservations

## TWO CAVEATS

----- The 1925 Protocol only applies to conflicts between the parties (i.e., international armed conflicts); the 1993 Convention applies to both international and non-international

----- The 1993 Convention does not regulate "law enforcement including domestic riot control purposes"

-- Chivalry

--- This principle addresses the waging of war in accord with well-recognized formalities and courtesies

--- It permits lawful ruses, such as camouflage, false radio signals, and mock troop movements

--- It forbids treacherous acts (perfidy). These involve misuse of internationally recognized symbols or status to take unfair advantage of the enemy, such as false surrenders, placing anti-aircraft artillery in hospitals, and misuse of the Red Cross or the Red Crescent (in Islamic countries)

**References:**

DoDD 5100.77, *DoD Law of War Program*, 9 December 1998

Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01A, *Implementation of the DoD Law of War Program*, 27 August 1999

AFPD 51-4, *Compliance with the Law of Armed Conflict*, 26 April 1993

AFI 51-401, *Training and Reporting to Ensure Compliance with the Law of Armed Conflict*, 19 July 1994

Chapter 2, *The Law of Aerial Warfare*, and Chapter 18, *Targeting and Weaponing*, *Air Force Operations and the Law* (2002)

## **OPERATIONS LAW**

Operations Law (also called Operational Law) generally refers to those legal rules applicable in actual military operations. It is normally defined as that body of domestic, foreign, and international law that impacts upon the activities of US forces in war and operations other than war.

It is a collection of diverse legal areas. It is not a unique, stand-alone body of law or rules; rather, it consists of existing rules that usually take on greater significance during military operations

Operations law includes such matters as military justice, procurement law, fiscal law, and legal assistance that also play a large role in the normal peacetime activities of the military

It includes matters such as the law of armed conflict, rules of engagement, law of the sea, humanitarian assistance, and other areas normally associated with combat activities or military operations in a deployed environment.

A judge advocate, acting as an operations law attorney, is

Available at all times to assist the command on legal issues and problems that arise during all phases of the operation

Knowledgeable in laws and rules that are of specific importance during operations; and

Granted access to JAG assistance at other levels of the command and from JAG offices within the military department for unique issues that may arise

A common assumption is that JAG advice during a military operation is limited to issues involving the law of war (or the law of armed conflict)

Such issues are extremely important; however, most issues that arise are of a more mundane, yet equally important nature, such as proper authority for the expenditure of funds and limitations on peacekeeping operations

The deployed JAG can play a crucial role in the overall success of an operation if the commander keeps the JAG involved in the day-to-day operations of the mission. It is easier to confront legal issues before the fact than to address them afterwards

### **Reference:**

*Air Force Operations and the Law, A Guide for Air & Space Forces, 2002*

## **INFORMATION OPERATIONS**

Information Operations (IO) involve offensive and defensive actions covering a spectrum of capabilities ranging from ancient concepts of military deception to relatively new capabilities involving high tech computers and satellite systems. IO poses several legal challenges, most of which are dealt with by higher headquarters units. IO must comply with the applicable ROE and LOAC.

### **ELECTRONIC WARFARE (EW)**

EW gained prominence in World War II and remains one of the most important components of IO

EW consists of electronic attack (EA), electronic protection (EP), and electronic support (ES)

EA uses electronic jamming and deception to disrupt and degrade adversary radar, guidance, and communications systems

EP protects friendly forces and systems from enemy EA; examples of EP include stealth technology, chaff, and emissions control

ES includes surveillance of the electromagnetic spectrum and is conducted by systems such as airborne early warning aircraft

It is important to consider possible collateral damage to civilian or neutral aviation before conducting EW, particularly when jamming radar and guidance systems

### **MILITARY DECEPTION**

Actions intended to “deliberately mislead adversary military decision makers as to friendly military capabilities, intentions, and operations.” JP 3-58, 1-1

The primary legal consideration in military deception is distinguishing lawful ruses from perfidy, a job that is often difficult and may result in ambiguity

Lawful ruses may include aerial decoys, simulated damage, false radio signals, or false raids, such as the bombing of Norway prior to D-Day to distract Axis forces

Perfidy involves treachery or a general failure to keep faith with an enemy; examples include abusing protected symbols such as the Red Cross, putting combatants in civilian clothes, and misusing enemy uniforms or transponder signals to attack

Otherwise lawful ruses may also become unlawful if it involves performing an illegal act, such as tricking the enemy into attacking their own civilians

