

KANSAS NATIONAL GUARD  
REGULATION 27-10  
(KNGR 27-10)

MILITARY JUSTICE



1 March 1998

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KARNG 111-01**

**DEPARTMENTS OF THE ARMY AND AIR FORCE  
NATIONAL GUARD OF KANSAS  
The Adjutant General of Kansas  
Topeka, Kansas 1 March 1998**

**IMPLEMENTING REGULATIONS  
KANSAS CODE OF MILITARY JUSTICE**

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**THIS REGULATION REVISES THE IMPLEMENTING REGULATIONS FOR THE  
KANSAS CODE OF MILITARY JUSTICE IN ITS ENTIRETY FOR ALL UNITS OF THE  
KANSAS ARMY AND AIR NATIONAL GUARD.**

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1. KNGR 27-10/ KANGR 111-01, dated 2 July 1973, with the following changes: Change No. 1, dated 26 October 1973, Change No. 2, dated 24 June 1977, and Change No. 3 dated 11 February 1983 – are no longer VALID. That version of this regulation will be removed and destroyed.
2. Replace the discarded KNGR 27-10 / KANGR 111-01 with the revised KNGR 27-10 / KARNG 111-01 in its entirety.
3. This sheet is to be filed in the front of the publication for reference purposes.

BY THE ORDER OF THE GOVERNOR:

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**KANSAS NATIONAL GUARD REGULATION 27-10  
KNGR 27-10**

**MILITARY JUSTICE**

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## CHAPTER 1

### INTRODUCTION

#### 1-1. Purpose.

This regulation prescribes the policies and procedures pertaining to the administration of military justice and implements the Kansas Manual for Courts-Martial, United States, 1996, hereafter referred to as the KMCM and the Kansas Rules for Courts-Martial (KRCM) contained in the KMCM.

#### 1-2. References.

Required and related publications are listed in Appendix A, AR 27-10. Additional references include:

- (a) KCMJ
- (b) KMCM
- (c) AR 27-10

#### 1-3. Explanation of abbreviations and terms.

- (a) Abbreviations and special terms used in this regulation are explained in the Glossary to AR 27-10. See also KRCM 103 for definitions of terms used in the KMCM.
- (b) References to KMCM are to the Kansas Manual for Courts-Martial.
- (c) References to KRCM are to the Kansas Rules of Courts Martial, contained in the KMCM.
- (d) References to the MCM are to the Manual for Courts-Martial, United States.
- (e) References to the UCMJ and to the KCMJ are to the Uniform Code of Military Justice and the Kansas Code of Military Justice, respectively. When a provision is referred to as "Article" (i.e. Article 138), the reference is to the KCMJ, unless otherwise indicated.
- (f) References to The Judge Advocate General (TJAG) are to the Kansas National Guard Judge Advocate General, unless otherwise indicated.
- (g) References to Appendices, Glossary, and "Figures", are to AR 27-10, and are used as guides. The use of illustrations in AR 27-10 are appropriate with necessary changes to facilitate KNGR 27-10, KMCM, and the KCMJ.
- (h) The DA and DD Forms referenced may be used as indicated, except that appropriate changes and notations should be made when using the forms to indicate the application of the KCMJ, KMCM and this regulation.

(i) KSANG (Air Force) forms may be used in lieu of DA forms in Air National Guard Military Justice Actions. AG Regulation 111-1 may be consulted as a reference for the use of Air Force forms.

**1-4. Responsibilities.**

(a) The Kansas Judge Advocate General (TJAG) is responsible for the overall supervision and administration of military justice within the Kansas National Guard.

(b) The Chief Military Judge, Kansas National Guard, as designee of TJAG, is responsible for the supervision and administration of the Trial Judiciary and the Military Magistrate Program.

(c) The Kansas Judge Advocate General (TJAG) is responsible for the administration of defense services in the Kansas National Guard. Unless prevented by military necessity, assignments of counsel to individual soldiers in military justice matters shall be made by TJAG or his/her designee, and counsel shall be in a different rating chain than counsel for the unit prosecuting the soldier.

**1-5. Reserved.**

**1-6. Exceptions.**

Exceptions to provisions of this regulation containing procedures that are not required by statute, prescribed by executive order, mandated by applicable case law, or required by The Adjutant General (TAG) or higher authority, may be granted by TJAG. Such exceptions may be granted only after TJAG determines they are required because of military exigencies. Such exceptions may be granted upon request of the general court-martial (GCM) convening authority involved or may be initiated by TJAG. Requests for such exceptions will be submitted through command channels.

## CHAPTER 2

### INVESTIGATION AND PROSECUTION OF CRIMES OVER WHICH THE STATE OF KANSAS OR THE UNITED STATES, AND THE KANSAS NATIONAL GUARD HAVE CONCURRENT JURISDICTION

#### **2-1. General.**

Crimes over which the State of Kansas or any subdivision thereof, or the United States, have concurrent jurisdiction with the Kansas National Guard shall be referred to civilian authorities for investigation and prosecution. The Kansas National Guard may investigate and prosecute such offenses when the military interest in the offense exceeds the interest of civilian authorities. In any event, the National Guard will not investigate or prosecute an offense for which a civilian investigation or prosecution is in progress. Neither will the National Guard prosecute an offense which was the subject of a civilian prosecution for an offense with substantially the same elements which resulted in a conviction or acquittal. This provision shall not prevent administrative action not under the KCMJ.

#### **2-2. Grants of immunity.**

Grants of immunity may shall be approved and conveyed only by the Kansas Attorney General.

#### **2-3. Reserved.**

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**CHAPTER 3**  
**NONJUDICIAL PUNISHMENT**

**SECTION I**

**APPLICABLE POLICIES**  
**(para 1, Part V, MCM)**

**3-1. General.**

This chapter implements and amplifies Article 15, KCMJ, K.S.A. 48-2301, and Part IV, Chapter XV, KMCM. No action should be taken under the authority of Article 15, KCMJ, without referring to the appropriate provisions of the KMCM and this chapter. This chapter prescribes requirements, policies, limitations, and procedures for:

- (a) Commanders at all levels imposing nonjudicial punishment.
- (b) Members on whom this punishment is to be imposed.
- (c) Other persons who may take some action with respect to the proceedings.

**3-2. Use of nonjudicial punishment.**

A commander should use nonpunitive measures to the fullest extent to further the efficiency of the command before resorting to nonjudicial punishment (para 1(d)(1), Part IV, Chapter XV, KMCM). Use of nonjudicial punishment is proper in all cases involving minor offenses in which nonpunitive measures are considered inadequate or inappropriate. If it is clear that nonjudicial punishment will not be sufficient to meet the ends of justice, more stringent measures must be taken. Prompt action is essential for nonjudicial punishment to have the proper corrective effect. Nonjudicial punishment may be imposed to-

- (a) Correct, educate, and reform offenders who the imposing commander determines cannot benefit from less stringent measures.
- (b) Preserve a soldier's record of service from unnecessary stigma by record of court-martial conviction.
- (c) Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.

**3-3. Relationship of nonjudicial punishment to nonpunitive measures (para (1)(g), Part IV, Chapter XV, KMCM).**

- (a) General Nonjudicial punishment is imposed to correct misconduct in violation of the KCMJ. Such conduct may result from intentional disregard of or failure to comply with prescribed standards of military conduct. Nonpunitive measures usually deal with misconduct resulting from simple

neglect, forgetfulness, laziness, inattention to instructions, sloppy habits, immaturity, difficulty in adjusting to disciplined military life, and similar deficiencies. These measures are primarily tools for teaching proper standards of conduct and performance and do not constitute punishment. Included among nonpunitive measures are: denial of pass or other privileges, counseling, administrative reduction in grade, administrative reprimands and admonitions, extra training (AR 600-20), bar to reenlistment, and MOS reclassification. Certain commanders may administratively reduce enlisted personnel for inefficiency and other reasons. This authority exists apart from any authority to punish misconduct under Article 15. These two separate and distinct kinds of authority should not be confused (AR 600-200).

(b) Reprimands and admonitions

(1) Commanding officers have authority to give admonitions or reprimands either as an administrative measure or as nonjudicial punishment. If imposed as a punitive measure under Article 15, the procedure set forth in paragraph 4, Part IV, Chapter XV, KMCM, and in section III of this chapter must be followed.

(2) A written administrative admonition or reprimand will contain a statement that it has been imposed as an administrative measure and not as punishment under Article 15 (AR 600-37). Admonitions and reprimands imposed as punishment under Article 15, whether administered orally or in writing (para 5c(1), Part IV, MCM), should state clearly that they were imposed as punishment under that Article.

(c) Extra training or instruction. One of the most effective nonpunitive measures available to a commander is extra training or instruction (AR 600-20). It is used when a soldier's duty performance has been substandard or deficient; e.g., a soldier who fails to maintain proper attire may be required to attend classes on the wearing of the uniform and stand inspection until the deficiency is corrected. The training or instruction must relate directly to the deficiency observed and must be oriented to correct that particular deficiency. Extra training or instruction may be conducted after duty hours.

**3-4. Personal exercise of discretion** (para 1(d)(2), Part IV, Chapter XV, KMCM).

(a) A commander will personally exercise discretion in the non-judicial punishment process by-

(1) Evaluating the case to determine whether proceedings under Article 15 should be initiated.

(2) Determining whether the soldier committed the offense(s) where Article 15 proceedings are initiated and the soldier does not demand trial by court-martial.

(3) Determining the amount and nature of any punishment, if punishment is appropriate.

(b) No superior may direct that a subordinate authority impose punishment under Article 15 or issue regulations, orders, or so-called "guides" that either directly or indirectly suggest to subordinate commanders that-

(1) Certain categories of offenders or offenses should be disposed of by punishment under Article 15.

(2) Predetermined kinds or amounts of punishment should be imposed for certain categories of offenders or offenses.

(c) A superior commander may send or return a case to a subordinate for appropriate disposition if necessary and within the jurisdiction of the subordinate. A superior commander may also reserve personally, or to the superior commander's delegate, the right to exercise Article 15 authority over a particular case or over certain categories of offenders or offenses (para 3-7(c)).

### **3-5. Reference to superior.**

(a) See KRCM 306(b). Nonjudicial punishment should be administered at the lowest level of command commensurate with the needs of discipline, after thoroughly considering-

- (1) The nature and circumstances of the offense.
- (2) The age, previous record, maturity, and experience of the offender.

(b) If a commander determines that the commander's authority under Article 15 is insufficient to impose a proper punishment, the case may be referred to an appropriate superior. The same procedure will be followed if the authority of the commander to exercise Article 15 powers has been withheld or limited (paras 3-4 and 3-7(c)). In transmitting a case for action by a superior, no recommendation of the nature or extent of the punishment to be imposed will be made. Transmittal should normally be accomplished by written correspondence using KNG Form 5109-R (Request to Superior to Exercise Article 15, KCMJ Jurisdiction). (A reproduction master copy of this form appears at the end of this regulation and will be locally reproduced on 8 1/2- by 11-inch paper.)

### **3-6. Filing determination.**

(a) A commander's decision whether to file a record of nonjudicial punishment in the performance fiche of a soldier's Official Military Personnel, File (OMPF) is as important as the decision relating to the imposition of nonjudicial punishment itself. In making a filing determination, the imposing commander must weigh carefully the interests of the soldier's career against those of the National Guard to produce and advance only the most qualified personnel for positions of leadership, trust, and responsibility. In this regard, the imposing commander should consider the soldier's age, grade, total service (with particular attention to the soldier's recent performance and past misconduct), and the fact that the filing decision is final, except for those cases where the soldier has more than one record of nonjudicial punishment directed for filing in the restricted fiche (see b below). However, the interests of the National Guard are compelling when the record of nonjudicial punishment reflects unmitigated moral turpitude or lack of integrity, patterns of misconduct, or evidence of serious character deficiency or substantial breach of military discipline. In such cases, the record should be filed in the performance fiche.

(b) If a record of nonjudicial punishment has been designated for filing in a soldier's restricted fiche, the soldier's OMPF will be reviewed to determine if the restricted fiche contains a previous record of nonjudicial punishment. In those cases where a previous Record of Proceedings under Article 15, KCMJ, or under Article 25 UCMJ, DA Form 2627, that has not been wholly set aside, has been filed in the restricted fiche, and the soldier, prior to that punishment, was in the grade of E5 or higher, the present record of Nonjudicial Punishment will be filed in the performance fiche. The filing should be recorded on the present record of Nonjudicial Punishment in block 11. The soldier concerned and the imposing commander will be informed of the filing in the performance fiche. The copy of the record that was placed in the unit files will be moved to the soldier's MPRJ.

## SECTION II

### AUTHORITY (para 2, Part IV, Chapter XV, KMCM).

#### 3-7. Who may impose nonjudicial punishment.

(a) Commanders. Unless otherwise specified in this regulation or if authority to impose nonjudicial punishment has been limited or withheld by a superior commander (see c below), any commander is authorized to exercise the disciplinary powers conferred by Article 15.

(1) The term commander, as used in this chapter, means a commissioned or warrant officer who, by virtue of that officer's grade and assignment, exercises primary command authority over a military organization or prescribed territorial area, that under pertinent official directives is recognized as a command.

(2) The term imposing commander refers to the commander or other officer who actually imposes the nonjudicial punishment.

(3) Commands include the following-

(A) Companies, troops, squadrons, and batteries.

(B) Numbered units and detachments.

(C) Missions.

(D) Army National Guard and Air National Guard elements of unified commands and joint task forces.

(E) Service schools.

(F) Area commands.

(4) Commands also include, in general, any other organization of the kind mentioned in (1) above (e.g., a provisional unit designated under AR 220-5), the commander of which is the one looked to by superior authority as the individual chiefly responsible for maintaining discipline in that organization. Thus, an infantry company, whether or not separate or detached, is considered to be a command. However, an infantry platoon that is part of a company and is not separate or detached is not considered to be a command. Although a commissioned or warrant officer exercising command is usually designated as the commander, this position may be designated by various other titles having the same official connotation; i.e., commandant, chief of mission, or superintendent.

(b) Delegation. The authority given to a commander under Article 15 is an attribute of command and, except as provided in this paragraph, may not be delegated. Pursuant to the authority vested in the Governor under the provisions of Article 15(a), KCMJ, K.S.A. 48-2301(a), the following rules with respect to delegation of powers are announced:

(1) Any commander authorized to exercise GCM jurisdiction or any commanding general may delegate that commander's or commanding general's powers under Article 15 to one

commissioned officer actually exercising the function of deputy or assistant commander. A commander may, in lieu of delegating powers under Article 15 to a deputy or assistant commander, delegate such powers to the chief of staff of the command, provided the chief of staff is a general officer.

(2) Authority delegated under (b)(1) above may be exercised only when the delegate is senior in rank to the person punished. A delegate need not, when acting as a superior authority on an appeal, be senior in rank to the imposing commander.

(3) Delegations of authority to exercise Article 15 powers will be made in writing; e.g., a disposition form or letter. It will designate the officer on whom the powers are conferred by name and position. Unless limited by the terms of such delegation or by (2) above, an officer to whom this authority is granted may exercise any power that is possessed by the officer who delegated the authority. Unless, otherwise specified in the written authorization, a delegation of Article 15 authority shall remain effective until-

(A) The officer who delegated the officer's powers ceases to occupy that position, other than because of temporary absence;

(B) The officer to whom these powers, have been delegated ceases to occupy the position wherein the officer was delegated such powers, other than because of temporary absence; or

(C) Notification that the delegation has been terminated is made in writing. A delegation does not divest the delegating officer of the right to personally exercise the delegating officer's Article 15 powers in any case in which the delegating officer desires to act. Although an appeal from punishment imposed under a delegation of Article 15 powers will be acted on by the authority next superior to the delegating officer (para 3-30), the latter may take the action described in paragraph 3-32. (See paras 6 and 7, Part IV, Chapter KMCM, and para 3-38 of this regulation.)

(c) Limitation of exercise of disciplinary authority by subordinates. Any commander having authority under Article 15, KCMJ, may limit or withhold the exercise of such authority by subordinate commanders. For example, the powers of subordinate commanders to exercise Article 15 authority over certain categories of military personnel, offenses, or individual cases may be reserved by a superior commander. A superior authority may limit or withhold any power that a subordinate might otherwise have under this paragraph.

### **3-8. Persons on whom nonjudicial punishment may be imposed.**

(a) Military personnel of a commander's command. Unless such authority is limited or withheld by superior competent authority, a commander may impose punishment under Article 15 on commissioned officers, warrant officers, and other military personnel of a commander's command.

(1) For the purpose of Article 15, military personnel are considered to be "of the command" of a commander if they are-

(A) Assigned to an organization commanded by that commander.

(B) Affiliated with the command (by attachment, detail, or otherwise) under conditions, either express or implied, which indicate that the commander and the commander of the unit to which they are assigned are to exercise administrative or disciplinary authority over them.

(2) Under similar circumstances, a commander may be assigned territorial command responsibility so that all or certain military personnel in the area will be considered to be of the command for the purpose of Article 15.

(3) To determine if an individual is “of the command” of a particular commanding officer, refer first to those written or oral orders or directives that affect the status of the individual. If orders or directives do not expressly confer authority to administer non-judicial punishment to the commander of the unit with which the member is affiliated or present (as when, for example, they contain no provision attaching the member “for disciplinary purposes”), consider all attendant circumstances, such as-

(A) The phraseology used in the orders;

(B) Where the soldier slept, ate, was paid, performed duty, the duration of the status, and other similar factors.

(4) If orders or directives include such terms as “attached for administration of military justice,” or simply “attached for administration,” the individual so attached will be considered to be of the command of the commander of the unit of attachment for the purpose of Article 15.

(a) Termination of status. Nonjudicial punishment will not be imposed on an individual by a commander after the individual ceases to be of the commander’s command, because of transfer or otherwise. However, if Article 15 proceedings have been instituted and punishment has not been imposed prior to the time of the change of assignment, the commander who instituted the proceedings may forward the record of proceedings to the gaining commander for appropriate disposition.

(b) Personnel of other armed forces. The Kansas National Guard is a joint command composed of members of both the Army National Guard and the Air National Guard. The fact that the member and the issuing commander are of different services shall not bar the imposition of punishment under this provision, provided the commander is otherwise qualified.