Although all commanders are authorized to engage in deception operations, such operations are subject to special restrictions under the SROE

### **INFORMATION ASSURANCE (IA)**

IA consists of those actions designed to safeguard the “availability, integrity, authenticity, confidentiality, and nonrepudiation,” of information and information systems. AFDD 2-5, p 20

Communications squadrons routinely conduct and administer IA programs

Most legal issues arising in IA deal with law enforcement activities and system administrators’ ability to monitor their respective systems; the Electronic Communications Privacy Act, USA PATRIOT Act, and Fourth Amendment control these activities

### **OPERATIONS SECURITY (OPSEC)**

OPSEC involves identifying those actions of friendly forces that can be observed by adversaries and used to the adversaries’ advantage, then taking steps to reduce the intelligence value of the adversaries’ observations

OPSEC is closely tied to military deception and EW

OPSEC is generally bound by the same legal guidelines as military deception

### **PSYCHOLOGICAL OPERATIONS (PSYOP)**

PSYOP seek to “induce, influence, or reinforce the perceptions, attitudes, reasoning, or behavior” of our adversary’s leaders and military forces. AFDD 2-5, p. 12

PSYOP may only be authorized by the President or his delegate (currently the Assistant Secretary of Defense, Office of Special Operations and Low Intensity Conflict after legal review by the OSD/GC)

PSYOP may not be conducted against US citizens

PSYOP must be coordinated through the Department of State and responsible embassy during peacetime

PSYOP may not engage in perfidy

Public Affairs teams may be used to counter PSYOP

## **PHYSICAL ATTACK**

Physical attack may be considered an information operation if the target is an “information” target

The same LOAC rules and legal apply to physical attack for IO as for any other physical attack

## **COMPUTER NETWORK OPERATIONS (CNO)**

CNO consist of defensive measures (CND) to protect our computer systems and offensive measures (CNA) to disable, disrupt, or degrade the integrity, reliability, or accessibility or adversary computer systems

CNO entail significant legal considerations, obviously greater if engaging in CNA

USSTRATCOM and its subordinate JTF-CNO have primary responsibility for CNO and should be consulted before engaging in CNO

## **PUBLIC AFFAIRS (PA)**

PA is considered component of IO by the Air Force, by is only a contributing activity in joint doctrine

PA may not intentionally deceive the Congress, US citizens, or US news media

Careful consideration must be used when involving PA in IO to ensure PA does not lose its credibility and, thereby, its ability to engage in counterpropaganda and counterdeception

### **References:**

Hague Convention No IV, Respecting the Laws and Customs of War on Land and Annex Thereto, 18 Oct 1907, T.S. 539, 36 Stat. 2227.2, 2 A.J.I.L. (1908) Supplement 90-117  
(*entry into force* 26 Jan 1910, *for US* 27 Nov 1909)  
JP 3-13, *Joint Doctrine for Information Operations*, 9 October 1998  
AFDD 2-5, *Information Operations*, 4 January 2002  
*Air Force Operations and the Law*, Chapter 24, 2002

## **RULES OF ENGAGEMENT**

Many problems arose during the Vietnam conflict because of confusion between the Law of Armed Conflict (LOAC) and Rules of Engagement (ROE). As a result, the US armed forces embarked upon a process to clarify the distinctions and to better educate our personnel to create ROE appropriate to the particular mission and take into account a number of political, military, and legal factors. This process, guided in large part by the U.S. Navy, led to the extremely successful ROE used in Operations Desert Shield and Desert Storm and to the publishing of the Standing Rules of Engagement (SROE) in 1994. As U.S. armed forces become involved in an ever-widening range of "operations other than war," the significance of appropriate ROE and their promulgation will only increase.

ROE definition from Joint Publication 1-02, *DoD Dictionary of Military and Associated Terms*, (1994): Directives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered

The relationship between the Law of Armed Conflict and Rules of Engagement

LOAC is international law that we have a legal duty to observe (infractions are punishable under the UCMJ)

ROE are our rules - how we want to operate. They have to comply with LOAC, but they also are influenced by a number of critical factors

ROE is always either equal in restrictiveness or more restrictive than LOAC.