### **3-9. Minor offenses.**

Generally, the term “minor” includes misconduct not involving any greater degree of criminality than is involved in the average offense tried by SCM. It does not include misconduct of a type which, if tried by GCM, under the KCMJ or under the UCMJ could be punished by dishonorable discharge or confinement for more than 1 year (see para. (1)(e), Part IV, Chapter XV, KMCM). This is not a hard and fast rule; the circumstances of the offense might indicate that action under Article 15 would be appropriate even in a case falling outside these categories. Violations of, or failures to obey general orders or regulations may be minor offenses if the prohibited conduct itself is of a minor nature even though also prohibited by a general order or regulation.

**3-10. Double punishment prohibited.**

Several minor offenses arising out of substantially the same transaction or misconduct will not be made the basis of separate actions under Article 15, KCMJ. When punishment has been imposed under Articles 13 (K.S.A. 48-2207) or 15, punishment may not again be imposed for the same misconduct under Article 15.

**3-11. Restriction on punishment after exercise of jurisdiction by civilian authorities.**

Chapter 4 covers the limitations on nonjudicial punishment after exercise of jurisdiction by civilian authorities.

**3-12. Statute of limitations.**

See KCMJ, Article 43(c), K.S.A. 48-2708 and paragraph (1)(f)(4), Part IV, Chapter XV, KMCM, regarding the statute of limitations applicable to nonjudicial punishment.

**S E C T I O N   I I I****PROCEDURE (para 4, Part IV, Chapter XV, KMCM).****3-13. General.**

The authority to impose nonjudicial punishment charges a commander with the responsibility of exercising the commander's authority in an absolutely fair and judicious manner. (See also para (1)(d), Part IV, Chapter XV, KMCM.)

**3-14. Preliminary Inquiry.**

(a) The commander of the alleged offender must ensure that the matter is promptly and adequately investigated. The investigation should provide the commander with sufficient information to make an appropriate disposition of the incident. The investigation should cover-

- (1) Whether an offense was committed.
- (2) Whether the soldier was involved.
- (3) The character and military record of the soldier.

(b) Usually the preliminary investigation is informal and consists of interviews with witnesses and/or review of police or other informative reports. If, after the preliminary inquiry, the commander determines, based on the evidence currently available, that the soldier has probably committed an offense and that a nonjudicial punishment procedure is appropriate, the commander should (unless the case is to be referred to a superior commander (para 3-5)) take action as set forth in this section.

**3-15. Commander's guide for notification and imposition.**

In all cases other than summarized proceedings, commanders should use appendix B of this regulation as a guide in conducting the proceedings.

**3-16. Summarized proceedings.****(a) Preliminary inquiry.**

(1) A commander, after a preliminary inquiry into an alleged offense by an enlisted soldier may use summarized proceedings if it is determined that should punishment be found to be appropriate, it should not exceed-

- (A) Extra duties for 14 days.
- (B) Restriction for 14 days.
- (C) Oral reprimand or admonition.
- (D) Any combination of the above.

(2) DA Form 2627-1 (Summarized Record of Proceedings Under Article 15, UCMJ) will be used to record the proceedings. An illustrated example of a completed DA Form 2627-1 is shown at figure 3-1, AR 27-10. The rules and limitations concerning punishments in section IV and provisions regarding clemency in section V are applicable.

**(b) Notification and explanation of rights.** If an imposing commander determines that summarized proceedings are appropriate, the designated subordinate officer or noncommissioned officer (NCO) (para 3-18), or the commander personally will notify the soldier of the following:

- (1) The imposing commander's intent to initiate proceedings under Article 15, UCMJ.
- (2) The fact that the imposing commander intends to use summarized proceedings and the maximum punishments imposable under these proceedings.
- (3) The right to remain silent.
- (4) Offenses that the soldier has allegedly committed and the Article(s) of the UCMJ violated.
- (5) The right to demand trial (see para (4)(a)(5), Part IV, Chapter XV, KMCM).
- (6) The right to confront witnesses, examine the evidence, and submit matters in defense, extenuation, and/or mitigation.
- (7) The right to appeal.

**(c) Decision period.** The soldier will be given the opportunity to-

- (1) Accept the Article 15, or,

(2) Request a reasonable time, normally 24 hours or until the next day the soldier is on duty, whichever is longer, to decide whether to demand trial by court-martial and to gather matters in defense, extenuation, and/or mitigation. During this decision period, the soldier may consult with qualified counsel, appointed by TJAG.

(d) Hearing. Unless the soldier demands trial by court-martial within the decision period, the imposing commander may proceed with the hearing (see para 3-18(g)(1)). The hearing will consist of the following:

- (1) Consideration of evidence, written or oral, against the soldier.
- (2) Examination of available evidence by the soldier.
- (3) Presentation by the soldier of testimony of available witnesses or other matters, in defense, extenuation, and/or mitigation.
- (4) Determination of guilt or innocence by the imposing commander.
- (5) Imposition of punishment or termination of the proceedings.
- (6) Explanation of right to appeal.

(e) Appeal. The appeal and the decision on appeal will be recorded in block 5, DA Form 2627-1. This will be done according to the procedures set forth in paragraph 3-32. The soldier will be given a reasonable time (normally no more than 5 calendar days) within which to submit an appeal (see para 3-29). The soldier may, pending submission and decision on the appeal, be required to undergo the punishment imposed, but once submitted, such appeal will be promptly decided. If the appeal is not decided within 3 calendar days excluding the day of submission, and if the soldier so requests, further performance of any punishments involving deprivation of liberty will be delayed pending the decision on the appeal (see Section IV)

(f) Recording and filing of DA Form 2627-1. The proceedings will be legibly summarized on DA Form 2627-1, ordinarily with handwritten entries. These forms will be maintained locally in nonjudicial punishment files (file number 27-10f.) They will be destroyed at the end of 2 years from the date of imposition of punishment or on the soldier's transfer from the unit, whichever occurs first. A copy will be provided to the soldier on a request submitted during the filing period.

### **3-17. Formal proceedings (para 4, Part V, MCM).**

A commander who, after a preliminary inquiry, determines-

- (a) That the soldier alleged to have committed an offense is an officer, or
- (b) That punishment, if it should prove to be appropriate, might exceed extra duties for 14 days, restriction for 14 days, oral reprimand on admonition, or any combination thereof, will proceed as set forth below. All entries will be recorded on DA Form 2627 (Record of Proceedings under Article 15, UCMJ). (An illustrated example of a completed DA Form 2627 is shown at figure 3-2, AR 27-10.)

**3-18. Notification and explanation of rights.**

(a) General. The imposing commander will ensure that the soldier is notified of the commander's intention to dispose of the matter under the provisions of Article 15, KCMJ. The soldier will also be notified of the maximum punishment which the commander could impose under Article 15, KCMJ. The soldier will be provided a copy of DA Form 2627 with items 1 and 2 completed, including the date and signature of the imposing commander. The imposing commander may authorize a commissioned officer, warrant officer, or NCO (E7 or above), provided such person is senior to the soldier being notified, to deliver the DA Form 2627 and inform the soldier of the soldier's rights. The NCO performing the notification should ordinarily be the unit first sergeant or the senior NCO of the command concerned. In such cases, the notice should follow appendix B as modified. The soldier should be provided with a copy of DA Form 2627 and supporting documents and statements, for use during the proceedings. The soldier will return the copy to the commander for annotation. It will be given to the soldier for retention, when all proceedings are completed.

(b) Right to remain silent. The soldier will be informed that-

(1) The soldier is not required to make any statement regarding the offense or offenses of which the soldier is suspected, and

(2) Any statement made may be used against the soldier in the Article 15 proceedings or in any other proceedings, including a trial by court-martial.

(c) Right to counsel. The soldier will be informed of the right to consult with counsel and the location of counsel. For the purpose of this chapter, counsel means a judge advocate (JA) of the Kansas National Guard.

(d) Right to demand trial. The member will be advised that the member has a right to demand trial. The demand for trial may be made at any time prior to imposition of punishment. The soldier will be told that if the soldier demands trial, trial could be by SCM, SPCM, or GCM. The soldier will also be told that the soldier may object to trial by summary court-martial (SCM) and that at special court-martial (SPCM) or general court-martial (GCM) the soldier would be entitled to be represented by qualified military counsel, or by civilian counsel obtained at no government expense.

(e) Other rights. The soldier will be informed of the right to-

(1) Fully present the soldier's case in the presence, except in rare circumstances, of the imposing commander (para 3-18(g)).

(2) Call witnesses. (See para (4)(c)(1)F, Part IV, Chapter XV, KMCM).

(3) Present evidence.

(4) Request that the soldier be accompanied by a spokesperson.

(5) Request an open hearing (para 3-18(g)).

(6) Examine available evidence.

(f) Decision period.

(1) If the soldier requests a decision period, the soldier will be given a reasonable time to consult with counsel, including time off from duty, if necessary, to decide whether or not to demand trial. The decision period will not begin until the soldier has received actual notice and explanation of rights under Article 15 and has been provided a copy of DA Form 2627 with items 1 and 2 completed (see para 3-18(a)). The soldier will be advised that if the soldier demands a trial, block 3a of DA Form 2627 must be initialed and item 3 must be signed and dated within the decision period, otherwise, the commander will proceed under Article 15. The decision period should be determined after considering factors such as the complexity of the case and the availability of counsel. Normally, 48 hours or, if the decision period begins during a regular training assembly, the next regularly scheduled training assembly, is a reasonable decision period. If the soldier does not request a delay, the commander may continue with the proceedings immediately. If the soldier requests a delay, the soldier may, but only for good reason, be allowed an additional period to be determined by the imposing commander to decide whether to demand trial. If a new imposing commander takes command after a soldier has been notified of the original imposing commander's intent to impose punishment, the soldier will be notified of the change. The soldier shall again be given a reasonable decision period in which to consult with counsel. In either case, item 11, DA Form 2627, will contain the following: "Para. 3-18J(1) complied with."

(2) Prior to deciding whether to demand trial, the soldier is not entitled to be informed of the type or amount of punishment the soldier will receive if nonjudicial punishment ultimately is imposed. The soldier will be informed of the maximum punishment that may be imposed under Article 15 and, on the soldier's request, of the maximum punishment that can be adjudged by court-martial on conviction of the offense(s) involved.

(3) If the soldier demands trial by court-martial on any offense, no further action will be taken to impose nonjudicial punishment for that offense unless the soldier's demand is voluntarily withdrawn. Whether court-martial charges will be preferred against the soldier for the remaining offense(s) and the level of court-martial selected will be resolved by the appropriate commander. A soldier's demand for trial by court-martial will not bar disposition of minor offenses by nonpunitive measures by the appropriate commander.

(4) If a demand for trial by court-martial is not made prior to expiration of the decision period, including any extension of time, the imposing commander may continue the proceedings. The imposing commander also may continue the proceedings if the Soldier, even though demanding trial, refuses to complete or sign item 3, DA Form 2627, within the prescribed time. In such instances the soldier will be informed that failure to complete and sign item 3 may be treated as a voluntary withdrawal of any oral demand for trial. If the soldier persists in the soldier's refusal and punishment is imposed, in addition to recording the punishment, the following entry will be made in item 4, DA Form 2627: "Advised of (his) (her) rights, the soldier (did not demand trial during the decision period) (refused to (complete) (sign) item 3)."

(g) Hearing.

(1) In the presence of the commander. The soldier will be allowed to personally present matters in defense, extenuation, or mitigation in the presence of the imposing commander, except when appearance is prevented by the unavailability of the commander or by extraordinary circumstances (e.g., the soldier is stationed at a geographic location remote from that of the imposing commander and cannot be readily brought before the commander). When personal appearance is requested, but is not granted, the imposing commander will appoint a

commissioned officer to conduct the hearing and make a written summary and recommendations. The soldier shall be entitled to appear before the officer designated to conduct the hearing. (See para 4(c)(1), Part IV, Chapter XV, KMCM.)

(2) Open hearing. Article 15 proceedings are not adversary in nature. Ordinarily, hearings are open. However, a soldier may request an open or closed hearing. In all cases, the imposing commander will, after considering all the facts and circumstances, determine whether the hearing will be open or closed. (See para 4(c)(1)(G), Part IV, Chapter XV, KMCM.) An open hearing is a hearing open to the public but does not require the commander to hold the proceeding in a location different from that in which the commander conducts normal business; i.e., the commander's office.

(h) Spokesperson. The person who may accompany the soldier to the Article 15 proceeding and who speaks on the soldier's behalf need not be a lawyer. An offender has no right to legal counsel at the nonjudicial proceedings. The soldier may retain civilian counsel to act as the soldier's spokesperson at no cost to the Government. However, the commander need not grant a delay for the appearance of any spokesperson, to include civilian counsel if so retained. No travel fees nor any other unusual costs may be incurred at Government expense for the presence of the spokesperson. The spokesperson's presence is voluntary. Because the proceedings are not adversary in nature, neither the soldier nor spokesperson (including any attorney present on behalf of the soldier) may examine or cross-examine witnesses, unless permitted by the imposing commander. The soldier or spokesperson may, however, indicate to the imposing commander relevant issues or questions they wish to explore or ask.

(i) Witnesses. The soldier's request for witnesses in defense, extenuation, or mitigation shall be restricted to those witnesses reasonably available as determined by the imposing commander. To determine whether a witness is reasonably available, the imposing commander will consider the fact that neither witness nor transportation fees are authorized. Reasonably available witnesses will ordinarily include only personnel at the installation concerned and others whose attendance will not unnecessarily delay the proceedings.

(j) Evidence. The imposing commander is not bound by the formal rules of evidence before courts-martial and may consider any matter, including unsworn statements, the commander reasonably believes to be relevant to the offense. The imposing commander will not impose punishment unless convinced beyond a reasonable doubt that the soldier committed the offense.

(k) Action terminating proceedings. If, after evaluation of all pertinent matters, the imposing commander determines that nonjudicial punishment is not warranted, the soldier will be notified that the proceedings have been terminated and all copies of DA Form 2627 will be destroyed.

(l) Imposition of punishment. If the imposing commander decides to impose punishment, ordinarily the commander will announce the punishment to the soldier. The commander may, if the commander desires to do so, explain to the soldier why a particular punishment was imposed.

(m) Right to appeal. The appellate rights and procedures which are available to the soldier will be explained.

## SECTION IV

### PUNISHMENT (para 5, Part IV, Chapter XV, KMCM).

#### 3-19. Rules and limitations.

(a) Whether to impose punishment and the nature of the punishment are the sole decisions of the imposing commander. However, commanders are encouraged to consult with their NCOs on the appropriate type, duration, and limits of punishment to be imposed. Additionally, as NCOs are often in the best position to observe a soldier undergoing punishment and evaluate daily performance and attitude, their views on clemency should be given careful consideration.

(b) Pursuant to the authority of The Adjutant General as set forth in paragraph 5(a), Part IV, Chapter XV, KMCM, the following additional rules and limitations concerning the kinds and amounts of punishment authorized under Article 15, KCMJ, are prescribed in table 3-1:

(1) Restriction. Restriction may be imposed with or without suspension from duties. Normally, the limits of the restriction should be announced at the time punishment is imposed. However, the imposing commander, a successor-in-command, and any superior authority may change the specified limits of restriction; e.g., if a soldier is transferred or assigned duties at another location after imposition and before the term of restriction is completed. The limits of restriction, as changed, will be generally no more restrictive (unless required by military exigencies) than the limits originally imposed.

(2) Arrest in quarters. A commissioned or warrant officer undergoing this punishment may be required to perform any military duty not involving the exercise of command. During field exercises, an officer's quarters are those normally occupied by officers, of a similar grade and duty position. If a commissioned or warrant officer in arrest in quarters is placed on duty involving the exercise of command by an authority having knowledge of the status of arrest in quarters, that status is thereby terminated.

(3) Extra duties. Extra duties may be required to be performed at anytime and, within the duration of the punishment, for any length of time. Extra duties may include the performance of fatigue duty or of any other military duty. No extra duty may be imposed that-

(A) Constitutes cruel or unusual punishment or a punishment not sanctioned by the customs of the service, e.g., using the offender as a personal servant;

(B) Is a duty normally intended as an honor, such as assignment to a guard of honor;

(C) Is required to be performed in a ridiculous or unnecessarily degrading manner; e.g., an order to clean a barracks floor with a toothbrush;

(D) Constitutes a safety or health hazard to the offender; or

(E) Would demean the soldier's position as a NCO or specialist (AR 600-20).

(4) Reduction in grade.

(A) Promotion authority. The grade from which the member is reduced must be within the promotion authority of the imposing commander or of any officer subordinate to the imposing commander. For the purposes of this regulation, the imposing commander or any subordinate commander has “promotion authority” within the meaning of Article 15(b) if the imposing commander has the general authority to appoint to the grade from which reduced or to any higher grade (AR 600-200).

(B) Lateral appointment or reduction of NCO to specialist and a specialist to NCO. Rescinded.

(C) Date of rank. When a person is reduced in grade as a result of an unsuspended reduction, the date of rank in the grade to which reduced is the date the punishment of reduction was imposed. If the reduction is suspended either on or after the time the punishment was imposed, or is set aside or mitigated to forfeiture, the date of rank in the grade held before the punishment was imposed remains unchanged. If a suspension of the reduction is vacated, the date of rank in the grade to which reduced as a result of the action is the date the punishment was originally imposed, regardless of the date the punishment was suspended or vacated.

(D) Entitlement to pay. When a soldier is restored to a higher pay grade because of a suspension or when a reduction is mitigated to a forfeiture, entitlement to pay at the higher grade is effective on the date of the suspension or mitigation. This is true even though an earlier date of rank is assigned. If, however, a reduction is set aside and all rights, privileges, and property are restored, the soldier concerned will be entitled to pay as though the reduction had never been imposed.

(E) Void reduction. Any portion of a reduction under Article 15 beyond the imposing commander’s authority to reduce is void and must be set aside. Where a commander reduces a service member below a grade to which the commander is authorized to reduce and if the circumstances of the case indicate that the commander was authorized and intended to reduce the soldier at least one grade, a one-grade reduction may be approved. Also, if a reduction is to a lower specialist grade when reduction should have been to a lower NCO grade (or vice versa), administrative action will be taken to place the offender in the proper rank for the MOS held in the reduced pay grade. All rights, privileges, and property, including pay and allowances, of which a soldier was deprived by a reduction that has been set aside must be restored.

(F) Removal from standing promotion lists. (See AR 600-200.)

(5) Forfeiture of pay.

(A) Format. Forfeiture of pay should be entered on DA Form 2627 per the following example (para 5(c)(8), Part IV, Chapter XV, KMCM)-

Example: “Forfeiture of \$.....”

(B) Limitations. The maximum forfeiture of pay to which a soldier is subject during a given month, because of one or more actions under Article 15, is one-half of the soldier’s pay per month. Article 15 forfeitures shall not (in conjunction with partial forfeitures adjudged by court-martial) deprive a person of more than two-thirds of the person’s pay per month. (See DOD Military Pay and Allowances Entitlements Manual.)

(C) Retired soldiers. Forfeitures imposed under Article 15 may be applied against a soldier's retired pay.

(6) Combination and apportionment. With the following exception, punishment authorized under Article 15(b) may be combined: No two or more punishments involving deprivation of liberty may be combined in the same nonjudicial punishment proceedings to run either consecutively or concurrently, except that restriction and extra duty may be combined in any manner to run for a period not in excess of the maximum duration imposable for extra duty by the imposing commander. Once commenced, deprivation of liberty punishments will run continuously, except where temporarily interrupted due to the fault of the soldier, or the soldier is physically incapacitated, or an appeal is not acted on as prescribed in paragraph 3-21(b). (See para 3-21(c) regarding the circumstances when deprivation of liberty punishments imposed in separate non-judicial punishment proceedings may run consecutively.)

### **3-20. Effect on appointable status.**

See AR 600-200 and AR 600-31.

### **3-21. Effective date and execution of punishments.**

(a) General. The date of imposition of nonjudicial punishment is the date items 4 through 6, DA Form 2627" or items 1 through 3, DA Form 2627-1, as appropriate, are signed by the imposing commander. This action normally will be accomplished on the day punishment is imposed.

(b) Unsuspended punishments. Unsuspended punishments of reduction and forfeiture of pay take effect on the date imposed. Other unsuspended punishments take effect on the date they are imposed, unless the imposing commander prescribes otherwise. In those cases where the execution of the punishment legitimately must be delayed (e.g., the soldier is hospitalized, placed on quarters, authorized emergency leave, on brief period of TDY or a brief field problem, or the punishment must be served during a later drill period) the execution of the should begin immediately thereafter.

Except as provided in paragraph 3-21(c), the delay in execution of should not exceed 60 days. Once the soldier has submitted an appeal, including all pertinent allied documents, the appeal normally should be decided within 5 calendar days (3 days for summarized proceedings) excluding the submission date, or by the next regular drill of the member whichever is later. If the appeal is not decided within this period, and if the soldier so requests, the performance of the punishments involving deprivation of liberty will be interrupted pending decision on the appeal.

(c) Additional punishment. If a soldier to be punished is currently undergoing punishment or deprivation of liberty under a prior Article 15 or court-martial, an imposing commander may prescribe additional punishment involving deprivation of liberty after completion of the earlier punishment.

(d) Vacated suspended reduction. A suspended reduction, later vacated, is effective on the date the vacation is directed. (See para 3-19(b)(6)(c) for determination of date of rank.)

(e) Execution of punishment. Any commanding officer of the person to be punished may, subject to paragraph 3-19 and any other limitations imposed by a superior authority, order the punishment to be executed in such a manner and under such supervision as the commander may direct.

**3-22. Announcement of punishment.**

The punishment may be announced at the next unit formation after punishment is imposed or, if appealed, after the decision on the appeal. It also may be posted of the unit bulletin board. The purpose of announcing the results of punishments is to preclude perceptions of unfairness of punishment and to deter similar conduct by other service members. An inconsistent or arbitrary policy should be avoided regarding the announcement of punishment that might result in the appearance of vindictiveness or favoritism. In deciding whether to announce punishment of soldiers in the grade of E5 or above, the following should be considered:

- (a) The nature of the offense.
- (b) The individual's military record and duty position.
- (c) The deterrent effect.
- (d) The impact on unit morale or mission.
- (e) The impact on the victim.
- (f) The impact on the leadership effectiveness of the individual concerned.

**SECTION V**

**SUSPENSION, VACATION, MITIGATION, REMISSION, AND, SETTING ASIDE  
(para 6, Part IV, Chapter XV, KMCM).**

**3-23. Clemency.**

- (a) General. The imposing commander, a successor-in-command, or the next superior authority may, in accordance with the time prescribed in the KMCM-
  - (1) Remit or mitigate any part or amount of the unexecuted portion of the punishment imposed.
  - (2) Mitigate reduction in grade, whether executed or unexecuted, to forfeiture of pay.
  - (3) At any time, suspend probationally any part or amount of the unexecuted portion of the punishment imposed.
  - (4) Suspend probationally a reduction in grade or forfeiture, whether or not executed. An uncollected forfeiture of pay shall be considered unexecuted.
- (b) Meaning of successor-in-command. As used in paragraph 6(a), Part IV, MCM, a successor-in-command is the officer who has authority to impose the same kind and amount of punishment on a soldier concerned that was initially imposed or was the result of a modification and who-
  - (1) Commands the unit to which the punished soldier is currently assigned or attached. (See para 3-8).

(2) Is the commander succeeding to the command occupied by the imposing commander, provided the soldier still is of that command, or

(3) Is the successor to the delegate who imposed the punishment, provided the same authority has been delegated under paragraph 3-7(b) to that successor and the soldier is still of that command.

(c) Recording of action. Any action of suspension, mitigation, remission, or setting aside (para 3-28) taken by an authority will be recorded according to notes 11 and 12, DA Form 2627, notes 9 and 10, DA Form 2627-1, or DA Form 2627-2 (Record of Supplementary Action Under Article 15, UCMJ) (para 3-38(b)). An illustrated example of a completed DA Form 2627-2 is shown at figure 3-3.

### **3-24. Suspension.**

Ordinarily, punishment is suspended to grant a probational period during which a soldier may show that the soldier deserves a remission of the remaining suspended punishment. An executed punishment of reduction or forfeiture may be suspended only within a period of 4 months after the date imposed. Suspension of punishment may not be for a period longer than 6 months from the suspension date. Further misconduct by the soldier, within the period of the suspension, may be grounds for vacation of the suspended portion of the punishment (para 3-25). Unless otherwise stated, an action suspending a punishment automatically includes a condition that the soldier not violate any punitive article of the KCMJ.

### **3-25. Vacation.**

(a) A commander may vacate any suspended punishment, (para 6a (5), Part IV, MCM), provided the punishment is of the type and amount the commander could impose and where the commander has determined that the soldier has committed misconduct (amounting to an offense under the KCMJ) during the suspension period. The commander is not bound by the formal rules of evidence before courts-martial and may consider any matter, including unsworn statements, the commander reasonably believes to be relevant to the misconduct. There is no appeal from a decision to vacate a suspension. Unless the vacation is prior to the expiration of the stated period of suspension, the suspended punishment is automatically remitted without further action. The death, discharge, or separation from service of the soldier punished prior to the expiration of the suspension automatically remits the suspended punishment. Misconduct resulting in vacation of a suspended punishment may also be the basis for the imposition of another Article 15.

(b) Commanders will observe the following procedures in determining whether to vacate suspended punishments:

(1) The soldier should, unless impracticable, be given an opportunity to appear before the officer authorized to vacate the suspension to rebut the information on which the proposed vacation is based. If appearance is impracticable the soldier should nevertheless ordinarily be given notice of the proposed vacation and the opportunity to respond.

(2) If the soldier is absent without leave at the time the commander proposes vacation, and remains so; the commander, after 30 days from the date the soldier departed AWOL, failed to appear for a regularly scheduled drill, or failed to report to perform duty pursuant to lawful

orders; or on the last day of the suspension period, whichever is earlier, may, at the commander's discretion, vacate the suspension without providing notice or any opportunity to respond.

(3) The following will be recorded according to notes 11 and 12, DA Form 2627, notes 9 and 10, DA Form 2627-1, or DA Form 2627-2 (para 3-38(b))-

(A) Action vacating a suspension, to include the basis for vacation.

(B) Whether or not the soldier appeared or was otherwise provided an opportunity to respond.

(C) An explanation, if the soldier did not appear or was not provided an opportunity to respond.

(D) Failure to provide notification and an opportunity to appear or to otherwise respond to the basis of a proposed vacation may result in the record of punishment being inadmissible in a subsequent court-martial, but will not, by itself render a vacation action void.

### **3-26. Mitigation.**

#### **(a) General.**

(1) Mitigation is a reduction in either the quantity or quality of a punishment; e.g., a punishment of correctional custody for 20 days reduced to 10 days or to restriction for 20 days. The general nature of the punishment remains the same. The first action lessens the quantity and the second lessens the quality, with both mitigated punishments remaining of the same general nature as correctional custody; i.e., deprivation of liberty. However, a mitigation of 10 days correctional custody to 14 days restriction would not be permitted because the quantity has been increased.

(2) A forfeiture of pay may be mitigated to a lesser forfeiture of pay. A reduction may be mitigated to forfeiture of pay (but see para 3-19(b)(7)(b)). When mitigating reduction to forfeiture of pay, the amount of the forfeiture imposed may not be greater than the amount that could have been imposed initially, based on the restored grade, by the officer who imposed the mitigated punishment.

#### **(b) Appropriateness. Mitigation is appropriate when-**

(1) The recipient has, by the recipient's subsequent good conduct, merited a reduction in the severity of the punishment.

(2) The punishment imposed was disproportionate to the offense or the offender.

#### **(c) Limitation on mitigation.**

(1) With the exception of reduction in grade, the power to mitigate exists only with respect to a punishment or portion thereof which is unexecuted. A reduction in grade may be mitigated to forfeiture of pay even though it has been executed. A reduction of more than one grade may not be mitigated to an intermediate grade. When punishments in the nature of deprivation of liberty are mitigated to lesser punishments of this kind, the lesser punishment may not run for a period greater than the remainder of the period for which the punishment mitigated was initially imposed.

(2) Although a suspended punishment may be mitigated to a punishment of a lesser quantity or quality (which is also suspended for a period not greater than the remainder of the period for which the punishment mitigated was suspended), it may not, unless the suspension is vacated, be mitigated to an unsuspended punishment. (See para 3-28 for the time period within which reduction ordinarily may be mitigated, if appropriate, to a forfeiture of pay.)

### **3-27. Remission.**

This is an action whereby any portion of the unexecuted punishment is canceled. Remission is appropriate under the same circumstances as mitigation. An unsuspended reduction is executed on imposition and thus cannot be remitted, but may be mitigated (see para 3-26) or set aside (see para 3-28). The death, discharge, or separation from the service of the soldier punished remits any unexecuted punishment. A soldier punished under Article 15 will not be held beyond expiration of the soldier's term of service (ETS) to complete any unexecuted punishment.

### **3-28. Setting aside and restoration.**

(a) This is an action whereby the punishment or any part or amount, whether executed or unexecuted, is set aside and any rights, privileges, or property affected by the portion of the punishment set aside are restored. Nonjudicial punishment is "wholly set aside" when the commander who imposed the punishment, a successor-in-command, or a superior authority sets aside all punishment imposed upon an individual under Article 15. The basis for any set aside action is a determination that, under all the circumstances of the case, the punishment has resulted in a clear injustice. "Clear injustice" means that there exists an unwaived legal or factual error which clearly and affirmatively injured the substantial rights of the soldier. An example of "clear injustice" would be the discovery of new evidence unquestionably exculpating the soldier. "Clear injustice" does not include the fact that the soldier's performance of service has been exemplary subsequent to the punishment or that the punishment may have a future adverse effect on the retention or promotion potential of the soldier.

(b) Normally, the soldier's uncorroborated sworn statement will not constitute a basis to support the setting aside of punishment.

(c) In cases where administrative error results in incorrect entries on DA Form 2627 or DA Form 2627-1 the appropriate remedy generally is an administrative correction of the form and not a setting aside of the punishment.

(d) The power to set aside an executed punishment and to mitigate a reduction in grade to a forfeiture of pay, absent unusual circumstances, will be exercised only within 4 months after the punishment has been executed. When a commander sets aside any portion of the punishment, the commander will record the basis for this action according to notes 11 and 12, DA Form 2627, notes 9 and 10, DA Form 2627-1, or DA Form 2627-2 (para 3-38(b)). When a commander sets aside any portion of the punishment after 4 months from the date punishment has been executed, a detailed addendum of the unusual circumstances found to exist will be attached to the form containing the set aside action.

## SECTION VI

### APPEALS (para 7, Part IV, Chapter XV, KMCM).

#### 3-29. General.

(a) Only one appeal is permissible under Article 15 proceedings. Provisions for other administrative relief measures are contained in paragraph 3-43. An appeal not made within a reasonable time may be rejected as untimely by the superior authority. A reasonable time will vary according to the situation; however, an appeal (including all documentary matters) submitted later than the next regularly scheduled drill or, if the member is on continuous duty for at least 7 days following the imposition of punishment, later than 5 calendar days after the punishment is imposed, will be presumed to be untimely, unless the superior commander, in the superior commander's sound discretion for good cause shown, determines it to be timely.

(b) If, at the time of imposition of punishment, the soldier indicates a desire not to appeal, the superior authority may reject a subsequent election to appeal, even though it is made within period specified in "a." Although a suspended punishment may be appealed, no appeal is authorized from the vacation of a suspended punishment.

#### 3-30. Who may act on an appeal.

(a) The authority next superior to the commanding officer will act on an appeal if the soldier punished is still of the command of that officer at the time of appeal. If the commander has acted under a delegation of authority, the appeal will be acted on by the authority next superior to the delegating officer. If, at the time of appeal, the soldier is no longer of the imposing commander's command, the authority next superior to the soldier's present commanding officer (who can impose the same kind and amount of punishment as that imposed or resulting from subsequent modifications) will act on the appeal.

(b) The authority "next superior" to an imposing commander is normally the next superior in the chain of command, or such other authority as may be designated by competent authority as being next superior for the purposes of Article 15. A superior authority who exercises GCM jurisdiction, or is a general officer in command, may delegate those powers the superior authority has as superior authority under Article 15, KCMJ, to a commissioned officer of the superior authority's command subject to the limitations in paragraph 3-7(b). Regardless of the rank of the imposing commander, The Judge Advocate General is delegated the authority next superior for acting on appeals when no intermediate superior authority is reasonably available. Such appeals will be forwarded to The Judge Advocate General, State Area Command, in Topeka.

#### 3-31. Procedure for submitting an appeal.

All appeals will be made on DA Form 2627 or DA Form 2627-1 and forwarded through the imposing commander or successor-in-command, when applicable, to the superior authority. The superior authority will act on the appeal unless otherwise directed by competent authority. The soldier may attach documents to the appeal for consideration. A soldier is not required to state reasons for the soldier's appeal; however, the soldier may do so. For example, the person may state the following in the appeal:

- (a) Based on the evidence the soldier does not believe the soldier is guilty.
- (b) The punishment imposed is excessive, or that a certain punishment should be mitigated or suspended.

### **3-32. Action by the Imposing Commander or the Successor-In-Command.**

The imposing commander or the successor-in-command may take any action on the appeal with respect to the punishment that the superior authority could take (para 6, Part IV, Chapter XV, KMCM, and para 3-33 of this regulation). If the imposing commander or a successor-in-command suspends, mitigates, remits, or sets aside any part of the punishment, this action will be recorded according to notes 11 and 12, DA Form 2627, or notes 9 and 10, DA Form 2627-1. The appellant will be advised and asked to state whether, in view of this action, the appellant wishes to withdraw the appeal. Unless the appeal is voluntarily withdrawn, the appeal will be forwarded to the appropriate superior authority. An officer forwarding the appeal may attach any matter in rebuttal of assertions made by the soldier. When the soldier desires to appeal the imposing commander, or the successor-in-command, will make available to the soldier reasonable assistance in preparing the appeal and will promptly forward the appeal to the appropriate superior authority.

### **3-33. Action by the Superior Authority.**

Action by the superior authority on appeal will be entered in item 9, DA Form 2627, or item 5, DA Form 2627-1. A superior authority will act on the appeal expeditiously. Once the soldier has submitted an appeal, including all pertinent allied documents, the appeal normally should be decided with 5 calendar days if the appellate authority is on duty during such period. Otherwise, the appeal should be decided by the end of the appellant's next regularly scheduled drill. The superior authority may conduct an independent inquiry into the case, if necessary or desirable. The superior authority must refer an appeal from certain punishments, whether or not suspended, to a JA for consideration and advice before taking action (See note 9, DA Form 2627). The superior authority may refer an appeal in any case. In acting on an appeal, the superior authority may exercise the same powers with respect to the punishment imposed as may be exercised by the imposing commander or the imposing commander's successor-in-command. However, the superior authority cannot change a filing determination. A timely appeal does not terminate merely because a soldier is discharged from the service. It will be processed to completion by the superior authority.

### **3-34. Action by a Judge Advocate.**

- (a) When an appeal is referred to a JA, the superior authority will be advised either orally or in writing of the JA's opinion on-
  - (1) The appropriateness of the punishment.
  - (2) Whether the proceedings were conducted under law and regulations.
- (b) If the advice is given orally that fact and the name of the JA who rendered the advice will be recorded in item 8, DA Form 2627.

(c) The JA is not limited to an examination of written matters of the record of proceedings and may make any inquiries that are necessary.

### **3-35. Action by superior authority regardless of appeal.**

Any superior authority may exercise the same power except those of filing determinations (para 3-37), as may be exercised by the imposing commander, or the imposing commander's successor-in-command, whether or not an appeal has been made from the punishment (para 7(f)(1), Part IV, Chapter XV, KMCM). "Any superior authority" has the same meaning as that given to the term "authority next superior" in paragraph 3-30, except that it also includes any authority superior to that authority. A soldier has no right to petition for relief under this paragraph and any petition so made may be summarily denied by the superior authority to whom it is addressed.