ROE can never authorize an act that is forbidden under LOAC

Critical factors which may influence the promulgation of ROE

Domestic law and concerns (e.g., E.O. 11850 limiting use of riot control agents)

National security policy (protect interests of US and allies)

Operational concerns (protection of our forces and those of our allies)

International law and concerns (LOAC, status of forces agreements, host nation law)

Overall purposes of ROE

To provide standing guidance during "peacetime"

To control the transition from "peacetime" to "conflict"

To control combat operations during conflicts, and

To control the transition away from conflict to peacetime

Specific purposes of the Standing Rules of Engagement (SROE): to provide implementation guidance on the inherent right and obligation of self-defense and the application of force for mission accomplishment (SROE, Enclosure A, para. 1a)

ROE overview

ROE need to recognize the inherent right (and obligation) of self-defense

Article 51, United Nations Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security"

Standing Rules of Engagement Policy (SROE, Enclosure A, para. 2): The SROE do not limit a commander's inherent authority and obligation to use all necessary means available to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity

Different ROE must be drafted for different tasks and different levels, e.g., information operations, counterdrug support operations, noncombatant evacuation operations, domestic support operations, and maritime/land/air/space operations (SROE Enclosures B-J)

Specific guidance for U.S. forces operating with multinational forces (SROE, Enclosure A, para. 1c)

U.S. forces assigned under operational control (OPCON) of multinational force (MNF) will follow the MNF ROE unless otherwise directed by the President and Secretary of Defense. U.S. forces will remain assigned and under MNF OPCON if the combatant commander and higher authority determine that the MNF ROE are consistent with the SROE self-defense policy

When U.S. forces are under U.S. OPCON and operate in conjunction with a multinational force, reasonable efforts will be made to establish common ROE. If this is not possible, U.S. forces will exercise self-defense under the SROE and seek guidance from the appropriate combatant command. The MNF command will be informed U.S. forces will be under SROE rather than MNF ROE

ROE need to be tailored to local circumstances and the nature and history of the threat and must be dynamic and changing as the mission evolves

ROE may be a factor in the escalation or de-escalation of hostilities (e.g., US Navy Freedom of Navigation [FON] exercises in the Gulf of Sidra during the 1980s)

Potential problem area: ROE may be unduly restrictive based upon erroneous interpretations of LOAC requirements (e.g., Rolling Thunder restrictions on attacks on dikes in North Vietnam, 1967-1972)

Transition from "Peacetime" to Conflict

The SROE provide a clear transition from peacetime to conflict

Peacetime: U.S. forces may only attack in self-defense

Article 51, United Nations Charter

Our response must be necessary and proportional (SROE, Enclosure A, para. 5f and 8)

U.S. interpretation of self-defense arises in three instances

Against the use of force ("hostile act") (SROE, Enclosure A, para. 5g)

Against a threat of the imminent use of force ("hostile intent")(SROE, para. 5h)

Against a continuing threat of the use of force (e.g., the U.S. response to the Iraqi attempted assassination of former President Bush) (not specifically addressed in the SROE)

What or who may we defend? (Other than the United States and U.S. forces) (SROE, Enclosure A, para. 8c)

United States nationals and property

Other designated non-US forces, foreign nationals and property ("Collective self defense" -- only the President or Secretary of Defense can authorize this) (SROE, Enclosure A, para. 5c)

Conflict: Attacks are restricted only by LOAC and our government's policy

Those involved in promulgating ROE need to clearly identify in their operation plans if conflict ROE will come into effect, under what conditions, and on whose authority

Immediate ("hot") pursuit: In self-defense, U.S. forces can pursue and engage a hostile force that has committed a hostile act or demonstrated hostile intent and remains an imminent threat. (SROE, Enclosure A, para. 8b) If in conflict, U.S. forces can pursue enemy forces into neighboring territory if that neighbor is unable or unwilling to control the illegal use of its territory

## Considerations when preparing ROE

What is the President and the Secretary of Defense's goal? (e.g., hostage rescue; freedom of navigation; attack terrorist base)

In order to carry out that goal, what is the mission? (e.g., warn an enemy; destroy bases; limited or minor attack)

What is the threat? (e.g., Taliban; Iraq; Bosnian Serbs)

Who else is involved? (e.g., NATO; coalition; United Nations)

Are there any unique concerns? (e.g., fear of capture of U.S. forces; hostages)

Who should prepare the ROE? (e.g., those familiar with the weapons and the systems)

What are the ROE sources? (e.g., joint task force guidance; NATO; United Nations)

### **References:**

DoDD 5100.77, *DoD Law of War Program*, 9 December 1998

Joint Publication 1-02, *DoD Dictionary of Military and Associated Terms*, 5 June 2003

Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01A, *Standing Rules of Engagement for US Forces*, 15 January 2000

CJCSI 5810.01A, *Implementation of the DoD Law of War Program*, 25 March 2002