## **SECTION VII**

### **RECORDS OF PUNISHMENT, DA Form 2627 (para 8, Part IV, Chapter XV, KMCM).**

### **3-36. Records of punishment.**

All Article 15 actions, including notification, acknowledgement, imposition, filing determinations, appeal, action on appeal, or any other action taken prior to action being taken on an appeal, except summarized proceedings (sec III), will be recorded on DA Form 2627. The DA Form 2627 is a record of completed actions and either the DA Form 2627 or a duplicate as defined in M.R.E. 1001(4) may be considered for use at courts-martial or administrative proceedings independently of any written statements or other documentary evidence considered by an imposing commander, a successor, or a superior authority.

### **3-37. Distribution and filing of DA Form 2627 and allied documents.**

(a) General. DA Form 2627 will be prepared in an original and five copies. All written statements and other documentary evidence considered by the imposing commander or the next superior authority acting on an appeal will be transmitted with the original (see g below). Copies of DA Form 2627 will be transmitted through the Military Personnel Division (MPD) or the Personnel Service Company (PSC) serving the military Personnel Records Jacket (MPRJ) to the Finance and Accounting Office maintaining the soldier's pay account according to DA Pam 600-8, Chapter 8. DA Form 268 (Report for Suspension of Favorable Personnel Actions) will be submitted per AR 600-31. Standard instructions for distribution and filing of forms for commissioned officers, warrant officers, and enlisted soldiers are set out below.

(b) Original of DA Form 2627

(1) Place of filing. For soldiers E4 and below (prior to punishment) the original will be filed locally in unit nonjudicial punishment files (file number 27 10f). Such locally filed originals will be destroyed at the end of 2 years from the date of imposition of punishment or on the soldier's

transfer to out of the Kansas National Guard, whichever occurs first. For these soldiers, the imposing commander should annotate item 5 of DA Form 2627 as "Not Applicable (N/A)."

(1.1) For all other soldiers, the original will be sent to the appropriate custodian listed in (2) below for filing in the OMPF. The decision to file the original DA Form 2627 on the performance fiche or the restricted fiche in the OMPF will be determined by the imposing commander at the time punishment is imposed. The filing decision of the imposing commander is final subject only to review when a previous DA Form 2627 that has not been wholly set aside is filed in the restricted fiche, (See para 3-6(b)) and the imposing commander's filing decision will be indicated in item 5, DA Form 2627. A superior authority will not limit a subordinate commander's filing determination authority. (See para. 3-7(c) regarding the withholding authority of a superior authority in general.) When the imposing commander makes a decision regarding the filing, the imposing commander should consider the following:

(A) The performance fiche is that portion of the OMPF that is routinely used by career managers and selection boards for the purpose of assignment, promotion, and schooling selection.

(B) The restricted fiche is that portion of the OMPF that contains information not normally viewed by career managers or selection boards except as provided in AR 640-10, or specified in the Secretary of the Army's or The Adjutant General's written instructions to the selection board.

(C) Records directed for filing in the restricted fiche will be redirected to the performance fiche in accordance with paragraph 3-6 if the soldier has other records of nonjudicial punishment reflecting misconduct in the grade E5 or higher that have not been wholly set aside recorded in the restricted fiche. (See para 3-6).

(2) Mailing addresses. The original DA Form 2627 will be transmitted by the MPD/PSC to one of the following appropriate addresses-

(A) For ARNG commissioned and warrant officers: Chief, Army National Guard Bureau, ATTN: NGB-ARP-CA, 5600 Columbia Pike, Falls Church, VA 22041-5125.

(B) For ARNG enlisted soldiers: The Adjutant General of Kansas.

(b) Copy one of DA Form 2627.

(1) For those Article 15s directed for filing on the performance fiche of the OMPF, forward to the MPD/PSC for filing in the MPRJ. Copy one will be filed in the permanent section of the MPRJ unless the original Article 15 is transferred from the performance to the restricted fiche of the OMPF. In this case, copy one will be withdrawn from the MPRJ and destroyed.

(2) For those Article 15s directed for filing on the restricted fiche of the OMPF, this copy will be filed in the unit personnel files and destroyed at the expiration of 2 years from the date of punishment or on the soldier's transfer, whichever occurs first. (See also DA Pam 600-8, chap 9, for use and preparation of DA Form 4187 (Personnel Action)).

(3) For soldiers in grades E4 and below, copy one will be destroyed. (See DA Pam 600-8, chap 9, for use and preparation of DA Form 4187 (Personnel Action).)

## (d) Copies two and three of DA Form 2627.

- (1) Copies two and three for use as substantiating documents will be forwarded to the MPD/PSC that services the MPRJ if the punishment includes an unsuspended reduction and/or forfeiture of pay. If the punishment includes an unsuspended forfeiture of pay, the MILPO will forward copy three to the Finance and Accounting Office maintaining the soldier's pay account.
- (2) If all punishments affecting pay are suspended by the imposing commander, copies two and three will be retained by the unit where the punishment was imposed and destroyed on expiration of the period of suspension, unless forwarded according to paragraph 3-38. If the punishment, suspended or unsuspended, does not include reduction or forfeiture of pay, these copies will be destroyed.
- (3) If a punishment affecting pay is suspended by a superior authority acting on an appeal, copy two will be retained by the unit where the punishment was imposed. It will be destroyed when the period of suspension expires unless forwarded according to paragraph 3-38. If the punishment includes only a reduction, copy three will be forwarded to the MPD/PSC servicing the MPRJ. If the punishment includes a reduction and a forfeiture or only a forfeiture, copy three will be forwarded through the MPD/PSC servicing the MPRJ to the Finance and Accounting Office maintaining the soldier's pay account for use as a substantiating document according to AR 37-104-3.

## (e) Copy four of DA Form 2627.

- (1) General. Immediately after imposition of punishment, copy four will be annotated in the left hand corner of the title block (fig 3-2), sequentially in the order the Article 15 was given during the calendar year, i.e., 84-1, 84-2. If the unit maintains a Reconciliation Log (para 3-39), the appropriate information will be entered in it. Thereafter, copy four will be used according to (2) and (3) below;
- (2) Cases involving an appeal.
- (A) On the date punishment is imposed, if item 7 is not completed or blocks b and c are initialed, and item 7 is signed by the soldier and the punishment includes an unsuspended reduction or unsuspended forfeiture of pay, copy four of DA Form 2627 will be marked "APPEAL PENDING" in the right-hand margin.
- (B) Copy four will be sent through the MPDD/PSC servicing the MPRJ to the Finance and Accounting Office maintaining the soldier's pay account. On receipt, the local MPD/PSC and the Finance and Accounting Office maintaining the soldier's pay account will check that proper action has been taken on unsuspended reductions and forfeitures of pay. If the punishment includes a reduction, the MPD/PSC will see that the left-hand margin is annotated with the words, "ENTRY POSTED," the date of posting, and the initials of the posting clerk. If the punishment includes a forfeiture, finance will see that the left-hand margin is annotated with the words, "ENTRY POSTED," the date of posting, and the initials of the posting clerk.
- (C) On receipt of the copies of DA Form 2627 forwarded by the unit (para 3-37(d)), copy four will be returned directly to the imposing commander to verify that the entry has been posted by finance (para 3-39). Copy four will be destroyed after all periods of suspension of punishment affecting pay have expired.

(D) If punishments affecting pay are suspended, copy four will not be transmitted to the MPD/PSC and finance. It will be destroyed after all periods of suspended punishments affecting pay have expired.

(E) If there are no punishments affecting pay, copy four will not be transmitted to the MPD/PSC and finance and will be destroyed after the entry is made in the Reconciliation Log.

(3) Cases not involving an appeal.

(A) Where there is no appeal and the punishment imposed includes an unsuspended reduction or unsuspended forfeiture of pay, copy four will not be marked "APPEAL PENDING." If the punishment imposed includes only an unsuspended reduction, copy four will be forwarded with copies two and three to the MPD/PSC that will see that the left-hand margin is annotated with the words 'ENTRY POSTED,' the date of posting, and the initials of the posting clerk. If the punishment imposed includes an unsuspended reduction and unsuspended forfeiture or only an unsuspended forfeiture, copy four will be forwarded with copy three to the Finance and Accounting Office maintaining the soldier's pay account that will see that the left-hand margin is annotated with the words 'ENTRY POSTED,' the date of posting, and the initials of the posting clerk. Copy four will be returned directly to the imposing commander to verify the entry has been posted by the MPD/PSC and/or finance (para 3-39) and destroyed after all periods of suspension of punishment affecting pay have expired.

(B) If punishments affecting pay are suspended, copy four will not be transmitted to the MPD/PSC and/or finance and will be destroyed after all periods of suspended punishments affecting pay have expired.

(C) If there are no punishments affecting pay, copy four will not be transmitted to the MPD/PSC and/or finance and will be destroyed after the entry is made in the Reconciliation Log.

(f) Copy five of DA Form 2627. Give to soldier punished.

(g) Allied documents. Allied documents will be transmitted for administrative convenience with the original DA Form 2627 for filing on the restricted fiche of the OMPF (para 3-44).

### 3-38. Supplementary action.

(a) Supplementary action. Any action taken by an appropriate authority to suspend, vacate, mitigate, remit, or set aside a punishment (except punishment imposed under summarized proceedings, para 3-16) after action has been taken on an appeal or DA Form 2627 has been distributed according to paragraph 3-37.

(b) Recording. Supplementary action will be recorded on DA Form 2627-2.

(c) Distribution and filing.

(1) Original. The original will be forwarded to the appropriate custodian of the OMPF (para 3-37(b)(2)). This copy will be filed in the same OMPF fiche location as the DA Form 2627 that

initially imposed the punishment. The imposing commander's filing determination on the initial DA Form 2627 will be annotated on the DA Form 2627-2 (fig 3-3).

(2) Copy one. Copy one will be forwarded to the MPD/PSC to be filed in the soldier's MPRJ when the imposing commander directs filing on the performance fiche of the OMPF. This copy will be destroyed along with copy one of the initial DA Form 2627 if the original DA Form is transferred from the performance to the restricted fiche. In cases of filing on the restricted fiche of the OMPF, copy one will be filed in the unit personnel files per paragraph 3-37(c)(2).

(3) Copies two and three. If the action affects a reduction copy two (and copy two of the initial DA Form 2627, if maintained by the unit (para 3-37(d)) will be forwarded to the MPD/PSC. If the action affects a forfeiture copy three will be forwarded to the finance and accounting office maintaining the soldier's pay account.

(4) Copy four. Copy four will be annotated with the same sequence number as the initial copy four (para 3-37(e)(2)). If the action affects a reduction, it will be forwarded to the MPD/PSC servicing the MPRJ which will annotate it as indicated below. If the action affects a forfeiture, it will be forwarded to the finance and accounting office maintaining the soldier's pay account which will annotate as indicated below. Either the MPD/PSC, finance, or both will see that the following is annotated in the left-hand margin and returned to the unit to verify the entry of subsequent actions in the Reconciliation Log:

(A) The words "ENTRY POSTED".

(B) The date of posting.

(C) The initials of the posting clerk.

(5) Copy five. Give to soldier punished.

### **3-39. Reconciliation Log.**

Imposing commanders will ensure that punishments imposed under the provisions of Article 15 are executed. Punishments of reduction and forfeiture of pay may be monitored by the optional use of the Reconciliation Log, DA Form 51 10-R (Article 15 Reconciliation Log), showing the punishment and date imposed. (A reproduction master copy of this form appears at the end of this regulation and will be locally reproduced on 8 1/2- by 11-inch paper.) To properly use DA Form 51 10-R, copy four of all DA Forms 2627 must be sequentially numbered and the required data entered in the DA Form 51 10-R. These entries are to be compared with copy four of the DA Form 2627 that was returned to the unit by the MPD/PSC and/or Finance and Accounting Office maintaining the soldier's pay account. Sequential numbers on the DA Form 51 10-R, will correspond to the number noted on copy four. After information is verified on the DA Form 51 10-R from copy four, this copy will be retained until the expiration of any period of suspension of punishments affecting pay.

### **3-40. Time for distribution of initial DA Form 2627.**

Distribution will be made according to paragraph 3-37 after the recipient indicates in item 7 that the recipient does not appeal. If the recipient appeals, the DA Form 2627, minus copy four (if it has been forwarded as an "APPEAL PENDING" copy (para 3-37(e)(2)), will be forwarded to the superior

authority and distributed after completion of item 10. Completion of this item shows that the recipient acknowledges notification of action on the recipient's appeal. If item 10 cannot be completed because the recipient is not reasonably available or due to military exigencies, a statement signed by the imposing commander stating that the recipient was informed in writing of the disposition of the appeal and why it was not possible to have item 10 completed will be placed in item 11 before distribution is made. When the recipient appeals the punishment, an "APPEAL PENDING" copy will be distributed according to paragraph 3-37(e)(2). If the recipient fails to complete or sign item 7, an explanation of the failure will be provided by the imposing commander in item 11 and distribution will be made according to 3-37 or this paragraph, whichever is applicable (a recipient's refusal to indicate whether or not the recipient desires to appeal may be presumed to indicate an intention not to appeal).

**3-41. Reserved.**

**3-42. Transfer of Article 15s wholly set aside or in cases of change of status.**

(a) Change in status on or after 1 September 1979. On approval of a change in status from enlisted to commissioned or warrant officer, on or after 1 September 1979, DA Form 2627 (recording nonjudicial punishment received while in an enlisted status and filed in the OMPF) will be transferred to the restricted fiche of the OMPF. Copies of such records in the Career Management Individual File (CMIF and the MPRJ will be destroyed.

(b) Wholly set aside since 1 September 1979. All DA Forms 2627 of commissioned officers, warrant officers, and enlisted soldiers filed in the OMPF reflecting that punishments have been wholly set aside (para 3-28) since 1 September 1979, will routinely be transferred to the restricted fiche. The DA Form 2627 reflecting the original imposition of punishment, if filed in the MPRJ or CMIF, will be destroyed.

(c) Change in status and wholly set asides prior to 1 September 1979.

(1) On request of the individual concerned, the following will be transferred to the restricted fiche of the individual's OMPF:

(A) Records of nonjudicial punishment received while serving in a prior enlisted status.

(B) Records of nonjudicial punishment wholly set aside prior to 1 September 1979. Copies of such records filed in the CMIF and the MPRJ will be destroyed.

(2) Transfer from the performance to the restricted file will automatically cause copies of such records filed in the CMIF to be destroyed. Requests will be mailed directly to the custodian of the MPRJ (usually at the local MPD/PSC) and to the custodian of the OMPF.

(3) These requests will not constitute a basis for review by a special selection board or its equivalent.

**3-43. Transfer or removal of records of nonjudicial punishment.**

(a) General. This paragraph covers policies and procedures for enlisted soldiers (E5 and above) and commissioned and warrant officers to petition the DA Suitability Evaluation Board (DASEB) for

transfer of records of nonjudicial punishment from the performance to the restricted portion of the OMPF. (See table 3-2.)

(b) Policies.

(1) Enlisted soldiers (E5 and above), commissioned and warrant officers may request the transfer of a record of nonjudicial punishment from the performance fiche of their OMPF to the restricted fiche under the provisions of this regulation. To support the request, the person must submit substantive evidence that the intended purpose of Article 15 has been served and that transfer of the record is in the best interest of the Army.

(2) Requests normally will not be considered until a minimum of one (1) year has elapsed and at least one nonacademic evaluation report has been received since imposition of the punishment.

(3) The request must be in writing and should include the soldier's current unit mailing address and duty telephone number. Requests by enlisted soldiers (E-5 and above) should also include a true copy of the DA Form 2A and 2-1, certified by the custodian of the MPRJ. No person is authorized to appear in person before the DASEB.

(4) The officer who directed the filing of the record in the OMPF (of enlisted soldiers (E5 and above) and commissioned and warrant officers) may provide a statement to the soldier in support of a request for transfer of the record from the performance to the restricted fiche. Other evidence submitted in support of a request should not include copies of documents already recorded in the soldier's OMPF.

(5) The DASEB will review and evaluate the evidence submitted and obtained and will take final action where this authority has not been specifically withheld to the Deputy Chief of Staff for Personnel (DCSPER) or the DCSPER's delegate. Requesters will be notified in writing of the determination. Letters of denial will be placed upon the performance fiche of the soldier concerned. Other related documentation and evidence will be placed upon the restricted fiche.

(6) The DASEB has access to unfavorable information that might be recorded on DOD investigative records. If such information is used, in part or in whole, as the basis for denying a request, the soldier will be notified of this by correspondence (which will not be filed in the OMPF) and given an opportunity to review and explain the unfavorable information in a subsequent petition.

(7) The determination of the DASEB to transfer such records will not alone be a basis for review by a special selection board or its equivalent. The DCSPER, or the DCSPER's delegate, has the final authority in cases where circumstances exist that warrant referral to one of the above boards.

(8) The DASEB will consider subsequent requests only upon presentation of substantive evidence not previously considered.

(c) Processing Requests. Requests submitted by ARNG officers and enlisted personnel not on active duty will be processed through the proper State Adjutant General and the Chief, National Guard Bureau to the DCSPER (ATTN: DAPE-MPC-E) for proper action.

(d) Amendment rights. These procedures do not limit or restrict the right of soldiers to request amendments of their records under the Privacy Act and AR 340-21. Neither do they limit or restrict the authority of the DASEB to act as an Access and Amendment Refusal Authority under AR 340-21.

(e) Correction of military records. AR 15-185 contains policy and procedures for applying to the Army Board for Correction of Military Records (ABCMR) and for the correction of military records by the Secretary of the Army. Requests should be sent to the ABCMR to correct an error or remove an injustice only after other available means of administrative appeal have been exhausted. This includes requests under this paragraph.

### **3-44. Use of Records.**

(a) Records of proceedings and supplementary action under Article 15 recorded on DA Forms 2627 and 2627-2, previously or here after administered, may be used as directed by competent authority. Allied documentation transmitted with the original or copies of DA Forms 2627 and 2627-2, where filed with any of these forms, shall be considered to be maintained separately for the purpose of determining the admissibility of the original or copies of DA Forms 2627 or 2627-2 at courts-martial or administrative proceedings.

(b) A record of nonjudicial punishment or a duplicate as defined in M.R.E. 1001(4), not otherwise inadmissible, may be admitted at courts-martial or administrative proceedings from any file in which it is properly maintained by regulation. A record of nonjudicial punishment, otherwise properly filed, will not be inadmissible merely because the wrong copy was maintained in a file.

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## **CHAPTER 4**

### **DISCIPLINARY PROCEEDINGS SUBSEQUENT TO EXERCISE OF JURISDICTION BY CIVILIAN AUTHORITIES**

#### **4-1. General.**

This chapter covers policies on disciplinary proceedings under the KCMJ against persons who previously have been tried in a civilian court deriving its authority from a State of the United States or a foreign country.

#### **4-2. Policy.**

A person subject to the KCMJ who has been tried in a civilian court will not be tried by court-martial or punished under Article 15, KCMJ, for the same act over which the civilian court has exercised jurisdiction, unless the civilian trial terminated without a conviction or in acquittal under circumstances which would have permitted the civilian authority to re-try the person.

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**CHAPTER 5**  
**PROCEDURES FOR COURTS- MARTIAL**  
**SECTION I**  
**GENERAL**

**5-1. Scope.**

This Chapter implements certain provisions of the KRCM, the KMCM, and the KCMJ.

**5-2. Jurisdiction.**

See KRCM 201.

**SECTION II**  
**COURT-MARTIAL PERSONNEL**

**5-3. Detail of military judges and trial counsel.**

(a) Procedures for obtaining a military judge are prescribed in Chapter 8. Whenever possible, military judges will be detailed to SPCMs that are not to be recorded verbatim (see para 8-1 (c)(1)). First priority for detail will be to cases involving complex issues of law or fact. Detail of military judges is a ministerial function to be exercised by The Judge Advocate General, officer's delegate. Detail of trial counsel is a ministerial function to be exercised by the SJA or that officer's delegate.

(b) The order detailing a military judge or trial counsel will be in writing, included in the record of trial, or will be announced orally on the record during the court-martial, and will indicate by whom the military judge or trial counsel was detailed.

**5-4. Certification and use of lawyers.**

(a) Commissioned officers, who are not members of the Army or Air Force Judge Advocate General's Corps (JAGC), but who possess legal qualifications in the sense of Article 27(b)(1), UCMJ, may be certified for duty as counsel by TJAG. As with certified JAGC counsel, detail of certified non-JAGC officers as trial and assistant trial counsel is a ministerial function performed by the SJA or that officer's delegate for the GCM jurisdiction where counsel are assigned or attached. The certified officer's commander must concur with the detail of the non-JAGC certified counsel. The Judge Advocate General, or that officer's delegate will detail officers as defense counsel or assistant or associate defense counsel (para 6-9). Unless required by military exigency, defense counsel appointed to represent an accused in a court-martial shall not be in a position rated by the SJA of the convening authority.

(b) The certification of counsel for appearance in courts-martial shall be by The Judge Advocate General.

#### **5-5. Qualified counsel at courts-martial.**

In all SPCM's and GCM's the accused must be afforded the opportunity to be represented by counsel qualified under Article 27(b), UCMJ.

#### **5-6. Qualified Individual civilian counsel at courts-martial.**

When a civilian counsel is to represent an accused at any court-martial, evidence may be requested that the civilian counsel is a member in good standing of the bar of the Supreme Court of the State of Kansas by-

- (a) The military judge.
- (b) The president of a court-martial sitting without a military judge, or
- (c) The SJA.

#### **5-7. Individual military counsel.**

(a) General. The accused has the right to be represented in his or her defense before a GCM or SPCM or at an investigation under Article 32, KCMJ (K.S.A. 48-2603) by-

- (1) Civilian counsel, if provided by the accused at no expense to the Government.
- (2) Military counsel detailed under Article 27, KCMJ, or
- (3) Military counsel of the accused's own selection, if reasonably available (KRCM 405(d)(2); 506(b)).

(b) "Reasonably available counsel" defined. All JAs certified under Article 27(b), KCMJ, are considered reasonably available to act as individual military counsel unless excluded by Article 38(b), KCMJ, R.C.M. 506(b), or this regulation.

(c) Persons not reasonably available. The following persons are unavailable to serve as individual military counsel because of the nature of their duties or positions:

- (1) A general or flag officer;
- (2) A trial or appellate military judge;
- (3) The SJA of the convening authority;
- (4) The Judge Advocate General;

(5) The principal legal advisor to a command when such command is the convening, or forwarding authority;

These are in addition to any persons The Adjutant General may determine to be not “reasonably available” to act as individual military counsel because of the nature or responsibilities of their assignments, geographic considerations, exigent circumstances, or military necessity.

(d) Reasonable availability determinations. In determining the availability of counsel not governed by the provisions of paragraph 5-7(c), above, the responsible authority under KRCM 506(b)(1) may consider all relevant factors, including, but not limited to, the following:

- (1) The requested counsel’s duty position, responsibilities, and workload.
- (2) Any ethical considerations that might prohibit or limit the participation of the requested counsel.
- (3) Time and distance factors; i.e., travel to and from the situs, anticipated date, and length of the trial or hearing.
- (4) The effect of the requested counsel’s absence on the proper representation of the requested counsel’s other clients.
- (5) The number of counsel assigned as trial or assistant trial counsel to the Article 32, UCMJ, investigation or trial.
- (6) The nature and complexity of the charges and legal issues involved in the case.
- (7) The experience level, duties, and caseload of the detailed military defense counsel.
- (8) Overall impact of the requested counsel’s absence on the ability of the requested counsel’s office to perform its required mission; e.g., personnel strength, scheduled departures or leaves, and unit training and mission requirements.

(e) Prior attorney-client relationship. Notwithstanding the provisions of c and d above, if an attorney-client relationship exists between the accused and the requested counsel regarding matters that relate solely to the charges in question, the requested counsel will ordinarily be considered available to act as individual military counsel.

(f) Procedure.

(1) See KRCM 506(b)(2).

(2) Requests for personnel to act as individual military counsel will be processed under R.C.M. 506(b)(2), and this regulation. It will be sent through the trial counsel to the convening authority. Requests will, as a minimum, contain the following information:

- (A) Name, grade, and station of the requested counsel.
- (B) Name, grade, and station of the accused and the accused’s detailed defense counsel.
- (C) UCMJ Article(s) violated and a summary of the offense(s).

(D) Date charges preferred and status of case; e.g., referred for investigation under Article 32, KCMJ, referred for trial by GCM, bad conduct discharge (BCD) SPCM, or regular SPCM.

(E) Date and nature of pretrial restraint, if any.

(F) Anticipated date and length of trial or hearing.

(G) Existence of an attorney-client relationship between the requested counsel and the accused, in this or any prior case.

(H) Specific circumstances or other factors relevant to determining availability.

#### **5-8. Professional standards.**

The Kansas Code of Professional Responsibility and Rules of Professional Conduct, are applicable to counsel practicing under the KCMJ.

The Army Rules of Professional Conduct for Lawyers as set forth in AR 27-1, the American Bar Association Standards for Criminal Justice (2d Ed., 1980) also apply to military judges, counsel, and clerical support personnel of Army courts-martial, to the extent they are not in conflict with requirements of the Kansas Supreme Court.

#### **5-9. Rating of court members, counsel, and military judges.**

(a) Court members and counsel. Under Article 37(b), KCMJ, the consideration and evaluation of the performance of duty as members of a court-martial is prohibited in preparing effectiveness, fitness, or evaluation reports on members of the Armed Forces. Article 37(b), KCMJ, also prohibits giving a less favorable rating or evaluation of any member of the Armed Forces because of the zeal with which such member, as counsel, represented any accused before a court-martial (see Article 37(a), KCMJ, and KRCM 104 regarding prohibition of unlawful command influence).

(b) Military judges.

(1) Article 26(d), KCMJ provides that neither the convening authority nor any member of the convening authority's staff shall prepare or review any report concerning the effectiveness, fitness or efficiency of a military judge which relates to the judge's performance of duty as such. A commissioned officer who is certified to be qualified for duty as a military judge of a court-martial may perform such duties only when such officer is assigned and directly responsible to the judge advocate general and may perform duties of a judicial or nonjudicial nature other than those relating to the primary duty as a military judge of a court-martial when such duties are assigned to such officer by or with the approval of the judge advocate general. The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may the judge vote with the members of the court.

**5-10. Preparation by court-martial personnel.**

(a) To be properly prepared for duty as president or counsel of a SPCM or as a SCM officer, persons so detailed must read and understand publications about their duties ((1) through (3) below). Before the trial of the first case by a court, the Staff Judge Advocate will ensure, through counsel who are not involved with the prosecution, that-

(1) The President of the SPCM, and at the discretion of the Staff Judge Advocate, those members who may become President because of challenges or other reasons, are familiar with Appendix 8, MCM.

(2) Detailed trial counsel of the SPCM who are not certified under Article 27(b), KCMJ, are familiar with Appendix 8, MCM.

(3) The SCM officer is familiar with DA Pam 27-7.

(b) In special courts-martial without a military judge, the procedural guide in Appendix 8, MCM, amended as required for the KCMJ, should be used by the SCM officer during trial (see also App 9, MCM).

(c) The general instructional or informational courses in military justice excluded from the general prohibitions contained in Article 37(a), KCMJ and KRCM 104, are those authorized in Chapter 19. No other instruction related to the exercise of KCMJ requirements is authorized. This does not restrict, however, the procedural preparation of court-martial personnel as outlined in this paragraph. Court members detailed to a functioning court may never be oriented or instructed on their immediate responsibilities in court-martial proceedings except by-

(1) The military judge, or

(2) The president of a SPCM without a military judge in open court.

**5-11. Reporters.**

(a) Detail. Reporters will not be detailed to SCMS. Reporters will be detailed for a SPCM authorized to adjudge a bad conduct discharge.

(b) Clerical assistance. A convening authority will, when necessary, furnish clerical personnel to assist SCMs and SPCMs to maintain and prepare a record of the proceedings.

**5-12. Authorization for payment of transportation expenses and allowances to civilian witnesses appearing before Article 32, KCMJ, investigations.**

(a) A civilian witness determined to be reasonably available under R.C.M. 405(g) and requested to testify before an Article 32, KCMJ, investigation, shall be tendered the mileage rate established pursuant to K.S.A. 75-3203a and amendments thereto for each mile by the ordinary traveled route to and from the court-martial proceeding and an amount equal to that provided for witness fees under K.S.A. 28-125 and amendments thereto for each day that the witness is required to travel and attend as a witness.

(b) Civilian witnesses will not be requested to appear before an Article 32, KCMJ, investigation until payment under para 5-12(a) above has been approved by the GCM convening authority, unless the witness voluntarily waives such payment in writing. The authority to approve, but not disapprove, the payment of transportation expenses and allowances may be delegated to the investigating officer or the GCM convening authority's SJA. An approved request to appear will inform the witness of the pertinent entitlements.

### SECTION III

#### PRETRIAL

##### 5-13. Pretrial confinement.

(a) General. Pretrial confinement for members pending court-martial charges under the KCMJ is not authorized. This provision does not prohibit confinement incidental to AWOL recovery under K.S.A. 48-2201(d).

(b) An accused pending charges should ordinarily continue the performance of normal duties within the accused's organization while awaiting trial. Duties may be modified if necessary for reasons of security pending court-martial. Pretrial punishment, to include suspension from drill, duty, uniform or other traditional punishments, is prohibited. Article 13, KCMJ.

##### 5-14. Preparation of charge sheet.

KRCM 307 and DD Form 458 (Charge Sheet) provide instructions in the preparation of charges and specifications. Available data as to service, social security account number, and similar items required to complete the first page of the charge sheet will be included. An original and four copies of the charge sheet will be forwarded (para 5-15) and all copies will be signed.

##### 5-15. Forwarding of charges.

(a) When trial by a SPCM or GCM is appropriate and the officer exercising SCM jurisdiction is not empowered to convene such a court (KRCM 504(b)), the officer exercising SCM jurisdiction will personally decide whether to forward the charges and allied papers. (See R.C.M. 401 through 403.)

(b) Charges and allied papers ordinarily will be forwarded through the chain of command to the officer exercising the appropriate kind of court-martial jurisdiction. The charges will be forwarded by endorsement or letter of transmittal signed by the SCM authority or authenticated with that officer's command line recommending disposition of the charges. (See KRCM 401(c)(2)).

##### 5-16. Referral of charges.

(a) The convening authority will personally determine whether to refer the charges for trial and the kind of court to which the charges will be referred. This function may not be delegated. The

endorsement or other directive referring the charges to a court-martial for trial will be signed by the convening authority or will be authenticated with the convening authority's command line. A warrant or noncommissioned officer may not act in a capacity as an adjutant or assistant adjutant to authenticate a command line (see AR 614-100). He or she must have prior signature authority under AR 340-15. Use of the command line verifies that the commander has personally acted (KRCM 601(e)).

#### **5-17. Accused's copy of charge sheet.**

(a) Summary courts-martial. At the opening session of the trial, before arraignment, the SCM officer will give the accused a copy of the charge sheet, as received and corrected by the officer.

(b) General and special courts-martial. Immediately on receipt of charges referred for trial, the trial counsel of a GCM or SPCM will-

(1) Serve, or cause to be served on the accused a copy of the charge sheet, as received and corrected by the counsel.

(2) Inform the defense counsel that this copy has been served (KRCM 602).

#### **5-18. Preliminary procedures.**

(a) Docketing and calendar management.

(1) Immediately on referral of charges for trial, the trial counsel will-

(A) Serve or cause the charges to be served on the accused.

(B) Furnish a copy of the charges and specifications to the defense counsel and trial judge detailed to the court-martial.

(2) When the trial judge receives the charges and specifications, the trial judge will set the case for trial at an early date. The date should be within 60 days of the service of charges on the accused.

(3) Docketing procedures may include-

(A) Requesting mutually recommended dates from counsel within time limits set by the judge,

(B) Conferences under KRCM 802, or

(C) Article 39(a), KCMJ, sessions.

(4) The procedure used must ensure an early and orderly disposition of charges, so that-

(A) The right of the accused to a speedy trial is assured.

(B) The right of the Government to prompt resolution of charges in the interest of good order and discipline is assured.

(5) As part of the docketing procedure, counsel should report to the judge-

(A) Anticipated pleas.

(B) Estimated duration of proceedings.

(C) Whether the trial will be by judge alone.

(6) Once the military judge has set a date for trial, a party moving for continuance must present full justification as provided by law. If final disposition occurs by other means, such as administrative separation, counsel will advise the trial judge immediately.

(7) In computing the time periods above, the day that charges are served on the accused will be excluded. The last day of the period will be included unless it falls on Saturday, Sunday, or a legal holiday.

(b) Article 39(a), KCMJ, sessions.

(1) Article 39(a), KCMJ, sessions will be called on order of the military judge; however, either the trial counsel or defense counsel may make application to the military judge to have such a session called. In requesting an Article 39(a), UCMJ, session, counsel should give opposing counsel adequate opportunity to prepare. Before the day of the session, counsel will serve on the opposing counsel, and provide the trial judge, written notice of all motions and other matters for disposition. The notice will inform opposing counsel and the judge whether submission will be on brief only, by oral argument, or both and whether evidence will be presented. The foregoing does not preclude matters from being raised and disposed of at the Article 39(a) session other than those contained in the counsel's notice.

(c) Excusal of members. Prior to assembly of a court-martial, detailed members may be excused by the convening authority. The convening authority may delegate the preassembly excusal authority to a deputy or assistant commander, the chief of staff, or the staff judge advocate. After assembly of the members, members may be excused for good cause only by the detailed military judge or the convening authority (see KRCM 505).

#### **5-19. Reserved.**

#### **5-20. Witness attendance.**

Subpoenas. See KRCM 703.

## SECTION IV

### TRIAL

#### 5-21. Procedure for summary courts-martial.

(a) DA Pam 27-7 and Appendix 9, MCM, will serve as guides for SCM procedure (see also DA Pam 27-9), but nothing contained therein will give an accused any greater protection than that required by military due process.

(b) Except when military exigencies require otherwise, the SCM officer will grant the accused an opportunity to consult with qualified defense counsel before the trial date for advice concerning-

(1) The accused's rights and options.

(2) The consequences of waivers of these rights in voluntarily consenting to trial by SCM.

(c) Whenever the SCM officer denies the accused an opportunity to consult with counsel before trial, the circumstances will be fully documented by the SCM officer in a certificate attached to the record of trial. Failure to provide the accused with the opportunity to consult with counsel may make the record of the SCM inadmissible at a subsequent court-martial. In no event may a SCM adjudge any punishment which includes any confinement or restriction upon liberty unless the accused has an opportunity to consult with defense counsel prior to trial.

(d) DA Form 5111-R (Summary Court-Martial Rights Notification/Waiver Statement) will be completed and attached to each copy of the charge sheet.

(e) Counsel will not represent the government at SCM without prior approval from The Judge Advocate General.

#### 5-22. Arraignment and pleas.

When an Article 39(a), KCMJ, session is conducted by the military judge before assembly, the arraignment may be held and the plea of the accused may be accepted at that time by the military judge. In addition, the military judge may enter at that time findings of guilty on an accepted plea of guilty.

#### 5-23. Entry of findings of guilty pursuant to a plea

(a) In a trial by a court-martial with members, a finding of guilty of the charge and specification may be entered immediately without vote (after a plea of guilty has been accepted by the military judge or president of a SPCM without a military judge). No such entry should be made as to any plea of guilty to a lesser included offense.

(b) Authority to enter into conditional pleas of guilty under KRCM 910 may be exercised only by GCM convening authorities.

(c) The military judge or president of a SPCM without a military judge will put the finding of guilty in proper form following the forms indicated in Appendix 10, MCM, and the instructions contained in KRCM 918.

#### **5-24. Special courts-martial involving bad-conduct discharges (BCD)**

- (a) A BCD may not be adjudged by a SPCM unless-
  - (1) A military judge was detailed to the trial.
  - (2) Counsel qualified under Article 27(b), KCMJ, was detailed to represent the accused.
  - (3) A verbatim record of the proceedings and testimony was made (KRCM 1103).
- (b) In addition, a BCD will not be adjudged by SPCM unless the court has been convened by an officer exercising GCM jurisdiction.
- (c) Reporters will not be detailed to a SPCM to take a verbatim record unless the SPCM is convened by an officer exercising GCM jurisdiction.
- (d) There is no requirement for a written pretrial advice before referring a case to a SPCM in which a BCD may be adjudged.

#### **5-25. Personal data and character of prior service of the accused.**

- (a) For purposes of KRCM 1001(b), trial counsel may, in the trial counsel's discretion, present to the military judge (for use by the court-martial members or military judge sitting alone) copies of any personnel records that reflect the past conduct and performance of the accused, made or maintained according to departmental regulations. Examples of personnel records that may be presented include-
  - (1) DA Form 2 (Personnel Qualification Record-Part 1) and DA Form 2-1 (Personnel Qualification Record-Part 2).
  - (2) Promotion, assignment, and qualification orders, if material.
  - (3) Award orders and other citations and commendations.
  - (4) Except for summarized records of proceedings under Article 15 (DA Form 2627-1), records of punishment under Article 15 KCMJ or UCMJ), from any file in which the record is properly maintained by regulation.
  - (5) Written reprimands or admonitions required by regulation to be maintained in the MPRJ or OMPF of the accused.
  - (6) Reductions for inefficiency or misconduct.
  - (7) Bars to reenlistment.
  - (8) Evidence of civilian convictions entered in official military files.

- (9) Officer and enlisted evaluation reports.
- (10) DA Form 3180 (Personnel Screening and Evaluation Record).
- (b) These records may include personnel records contained in the OMPF or located elsewhere, unless prohibited by law or other regulation. Such records may not, however, include DA Form 2627-1 (Summarized Record of Proceedings under Article 15, UCMJ or KCMJ).
- (c) Original records may be presented in lieu of copies with permission to substitute copies in the record. (See MRE 901, for authentication of original copies.)
- (d) Documents in the OMPF may be obtained for court-martial purposes under chapter 4, AR 640-10. Urgent requests may be telephonically submitted (DSN 699-3643) and followed up by a message to CDR USAEREC //PCRE-RF-I// FT BEN HARRISON, IN.

## SECTION V

### POST-TRIAL

#### **5-26. Report of result of trial.**

The trial counsel or SCM will prepare a report of the result of trial at the end of the court-martial proceedings. It will be prepared on DA Form 4430-R (Report of Result of Trial). (A reproduction master copy of this form appears at the end of AR 27-10 and will be locally reproduced on 8 1/2- by 11-inch paper.) Post-trial prisoners who are transferred to any confinement facility, must carry a copy of the DA Form 4430-R. DA Form 4430-R will include the amount of any presentence confinement and the names and social security numbers of any co-accused. The completed DA Form 4430-R will be typewritten, if practicable or legibly handwritten.

#### **5-27. Convening authority action.**

When taking action ordering the execution of any sentence to confinement, the convening authority will not designate the place of confinement. The place of confinement will be determined by The Adjutant General and designated by separate order.

#### **5-28. Rehearing in cases in which the accused is absent without leave.**

The following procedures will be followed in pending rehearing cases when the accused is absent without leave:

- (a) Action by convening authority. The convening authority having jurisdiction over the appellant will make the final decision on the practicability of holding a rehearing.
- (b) If the convening authority decides to defer the final decision, the convening authority will cause a notation to be placed in the accused's MPRJ. The notation will state that the accused is in an absent

without leave status and that a decision regarding rehearing on other charges is pending at a certain command. In such cases, the SJA will return the original and all copies of the record for safekeeping to The Judge Advocate General.

#### **5-29. Suspension of sentence.**

- (a) Authority to suspend the execution of a sentence is set forth in KRCM 1108(b).
- (b) No sentence may be suspended beyond a reasonable period (KRCM 1108(d)). A reasonable period of suspension shall be calculated from the date of the order announcing the suspension and shall not extend beyond-
  - (1) Three months for an SCM.
  - (2) Nine months for an SPCM in which no BCD was adjudged.
  - (3) One year for an SPCM in which a BCD was adjudged.
  - (4) Two years for a GCM.
- (c) These limits do not include any time in which a suspension period is legitimately interrupted under KRCM 1109(b)(4).

#### **5-30. Vacation of suspended sentences.**

- (a) Sentences adjudged by general courts-martial or by special courts-martial including a bad-conduct discharge.
  - (1) See KRCM 1109(d). DD Form 455 (Report of Proceedings to Vacate Suspension) (see App 18, MCM) with appropriate modifications, may be used as a guide for the hearing and for recording the evidence relied on and the reason(s) for vacating the suspension. The original and two copies of any proceedings vacating a suspension will be sent to the office of The Judge Advocate General, STARC, Topeka.
  - (2) In a case of a suspended dismissal, the officer exercising GCM jurisdiction over the accused, following a vacation hearing under KRCM 1109(d), will forward the record of the hearing and all recommendations, and a proposed action to vacate the suspension, if the GCM authority recommends vacation, to The Judge Advocate General.
- (b) Sentences adjudged by special courts-martial not including a bad-conduct discharge or by summary courts-martial. (See KRCM 1109(e).)

##### **5-30.1. Disposition of SJA recommendations and JA reviews of records of general courts-martial and of special courts-martial in which a bad conduct discharge has been approved.**

The original recommendation of the SJA or legal officer and the original of any subsequent review by a JA or legal officer will be attached to the record of trial.

**5-30.2. Reserved.**

**5-30.3. Clemency under Article 74.**

(a) The Adjutant General, or the commanding officer is empowered by Article 74a, KCMJ, (K.S.A. 48-2929(a)) to remit or suspend any part or amount of a court-martial sentence, other than a sentence approved by the Governor; and by Article 74b, KCMJ, for good cause, The Adjutant General may substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

(b) Prior to completion of appellate review, The Judge Advocate General (TJAG), as designee of The Adjutant General, may mitigate, remit, or suspend, in whole or in part, any unexecuted portion of a court-martial sentence, other than sentences extending to dismissal or affecting a general officer. The unexecuted portion of a court-martial sentence includes discharges not yet ordered into execution; unserved confinement, hard labor without confinement, or restriction; and uncollected fines and forfeitures. Appellate review is complete upon promulgation of an order directing execution of the sentence in its entirety.

(c) Petitions to The Adjutant General for clemency under Article 74, KCMJ, must be submitted by the convicted soldier or an attorney or recognized veterans organization action on the soldier's behalf.

(d) For guidance on the power of the Army Clemency and Parole Board to review cases for clemency and parole, see AR 15-130 and 10 U.S.C. 952-3.

**5-30.4. Petition for new trial under Article 73.**

(a) KRCM 1210 and Article 73, KCMJ, prescribe procedures for petitioning The Judge Advocate General for a new trial on the grounds of newly discovered evidence of fraud on the court.

(b) When direct review of petitioner's case is before either the Kansas Court of Military Review or the Kansas Court of Appeals, the petition for new trial shall be filed with The Judge Advocate General for referral to the appropriate court. For all other cases, the petition shall be filed with The Judge Advocate General for direct review. In either event, the petition should be filed within two years following the date of the convening authority's action on the record of trial.

**SECTION VI**

**RECORDS OF TRIAL**

**5-31. Preparation.**

(a) Records of trial will be prepared as prescribed in KRCM 1103 and KRCM 1305. Also, see paragraph 13-6 for identification of companion cases on the covers of original records of trial.

(b) In GCM and SPCM cases in which a summarized record of trial is authorized (see KRCM 1103(b)(2)), DD Form 491(Summarized Record of Trial) will be used to prepare the summarized report. (See App 13, MCM.) If a reporter was detailed and actually served in that capacity throughout the trial, the convening or higher authority may direct that the proceedings be reported verbatim as prescribed by KRCM 1103(b)(2)(B) and 1103(c)(1) and as indicated in Appendix 14, MCM.

(c) If the proceedings have resulted in an acquittal of all charges and specifications or in termination before findings, the record of trial will be prepared under R.C.M. 1103(e). In addition the record will include a summary of the trial proceedings up to the disposition of the case and all documentary exhibits and allied papers. DD Form 491 may be modified and used as a binder for the record-of trial.

(d) In SCM cases, preparation of DD Form 2329(Record of Trial by Summary Court-Martial) (see App 15, MCM) will include additionally the following:

(1) In the first sentence of item 8, DD Form 2329, strike the word “attached” and substitute the word “following”.

(2) In the left hand column of item 8, insert each article of the KCMJ alleged to have been violated. Include a summary of each specification in the format outlined in Appendix 17, MCM.

(3) In the lower right hand corner of item 8 or the upper right hand corner of item 13, and only after the written review required by KRCM 1112 has been completed and has determined the record of trial to be legally sufficient, enter the following phrase in block form: “This record of trial has been reviewed under Article 64(a), KCMJ, and KRCM 11 12 and is legally sufficient.”

(4) In those cases where review is completed under KRCM 1112 (f) or KRCM 1201(b)(2), item 8 or item 13, as noted in (3) above, will be annotated with the result of the completed review.

(5) The original charge sheet (DD Form 458) and all allied papers, documentary evidence, and descriptions or photographs of physical evidence will be attached to the original record of trial. After initial action, this file will be forwarded for JA review under paragraph 5-35(b) before disposition under paragraph 5-36(a).

### **5-32. Retention of trial notes or recordings.**

(a) For cases in which a summarized record of trial is authorized, the notes or recordings of the original proceedings will be retained until the record is authenticated.

(b) For cases in which a verbatim transcript is required, the verbatim notes or recordings of the original proceedings will be retained until completion of final action or appellate review whichever is later.

(c) The verbatim notes or recordings may be kept by the trial counsel, an assistant, court reporter, or a clerk or stenographer acting under the trial counsel’s direction.

### **5-33. Authentication of records of trial.**

(a) Records of trial will be authenticated under R.C.M. 1104(a).

(b) The record of trial of an SPCM in which no BCD was adjudged will be authenticated in the same manner as that of a GCM or SPCM in which a BCD has been adjudged.

(c) Records of trial should not be authenticated until all known administrative corrections have been made.

**5-34. Service of record of trial on the accused.**

Records of trial will be served under KRCM 1104(b) and KRCM 1305(d)(Forwarding of records of trial after initial action).

(a) In GCM cases (including proceedings ending in acquittal or termination (see KRCM 1103(e)), and in SPCM cases in which a BCD has been approved, where the accused has not waived appellate review under KRCM 1110, the record of trial will be forwarded to The Judge Advocate General for delivery to the Kansas Court of Military Review.

(b) In cases under R.C.M. 1112(a) (including those in which the accused withdraws appellate review), the record of trial will be forwarded to a JA for review. Review under R.C.M. 1112 may be done either by a JA in the Office of the SJA of the convening command or by a JA otherwise under the technical supervision of the SJA. Following JA review, those records of trial which are required to be forwarded under R.C.M. 1112(g)(1) or (2) will be transmitted to The Judge Advocate General. Records of trial not required to be forwarded under KRCM 1112(g)(1) or (2) will be filed under paragraph 5-36 below.

**5-35. Reserved.**

**5-36. Disposition of records of trial.**

On completion of review and any required supplemental action, records of trial will be filed under the supervision of The Judge Advocate General, unless otherwise required by AR 25-400-2 (file numbers 27-10a and 27-10c respectively).

**5-37. Mailing records of trial.**

Certified first class mail, return receipt requested, restricted delivery, or delivery by commercial means, with return receipt requested and restricted delivery, should be used to transmit records of trial for any official purpose.

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**CHAPTER 6**  
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## CHAPTER 7

### COURT MEMBERSHIP AND OTHER RELATED MILITARY JUSTICE DUTIES BY NON-JAGC PERSONNEL

#### 7-1. General.

This chapter is an informational reference to various restrictions on National Guard personnel, other than JAGC officers, as to membership of courts-martial and other related military justice duties. This chapter is not regulatory in nature and is subject to change as the cited regulatory sources change.

#### 7-2. Chaplains.

Chaplains will not be detailed as trial or defense counsel, investigating officers, or as members of courts-martial (AR 165-20, para 3-6).

#### 7-3. Medical, dental, and veterinary officers.

(a) Except when regulations specifically stipulate to the contrary, medical, dental, and veterinary officers will not be-

(1) Detailed as members of courts-martial, nonprofessional boards, or committees. Assigned to other duties in which medical training is not essential.

(b) Similarly, every effort consistent with due process of law will be made to use reports, depositions, or affidavits submitted by medical officers for use at courts-martial, boards, or committees (in preference to requiring the appearance of medical officers as witnesses to present testimony in person). (AR 40-1, paras 2-3b, 2-8, and 2-13.)

#### 7-4. Army nurses.

The applicable portions of paragraph 7-3 govern the use of Army Nurse Corps (ANC) officers. However, when ANC officers or other nursing service personnel are involved in the proceedings (AR 40-1, para 2-20) they may be detailed as members of courts-martial, nonprofessional boards, or committees.

#### 7-5. Medical specialist corps.

The applicable portions of paragraph 7-3 govern the use of Army Medical Specialist Corps (AMSC) officers. However, when AMSC officers or other food service, physical, or occupational therapy personnel are involved in the proceedings (AR 40-11 para 2-23), they may be detailed as members of courts-martial, nonprofessional boards or committees.

**7-6. Inspectors general (IG).**

- (a) Officers assigned as IGs will not be appointed as investigating officers under Article 32, KCMJ, AR 15-6, or any other regulation or directive providing for the appointment of investigating officers and members of courts-martial; nor will they be given similar duties that may later disqualify them from making impartial investigations or inquiries into any activity of the HQDA staff agency or command to which they are assigned. (See AR 20-1, para 1-7j.)
- (b) Noncommissioned officer assistants to IGs should not be given other duties that would disqualify them from performing their IG duties (AR 20-1, para 1-7j).

**7-7. Warrant officers.**

Warrant officers are expressly prohibited from performing additional duties as-

- (a) A member of any court-martial at the trial of any officer senior in grade or date of rank.
- (c) Trial counsel or defense counsel, or assistant trial counsel, or assistant defense counsel of a SPCM or GCM.
- (d) Individual military counsel before a GCM unless legally qualified in the sense of Article 27(b), UCMJ.
- (e) Investigating officer appointed under the provisions of Article 32, KCMJ, and KRCM 405.
- (f) A member of a formally convened military board whose duties include investigation of the conduct, status, liability, or rights of a commissioned officer.

**CHAPTER 8**  
**TRIAL JUDICIARY**

The Adjutant General shall appoint military judges to Courts-Martial from among Judge Advocates certified as qualified military judges by The Judge Advocate General.

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## **CHAPTER 9**

### **AWOL RECOVERY**

#### **9-1. General.**

This chapter describes procedures and policies for the implementation of Article 7 of the KCMJ, K.S.A. 48-2201(d), for apprehension of members who miss movement for unit Annual Training or State Active Duty.

#### **9-2. Statutory authority for AWOL Recovery.**

K.S.A. 48-2201(d) provides that any person subject to this code who misses a movement to annual training or state active duty or is absent without leave from annual training or state active duty, may be apprehended and delivered to the person's commanding officer pursuant to a warrant issued by a military judge based upon probable cause. Apprehension under this subsection may be made by military police, security police or civilian law enforcement officers.

#### **9-3. Enforcement of Article 7 during annual training.**

- (a) A commander of a unit on Annual Training or State Active Duty may request assistance in the apprehension of members who miss the movement.
- (b) Prior to seeking the apprehension of the AWOL member, the commander shall:
  - (1) Ascertain to the best of his/her ability the location of the AWOL member,
  - (2) Attempt to contact the member, and
  - (3) Determine whether orders for the movement, training, or duty missed were communicated to the member.
- (c) Once all actions taken to retrieve the soldier have been unsuccessful, the commander or the commander's representative should contact the SJA office and, under oath, provide the information needed to prepare an affidavit; or, in the alternative, contact the military judge and provide information directly, under oath, so that the military judge may review any evidence for probable cause. The military judge may require a written affidavit be mailed or transmitted from the AT site.
- (d) The information provided by the commander must include the following:
  - (1) Information establishing that the member was ordered to duty;
  - (2) Information establishing that the member is absent without leave or has missed movement;
  - (3) Information establishing the commander's compliance with para (b), above.

- (4) The member's name, rank, SSN, home address, home telephone number, date of birth, height, weight, color of hair, sex, race, and color of eyes. This information will be used to issue the warrant.
- (e) The military judge will review the information received and determine whether probable cause exists that the member has unlawfully missed movement or is absent without leave. If probable cause is found, the military judge may, at his/her discretion, issue a warrant directed to the sheriff of the county in which the member is located to apprehend the member.
- (f) The warrant issued will authorize the member to be held no longer than 48 hours. Units will make arrangements for the prompt transportation of the member to the AT site.

**9-4. Limitations.**

Article 7 and the procedures in this chapter shall not be used:

- (a) In lieu of punishment or as punishment. Commanders will not use this procedure except to deliver members to the duty site. Commander not intending to secure and deliver the member to the duty site shall not use this procedure.
- (b) To secure the attendance of a member who have been absent from weekend drills without leave continuously for 90 days prior to the duty.
- (c) For members with no reliable current address or telephone number.
- (d) For members outside the State of Kansas.
- (e) For members ordered to AT or other duties under Chapter 10, United States Code, who are subject to the Uniform Code of Military Justice.

## CHAPTER 10

### COURTS OF INQUIRY

#### 10-1. General.

This chapter applies only to courts of inquiry convened under the authority of Article 135, KCMJ, K.S.A. 48-3101.

#### 10-2. Jurisdiction.

(a) Statutory provisions. Courts of inquiry to investigate any matter may be convened by any person authorized to convene a GCM. They may also be convened by any other person designated by the Governor whether or not the persons involved have requested such an inquiry.

(b) Policy. A court of inquiry is a formal, fact-finding tribunal. The policy of The Kansas National Guard is that a court of inquiry will not be convened to investigate a particular matter to ascertain the facts if there are other satisfactory means (prescribed by law or regulation or authorized by the customs of the service). Under this policy, it is proper to convene a court of inquiry only when-

- (1) The matter to be investigated is one of grave importance to the military service or to an individual
- (2) The testimony is expected to be so diverse, complicated, conflicting, or difficult to obtain that a court of inquiry can best-
  - (A) Procure the pertinent evidence.
  - (B) Ascertain the true facts.
  - (C) Assist the convening or superior authority in determining what action should be taken.

(c) Persons whose conduct may be subject to inquiry. As a court of inquiry may be convened to investigate any matter (KCMJ, Art. 135(a)), it may also lawfully investigate the conduct of any person. A court of inquiry will not be convened to investigate the conduct of a person who is not a member of the Kansas National Guard.

(d) Effect of application for court of inquiry. Any person subject to the KCMJ, who believes the person has been wronged by any accusation or imputation against the person and cannot secure adequate redress by any other means (prescribed by law, regulation, or authorized by the customs of the service) may submit an application. The application will be sent through the person's immediate commander to the officer exercising GCM jurisdiction over the command for convening a court of inquiry to investigate and report the alleged accusation or imputation. The officer exercising GCM jurisdiction may, according to the policy in b above, convene a court of inquiry to investigate the matter or may take the appropriate action. The applicant will be advised if the GCM authority refuses to convene such a court, and will have the right to appeal to superior authority.

**10-3. Composition.**

(a) Number of members. A court of inquiry will consist of three or more members. The senior member will be the president.

(b) Qualifications of members.

(1) Any commissioned officer of the Kansas National Guard, (Army or Air) will be eligible to serve on a court of inquiry. No member will be junior in grade to, nor lower on the promotion list than any officer who is initially designated as a party to the inquiry, unless exigencies of the service do not permit otherwise. The decision by the convening authority, in this regard, as indicated by the order appointing the court, is final.

(2) The convening authority will appoint as members of a court of inquiry persons who are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. One or more members having experience or training in the subject of the inquiry, should, when possible, be appointed if that special training or experience will benefit the inquiry. When a female officer or enlisted person is initially designated a party to the inquiry, a female officer or enlisted person, as appropriate, senior to and of the same branch as that party, will, if possible, be appointed as a member of the court. Neither a party to the inquiry, nor his or her counsel, nor a witness against that party will be eligible to serve as a member of the court.

(c) Counsel. For each court of inquiry the convening authority will appoint by letter of appointment a commissioned officer as counsel for the court and assistant counsel as the convening authority deems appropriate. If practicable, the counsel appointed for the court will be an officer who is certified by TJAG to be qualified as counsel of a GCM under the provisions of Article 27(b), KCMJ. Neither a party to the inquiry, nor such a person's counsel, nor a witness against that party will be eligible to serve as counsel for the court.

(d) Reporters and interpreters. For each court of inquiry the convening authority will provide a qualified court reporter, who will record the proceedings and testimony taken before that court. When necessary, the convening authority will provide an interpreter who will interpret for the court. (See AR 37-106 for provisions as to pay of reporters and interpreters.)

**10-4. Convening order.**

(a) Format. The format of the order convening a court of inquiry will be similar to that for a court-martial (App 6, MCM).

(b) Content. In addition to naming the members and setting the time and place of assembly of the court, the initial convening order will clearly specify the matter to be investigated and the scope of the findings required. The order will also prescribe the number of copies of the record to be prepared. If it is desired that the court express opinions or make recommendations the order must specifically so state. When appropriate, the convening order will designate the parties whose conduct is subject to inquiry.

**10-5. Designation of parties.****(a) Person “whose conduct is subject to inquiry“.**

(1) Any person subject to the KCMJ whose conduct is subject to inquiry will be designated as a party.

(2) The conduct of a person is “subject to inquiry” when the court of inquiry is directed in the convening order to inquire into any past transactions or any accusation or imputation against that person.

**(b) Person who has a “a direct interest in the subject of inquiry.”**

(1) Any person subject to the KCMJ or employed by The Kansas National Guard who has a direct interest in the inquiry will have the right to be named as a party on request to the court.

(2) A person has a direct interest in the subject of inquiry when the findings, opinions, or recommendations of the court may, in view of the person’s relation to the incident or circumstances being inquired into-

(A) Reflect questionable or unsatisfactory conduct, efficiency, fitness, or performance of duty, or

(B) Affect the person’s pecuniary responsibility.

(3) The question of whether a person has a direct interest in the subject of the inquiry rests in the discretion of the court. Any doubts should be resolved in favor of the person claiming such an interest.

**(c) Designation of parties by court.** When it appears to the court during the course of an inquiry that a person subject to the KCMJ or employed by The Kansas National Guard has a “direct interest in the subject of inquiry” (as that term is defined in b above) the court, before completing its inquiry, will inform the person concerned, orally or in writing, of-

(1) The precise nature of the person’s interest in the case.

(2) The right to be designated as a party to the inquiry. The fact that the person was notified and the person’s desires with respect to being designated as a party will be made a part of the record.

**(d) Procedure on designation of party by court.**

(1) When the court designates a person as a party, it will take appropriate action, to ensure that the person-

(A) Understands the person’s rights as such.

(B) Is fully informed of the evidence pertaining to the person that was received by the court.

(2) Any reasonable request by the party for recall of previous witnesses for the purpose of cross-examination will be granted by the court if practicable. If the witness cannot be recalled, cross-examination may be accomplished by written interrogatories. Any testimony already given

by such a party remains in the record but, after the party's designation as a party, these rights as a witness are governed by paragraph 10-7(b).

#### **10-6. Rights of parties.**

A party to the inquiry, whether designated initially or during the course of the inquiry, has the following rights:

- (a) To be given due notice of such designation.
- (b) After a party's designation, to be present and to have counsel present during all proceedings in open court.
- (c) To be represented by civilian counsel if provided by the party at no expense to the State, by appointed military counsel, or by military counsel of the party's own selection, if reasonably available.
- (d) To challenge members, but only for cause stated to the court.
- (e) To cross-examine witnesses.
- (f) To introduce evidence and to examine and object to the introduction of evidence.
- (g) To testify as a witness under the rules set forth in paragraph 10-7(b).
- (h) To make a voluntary statement in any form, personally or through counsel.
- (i) To make an argument at the conclusion of presentation of the evidence.
- (j) To submit a written brief at the conclusion of the inquiry, after examination of the record of proceedings.

#### **10-7. Witnesses.**

- (a) **General.** Witnesses may be subpoenaed to appear, testify, and be examined before courts of inquiry. A court of inquiry and counsel for such court have the same powers with respect to obtaining the attendance of witnesses as a court-martial and the trial counsel of a court-martial (KRCM 703).
- (b) **Party to the inquiry.** In all proceedings in courts of inquiry the person charged will, at the person's own request, be a competent witness. The party's failure to make such a request will not create a presumption against the party (18 U.S.C. 3481). Any party to the inquiry who is charged with or suspected of an offense which is then the subject of inquiry by the court, is deemed to be "charged" within the meaning of the above act and is, on request, a competent witness. A party to the inquiry who is not charged with or suspected of an offense may be called as a witness and required to testify under oath on any matter on which the party might be a material witness, subject to the limitations imposed by Article 31, KCMJ, and due process considerations under state and federal constitutional law.
- (c) **Examination.**

- (1) The examination of a witness may be conducted, at the discretion of the court, by members and counsel for the court.
- (2) Any person designated as a party to the inquiry and the person's counsel will have the right to examine and cross-examine witnesses.
- (3) MRE 301, 305, 502, and 503 pertaining to the right against self-incrimination and to privileged communications are applicable to the examination of witnesses before a court of inquiry.
- (d) Fees. See AR 37-106 for provisions with respect to the payment of witness fees.

#### **10-8. Procedure.**

- (a) General. Except as otherwise provided by this regulation, the procedure before courts of inquiry will be governed by the provisions of AR 15-6 for formal boards of officers.
- (b) Duties of counsel for court. The counsel for a court of inquiry will perform substantially the same duties as are prescribed by AR 15-6 for the recorder of a board of officers. Counsel will be present during all proceedings in open court and may be present when the court is closed. An assistant counsel for the court is competent to perform any duty of counsel for the court. The counsel will perform such duties in connection with the inquiry as counsel for the court may designate.
- (c) Quorum. Three members of the court will constitute a quorum and must be present at all its sessions. An exception is that a member who was previously absent from, or newly appointed to a court may participate in the proceedings if the substance of all proceedings and the evidence introduced previously have been made known to the member.
- (d) Challenges. Members of a court of inquiry may be challenged by a party, but only for cause stated to the court. The procedure for presenting and determining challenges will be substantially the same as that provided for presenting and determining challenges for cause in SPCMs without a military judge (KRCM 912(h)).
- (e) Oaths.
  - (1) Before a court commences the inquiry directed by the convening order, the counsel for the court will administer to the members the following oath or affirmation:

“You, (Names), do swear (or affirm) that you will faithfully perform all the duties incumbent upon you as members of this court of inquiry, and that you will examine and inquire, according to the evidence, into the matter now before you without partiality. So help you God.”
  - (2) When the oath or affirmation has been administered to the members of the court, the president of the court will administer to the counsel (and assistant counsel, if any) the following oath or affirmation:

“You, (Name), do swear (or affirm) that you will faithfully perform the duties of counsel for this court. So help you God.”

(3) Every reporter and interpreter will, before performing duties make oath or affirmation administered by the counsel for the court, in the following form:

“You, (Name), do swear (or affirm) that you will faithfully perform the duties of reporter (interpreter) to this court. So help you God.”

(4) All persons who testify before a court of inquiry will be examined on oath of affirmation, administered by the counsel for the court, in the following form:

“You, (Name), do swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.”

(5) The counsel for the court will administer the following oath to a challenged member who is to be examined under oath as to his or her competency:

“You, (Name), do swear (or affirm) that you will answer truthfully to the questions touching your competency as a member of the court in this case. So help you God.

(f) Presence of party. Although a party to the inquiry has the right to be present during all proceedings in open court, his or her presence is not essential and the absence does not affect the authority of the court to proceed with the inquiry. An absent party may be represented by counsel. If a party is absent because of sickness or other good reason and was represented by counsel during the absence, the court will, if practicable, adjourn the inquiry until the party or counsel can be present. Otherwise the court will, upon request of the absent party-

(1) Make known to the party the evidence pertaining to the party that was received during the party's absence.

(2) Give the party a reasonable opportunity to cross-examine available witnesses and to present evidence in the party's own behalf.

(g) Rules of evidence.

(1) Although not generally bound by the rules of evidence contained in the MCM (but see Para 10-7(c)(3) above), courts of inquiry will, as far as practicable, observe those rules to ensure an orderly procedure and a full, fair, and impartial investigation. Thus a court may consider certificates of officers or affidavits of enlisted personnel or civilians if it is impossible or impracticable to obtain their personal testimony or depositions.

(2) Similarly, if it is impracticable to produce a witness to authenticate a document, the court may dispense with formal proof of its authenticity, however, the court must be satisfied that the document is what it purports to be. When a deposition is taken under the provisions of Article 49, KCMJ and KRCM 702, all known parties to the inquiry will be given notice and permitted to submit cross-interrogatories. In determining the materiality of evidence, the court should consider that the scope of the inquiry is limited by the directions contained in the convening order or in subsequent communications of the convening authority.

**10-9. Report.**

(a) **General.** After all the evidence has been presented and briefs, if any, submitted, the court will close to consider the evidence and formulate its findings and, if any are required, its opinions and recommendations. Only the members and counsel for the court may be present during its closed sessions. The findings, opinions, and recommendations of the court will not be divulged to anyone other than the convening authority; nor will the vote or opinion of any member be disclosed unless disclosure is required by these regulations or by a court of justice in due course of law.

(b) **Findings.** After careful consideration of the evidence of record and the instructions contained in the convening order, the court will record its findings. A finding is a clear and concise statement of a fact or a conclusion of the court that may reasonably be inferred from the evidence. On request of the court, the counsel for the court will assist the court in putting the findings in proper form. Each finding must be supported by evidence of record. In arriving at its findings with respect to disputed facts, the members of the court should use their professional knowledge, best judgment, and common sense in weighing the evidence. They will consider the probability or improbability of the disputed facts and should regard as established facts, those which are supported by evidence deemed most worthy of belief.

(c) **Opinions.** If the convening order directs the submission of opinions, the court will set forth the opinions that it believes may reasonably be inferred from the facts. The opinions consist of a concise summary of the results of the inquiry consequent from the evidence supported by the facts. They may consider matters in extenuation or mitigation. The court's opinions may include conclusions of law; e.g., whether the facts found establish the commission of an offense that is punishable by the KCMJ.

(d) **Recommendations.** If the convening order requires that recommendations be submitted, the court will make such recommendations as are specifically directed and any others that, in its opinion, are appropriate and advisable in view of the nature of the inquiry and the facts found. Recommendations must be appropriate and warranted by the findings and opinions. In general, they should cover the punitive, pecuniary, and corrective phases of the matter under investigation. If any member of the court recommends trial by court-martial, a charge sheet, signed and sworn to by that member, will be prepared and submitted to the convening authority with the record of proceedings. These charges may be signed and sworn to before the counsel for the court.

(e) **Minority report.** The report of the court will be based on the opinion of the majority of the members sitting at the inquiry. If a member does not concur with the findings, opinions, or recommendations of the majority of the court, the member will prepare a minority report. It will contain an explicit statement of the parts of the majority report with which the member disagrees and the reasons therefor.

**10-10. Preparation and submission of record.**

(a) **Content.** The record of proceedings of a court of inquiry will include-

(1) The convening order.

(2) Any other communication from the convening authority.

(3) An accurate transcript of the proceedings, including a verbatim report of the testimony.

- (4) The findings of facts.
  - (5) The opinions and recommendations, if any were required.
  - (6) The exhibits that were received in evidence.
- (b) Form. The provisions of Appendix 14, MCM, so far as they are applicable, will serve as a general guide for the preparation of the record of the proceedings of a court of inquiry.
- (c) Copies. The convening authority ordinarily will provide in the convening order for preparation of sufficient copies of the record to permit distribution to agencies directly concerned with the subject of the inquiry. If the convening order fails to prescribe the number of copies, the record will be prepared in duplicate.
- (d) Authenticating and forwarding. All copies of the record will be authenticated below the findings, opinions, and recommendations of the court, including any minority report, by the signature of the president and counsel for the court. In case the record cannot be authenticated by the president it will be authenticated by a member, in lieu of the president. In case the record cannot be authenticated by the counsel for the court, it will be authenticated by a member in lieu of counsel. After the record is authenticated, all copies will be forwarded to TJAG.

#### **10-11. Action of convening authority.**

- (a) Revision. If not satisfied with the investigation, facts, opinions, or recommendations, the convening authority may return the record to the court with explicit instructions to
- (1) Have the investigation pursued further, or the facts, opinions, or recommendations stated in greater detail, or in more definite and unequivocal terms.
  - (2) Correct some other error or defect or supply some omission.
- (b) Review and formal action. The convening authority will review the record of proceedings of a court of inquiry and consider the findings, opinions, and recommendations. The convening authority will state at the end of the record over the convening authority's own signature, approval or disapproval in whole or in part of the findings, opinions, and recommendations. In taking this action, the convening authority is not bound by the findings, opinions, or recommendations of the court.

#### **10-12. Disposition of record.**

- (a) Immediately after taking action on a record of the proceedings of a court of inquiry, the convening authority will forward the original copy of the record, by letter of transmittal, through normal command channels, to TJAG. The letter of transmittal will contain a statement as to what action the convening authority has taken or proposes to take on the matter investigated by the board.
- (b) Superior commanders may take such action as they deem appropriate on the subject of the inquiry and the action of subordinate commanders thereon. A notation of any action taken by such a commander will be included in the endorsement forwarding the record. The original copy of each record of a Court of Inquiry shall be permanently filed by TJAG in the same manner as records of trial by GCM (see para 5-36(b)).

## CHAPTER 11

### OATHS

#### 11-1. General.

This chapter implements Articles 42 and 136, KCMJ, and various rules of the MCM. It authorizes commanders to administer oaths related to military justice. It also authorizes other military personnel who are empowered to authorize searches and seizures (MRE 315(d)) to administer oaths for such searches and seizures and for apprehensions. This chapter prescribes the form and procedures of oaths to be administered to:

- (a) Personnel of courts-martial.
- (b) Persons providing sworn information supporting requests for authorizations to search and seize and authorizations to apprehend. (See chapter 9 for issuance of search and seizure authorizations.)

#### 11-2. Persons required to be sworn.

(a) All court-martial personnel, which include the following, will take an oath to perform their duties faithfully (KCMJ, Art. 42(a)):

- (1) The military judge.
- (2) Members of GCMs and SPCMS.
- (3) Trial counsel.
- (4) Assistant trial counsel.
- (5) Defense counsel.
- (6) Assistant defense counsel.
- (7) Reporters.
- (8) Interpreters.

(b) Additionally, an individual defense counsel, military or civilian, will take a similar oath (KRCM 807(b) (1); 901(d) (5)).

(c) Oaths to court-martial personnel need not be administered in the presence of the accused.

(d) Commanders are authorized to administer oaths for all military justice purposes. All other military personnel who are empowered to authorize searches and seizures (MRE 315(d)) are authorized to administer oaths for such searches, seizures and apprehensions.

**11-3. Oath administration procedure -Military Judges.**

A military judge will take an oral oath before an officer qualified to administer oaths by Article 136(a), KCMJ, to faithfully and impartially perform his or her duties when detailed, not later than the first Article 39a, UCMJ, session.

**11-4. Oath administration -Counsel.**

(a) A counsel certified under Article 27(b), KCMJ, who is a member of the JAGC will take the oath on the record during the first Article 39(a) session of a court-martial.

(b) The oath for faithful performance of duty in all cases, DA Form 3497-R, will generally be administered to members of the JAGC as part of their certification under Article 27(b)(2), UCMJ. It may also be administered at any time by an officer qualified to administer oaths under Article 136(a), UCMJ. At the time the oath is administered, DA Form 3497-R will be completed. One copy of the form will be retained by the JA who took the oath and two copies will be forwarded to HQDA (DAJA-PT), WASH DC 20310-2206.

**11-5. Oath administration procedure -Court Members.**

The trial counsel will normally administer the oath to court members in open session. As a matter of policy, such oaths should be administered at every court-martial to impress on the participants the solemnity of the proceedings. At the discretion of the officer who convened the court, however, the court members may take a written oath to perform their duties faithfully in all cases referred to that court. The convening authority authorizing the administration of this type of oath will maintain a copy of the oath so that it may readily be determined that court members have been previously sworn. When court members are not sworn because they have been administered such an oath previously, this fact will be noted in the record of trial.

**11-6. Oath administration procedure -Reporters.**

The trial counsel will administer the oath to the reporter at the court-martial.

**11-7. Oath administration procedure -Interpreters.**

The trial counsel or SCM officer will administer the oath to interpreter at the court-martial.

**11-8. Forms of oaths for court-martial personnel.**

(a) Oath for military judge. The following oath will be administered to the military judge:

“You (name of military judge) do swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trials by courts-martial, all the duties incumbent upon you as a military judge. (So help you God).”

(b) Oath for counsel. The following oath, as appropriate, will be administered to trial counsel, assistant trial counsel, defense counsel (individually requested, detailed, or civilian), and each assistant defense counsel:

“You (name(s) of counsel) do swear (or affirm) that you will faithfully perform the duties of (individual) (detailed) counsel in the case now in hearing. (So help you God).”

(c) Oath for court members. The following oath, as appropriate, will be administered to court-martial members according to paragraph 11-5 (KRCM 807(b)(2)):

“You (name(s) of member(s) (each of you)) do swear (or affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court (upon a challenge or) upon the findings or sentence unless required to do so in due course of law. (So help you God).”

(d) Oath for reporters. The following oath, as appropriate, will be administered to court reporters (KRCM 807(b)(2)):

“You (Name) do swear (or affirm) that you will faithfully perform the duties of reporter (to this court) (to any court to which you shall be detailed). (So help you God).”

(e) Oath for interpreters. The following oath, as appropriate, will be administered to every interpreter in the trial of any case before a court-martial before he or she enters upon his or her duties (KRCM 807(b)(2)):

“You (Name) do swear (or affirm) that (in the case now in hearing) (in any case to which you are detailed) you will interpret truly the testimony. (So help you God).”

**11-9. Oath administration procedure-persons providing sworn information in support of requests for authorizations to search and seize and authorizations to apprehend.**

(a) General. Oaths are not required to be given to persons providing information in support of requests for authorizations to search and seize. However, if the authorization is to be based on sworn information, the procedures set forth in b below should be followed. Nothing in this regulation is intended to prohibit the issuance of authorizations to search, seize, or apprehend on the basis of unsworn written or oral statements (para 9-8).

(b) Procedure.

(1) Commanders and other military personnel empowered to authorize searches and seizures, on probable cause, may administer oaths to persons presenting information in support of requests for such authorizations. The information presented may be oral or in writing. Where written information is provided by message or written statement, other persons authorized to administer oaths may do so. The authorizing official may accept representations by the person providing the information that this has been done. The representations should include the name and authority of the person administering the oath and the date and place of administration.

(2) If the information presented to the authorizing official consists solely of previously sworn affidavits, the individual requesting the authorization need not be sworn. If the requestor or any other individual also provides any additional information based on his or her personal knowledge to the authorizing official for use in the probable cause determination, that individual must do so under oath or affirmation. Sworn or affirmed information however, is generally more credible and often entitled to greater weight than information not given under oath (see para 9-8).

(3) Information may also be presented by telephone, radio, or similar device to those empowered to authorize searches, seizures, and apprehensions. The authorizing official may administer the oath over such devices.

(4) In addition to sworn or affirmed information presented to the authorizing official pursuant to a request for authorization to search and seize or apprehend, the authorizing official may consider any information he or she has, provided such information would not preclude him or her from acting in an impartial manner.

#### **11-10. Form of oaths for probable cause searches and seizures and apprehensions.**

No specific form of oath or affirmation is required as long as it imposes upon the requestor a legal responsibility for the correctness of the information. The following oath or affirmation, as appropriate, may be administered to persons providing information supporting requests for authorizations to search and seize:

“You (Name) do swear (or affirm) that the information you are providing is to the best of your knowledge, information, and belief, the truth. (So help you God).”

#### **11-11. Form of oath for the accused following a plea of guilty.**

The following oath will be administered to the accused prior to the military judge questioning the accused concerning the accuracy of his or her plea (see R.C.M. 910 (e)):

“Do you (swear)(affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?”

## CHAPTER 12

### COURT-MARTIAL ORDERS

#### 12-1. Types of court-martial orders.

- (a) Convening orders. A convening order is used to announce the detail of a SCM or of the members of a SPCM or GCM. (See KRCM, 504(d)).
- (b) Promulgating orders. An initial promulgating order is used to promulgate the results of trial by a GCM or SPCM and the initial action of the convening authority thereon. A supplementary promulgating order is used to promulgate any subsequent action taken by the convening or higher authority on findings or sentence of a GCM, SPCM, or SCM (see KRCM 1114).

#### 12-2. Convening orders.

The convening authority will issue convening orders for each GCM or SPCM as soon as practicable after he or she personally determines the members of a court-martial. The convening authority may issue a convening order for each SCM at the time of referral by annotating the charge sheet (KRCM 1302(c)). Oral convening orders will be confirmed by written orders as soon as practicable. Convening orders may be amended. SCM convening orders may be amended by an attachment to the charge sheet (App 4, MCM).

#### 12-3. Promulgating orders.

- (a) Initial promulgating orders (see fig, 12-1, AR 27-10).
- (1) The convening authority will issue an order promulgating the results of trial for all GCMs and SPCMS. An initial SCM promulgating order need not be issued (KRCM 1114.(a)(3)).
- (b) Supplementary promulgating orders (see fig 12-2 through 12-7, AR 27-10). Action taken on the findings or sentence of a GCM, SPCM, or SCM subsequent to the initial action by the convening authority will be promulgated, as appropriate, by-
- (1) The convening authority who took the initial action in the case.
- (2) The commanding officer of the accused who is authorized to take the action being promulgated.
- (3) An officer exercising GCM jurisdiction over the accused at the time of the action, or
- (4) The Adjutant General.
- (c) Designation. Initial or supplementary promulgating orders in GCMs, SPCMS, and SCMs are designated 'GENERAL COURT-MARTIAL ORDER', 'SPECIAL COURT-MARTIAL ORDER', or 'SUMMARY COURT-MARTIAL ORDER', respectively.

**12-4. Format for SCMCOs.**

(a) SCM convening order. A SCM may be convened at the time of referral by annotating Section IV of the charge sheet (App 4, MCM) after the words convened by as follows:

“this detail of (insert GRADE and NAME) as a Summary Court-Martial on (Date)”.

Amendments to SCM convening orders will be made by attachments to the charge sheet.

(b) SCM promulgating order. Initial SCM promulgating orders are not required. -Supplemental promulgating orders will be issued using the format in paragraph 12-5 and Appendix 17, MCM.

**12-5. Format for CMOs.**

(a) Heading.

(1) The heading of CMOs is the same as that used for other orders, except that the words “COURT-MARTIAL CONVENING ORDER,” “GENERAL COURT-MARTIAL ORDER,” “SPECIAL COURT-MARTIAL ORDER,” or “SUMMARY COURT-MARTIAL ORDER” are substituted for the word “Orders” (AR 310-10, para 2-4).

(2) Court-martial orders within each category (convening (except SCM convening orders), summary, special, or general) are numbered consecutively beginning anew with the start of each calendar year. The first numbered order in each series issued in any calendar year will bear a notation above the heading of the first page, showing the number of the last order issued for that series during the preceding year. For example, Court- Martial Convening Order Number 37 was the last of the series for 1981.”

(3) The type of order will be written in capital letters beginning at the left margin immediately opposite the date. The word “NUMBER” in capital letters will be placed immediately below the type of order. An Arabic numeral indicating the serial number of the order will be placed so that the last number is immediately below the last letter of the word “ORDER.” Dates will be indicated as follows:

(A) A court-martial convening order will bear the date of its publication.

(B) An initial promulgating order will bear the date of the action of the convening authority on the record of trial.

(C) An initial order promulgating an acquittal or termination, or a supplementary order will bear the date of its publication.

(b) Body.

(1) General. Detailed instructions on CMOs are contained in Appendices 6 and 17, MCM.

(2) Court-martial convening orders (see R.C.M. 504(d) and App 6, MCM).

(3) Initial GCM and SPCM promulgating orders (see fig 12-1, AR 27-10). The body of the order will contain the elements outlined in R.C.M. 1114 in the format of Appendix 17, MCM. If the

order promulgates the proceedings of a rehearing, it will recite that fact together with the number and date of the court-martial order publishing the former proceedings.

(4) Supplementary GCM, SPCM, and SCM promulgating orders (see figs 12-2 through 12-7). In addition to the information contained in Appendix 17, the order will include, if applicable the following:

(A) The date the sentence was adjudged if the supplementary action in any manner affects a sentence of confinement.

(B) The courts-martial case number inserted in parentheses at the end of the distribution list.

(c) Authentication. Court-martial orders are authenticated in the same manner as other orders discussed in AR 310-10, paragraph 1-15, with the exception of the authority line. The authority line in convening orders indicates that the commander has personally acted with respect to the selection of the personnel named in the order. In court-martial orders, the authority line reads-

(1) "BY COMMAND OF (grade and last name)" when the commander is a general officer.

(2) "BY ORDER OF (grade and last name)" when the commander is below the grade of brigadier general.

(d) Distribution designation.

(1) The word "DISTRIBUTION" is placed beginning at the left margin opposite the signature block. A list of the individuals, organizations, and installations to which copies of the order will be sent and the number of copies to be furnished will be indicated under "DISTRIBUTION." Distribution includes one copy for the reference set, when needed, and the record set, of military publications.

(2) Standard distribution of orders within a command and to agencies requiring full distribution may be designated by letters; for example, distribution A, B, or combinations thereof, to indicate all or part of the distribution made. Agencies included in each letter designation are shown in a distribution list prepared and published by the headquarters or agency concerned (AR 310-10, para 1-16a).

(e) Corrections. Court-martial orders are corrected in the same manner as other orders discussed in AR 310-10, paragraph 1-19, with the following exceptions:

(1) Changed material will be underscored.

(2) Further corrections will be made by additional corrected copies, as necessary, with the figure '2d', '3d', etc., inserted before the words 'CORRECTED COPY'. Extreme care should be used in preparing court-martial orders to avoid corrections.

## **12-6. Modification of findings or sentence.**

(a) General. Orders modifying the findings or all or any part of the sentence of a GCM, SPCM, or SCM issued subsequent to the order promulgating the result of a trial are published in appropriate supplementary court-martial orders.

(b) Supplemental orders for Article 66 cases in which a petition to the Kansas Court of Appeals has not been filed.

(1) No supplementary CMO is necessary if the accused waives or withdraws appellate review under KRCM 1110 (and no modification of the action in the initial promulgating order is necessitated after review under KRCM 1112) or if the KCMR affirms the findings and sentence without modification, and

(A) No dismissal or discharge was adjudged or approved, or

(B) A suspended dismissal or discharge has not been vacated pursuant to Article 72, KCMJ, and

(C) No action has been taken by TJAG or The Adjutant General modifying the findings or the sentence.

(2) A supplemental CMO is necessary for a case involving a sentence to dismissal or discharge not described in (1) above:

(A) In a case involving a sentence to a punitive discharge in which the accused has waived or withdrawn appellate review under KRCM 1110, the supplementary CMO will be promulgated on completion of review under KRCM 1112 or subsequently, after final review by TJAG pursuant to KRCM 1201(b)(2) if review by TJAG is required under R.C.M. 1112(g)(1).

(B) In a case involving a sentence to dismissal in which the accused has waived or withdrawn appellate review under KRCM 1110, the supplementary CMO will be promulgated after the record has been forwarded to TJAG under KRCM 1112g (2) for action under KRCM 1206.

(C) In a case reviewed by the KCMR, the supplementary CMO will be promulgated after the expiration of 75 days from the date the KCMR decision is served on or mailed to the accused under para 13-9, whichever is earlier, unless the accused requests final action sooner or petitions the Kansas Court of Appeals for a grant of review.

(3) A supplemental CMO is necessary in all other cases in which competent authority modifies the findings or sentence.

(4) When the accused is enlisted, or is an officer not under an approved or affirmed sentence to dismissal, the supplemental CMO will be promulgated by the officer (or successor) exercising GCM authority over the accused at the time the court-martial was held if the case receives final review under KRCM 1112 or otherwise by the officer presently exercising GCM authority over the accused or by HQDA. If the accused is under an approved sentence to dismissal, the supplementary CMO will be promulgated by HQDA.

(c) Supplementary orders for Article 66 cases in which a petition to the Kansas Court of Appeals has been filed. Supplemental CMOs, as required, will be promulgated either by the officer presently exercising GCM authority over the accused according to a letter of instructions from TJAG.

**12-7. Distribution of court-martial orders.**

Official copies of CMOs and amending orders, if any, issued from the various headquarters are distributed as follows:

(a) Convening orders. Convening orders will be distributed as follows:

- (1) One copy to each individual named in the order.
- (2) One copy to the officer exercising GCM jurisdiction (inferior courts only).
- (3) One copy each for original and copies of the record of trial.

(b) Initial court-martial promulgating orders with an approved sentence that involves dismissal or punitive discharge whether or not suspended. In all cases-

- (1) One copy for each individual tried (included in his or her copy of the record of trial).
- (2) One copy to the military judge, trial counsel and defense counsel of the court-martial before which the case was tried.
- (3) One copy each to the individual's immediate and intermediate commander.
- (4) One copy to the MILPO servicing the MPRJ of the individual. The MILPO will cause the order to be transmitted to the Finance and Accounting Office maintaining the soldier's, pay account for filing and for use as a substantiating document according to AR 37-104-3.
- (5) One copy each to the commanding officer.
- (6) One copy for each officer affected to HQDA(DAPC-MSP), 200 Stovall Street, Alexandria, VA 22332. One copy for each enlisted member affected to the Commander, US Army Enlisted Records and Evaluation Center, ATTN: PCRBF-S, Fort Benjamin Harrison, IN 46249.
- (7) Ten copies for each person accused forwarded to TJAG for the KCMR.
- (8) Two copies of GCM and SPCM promulgating orders to the Veterans Administration Insurance Center, P.O. Box 8079, Philadelphia, PA 19101, announcing approved finding of guilty of-
  - (A) Mutiny.
  - (B) Treasonable acts in violation of Articles 99, 104, or 134, KCMJ.
  - (C) Spying.
  - (D) Desertion.
  - (E) Because of conscientious objections, refusal to perform service in the Army of the United States or refusal to wear the uniform of the Army of the United States.

(9) One copy to the individual's MPD/PSC, ATTN: Records Section servicing the MPRJ, according to AR 640-10 and for compliance with AR 640-2-1, chapter 4.

(10) In GCM cases, two copies in cases of officers only, to Professor of Law, United States Military Academy, West Point, NY 10996.

(c) Initial GCM and SPCM court-martial orders promulgating acquittals, terminations, or approved -sentences not involving dismissal, or punitive discharge. In all cases-

(1) One copy for each individual tried (included in his or her copy of the record of trial).

(2) One copy each to the individual's immediate and intermediate commander.

(3) One copy to the MPD/PSC servicing the soldier's MPRJ. The MPD/PSC will cause the order to be transmitted to the Finance and Accounting Office maintaining the soldier's pay account for filing and for use as a substantiating document in accordance with AR 37-104-3.

(4) One copy for each officer affected to HQDA (DAPC-MSP), 200 Stovall Street, Alexandria, VA 22332. One copy for each enlisted member affected to the Commander, US Army Enlisted Records and Evaluation Center, ATTN: PCRE-FS, Fort Benjamin Harrison, IN 46249.

(5) In SPCM cases in which a punitive discharge was adjudged, but not approved, one copy forwarded to the Clerk of Court (JALS-CC), Nassif Building, Falls Church, VA 22041-5013.

(6) In GCM cases, ten copies for each person accused forwarded to TJAG for the use of the KCMR.

(7) Five copies for each person accused (included in the record of trial) in SPCM cases to the officer exercising GCM jurisdiction over the command to which the record of trial is forwarded.

(8) One copy to the individual's MPD/PSC, ATTN: Records Section, servicing the MPRJ, according to AR 660-10 and for compliance with AR 640-2-1, chapter 4.

(9) In GCM cases, two copies in cases of officers only, to Professor of Law, United States Military Academy, West Point, NY 10996.

(d) SCM record of trial.

(1) On completion of the convening authority's action, copies of the SCM records of trial (DD Form 2329) will be distributed as follows:

(A) One copy will be retained by the SCM authority.

(B) One copy shall be provided to each individual tried.

(C) Additional copies will be distributed as provided in (c)(3),(4),(5),(6),and (10) above.

(2) On completion of review under KRCM 1112 or KRCM 1201(b)(2), the original and copies of the SCM record of trial reflecting the completed review (see para 5-31(d)) will be distributed as follows:

(A) The original of the record of trial will be forwarded to the officer exercising GCM authority (ATTN: SJA) over the SCM authority.

(B) One copy will be distributed as provided in (c)(6) and (10) above.

(e) Supplementary court-martial orders.

(1) Copies of every supplementary order in which the initial action included an approved sentence that involves dismissal or punitive discharge will be distributed as provided in (b)(1) and (3) through (11) above. Two copies of the CMOs will be furnished to the convening authority who convened the court, ATTN: SJA.

(2) Copies of every GCM or SPCM supplementary order in which the initial action did not include an approved sentence that involves dismissal or punitive discharge year or more will be distributed as provided in c above. Copies of every SCM supplementary order will be distributed under (c)(3),(6), and (10) and (d)(2)(a) and (b) above.

(3) If the authority issuing the supplementary order is other than the authority initially acting on the case, the latter will be furnished two copies of the supplementary order. These copies will be made available for information and annotation of military police and criminal investigation.

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## CHAPTER 13

### APPELLATE REVIEW MATTERS

#### 13-1. Scope.

This chapter discusses appellate review matters pertaining to-

- (a) Appeals under Articles 62 and 66, KCMJ.
- (b) The waiver or withdrawal of an appeal under Article 61, KCMJ.
- (c) Petitions for extraordinary relief filed by the State.

#### 13-2. Petitions for extraordinary relief.

Prior to filing a petition for extraordinary relief with the Kansas Court of Military Review or the Kansas Court of Appeals on behalf of the State or State, in their official capacity, trial counsel, staff judge advocates or their representatives will coordinate with The Judge Advocate General.

#### 13-3. Appeals under Article 62.

- (a) A trial counsel shall not file a notice of appeal under KRCM 908 unless authorized to do so by the GCM authority or the SJA.
- (b) The trial counsel shall serve a certificate of notice of appeal under R.C.M. 908(b)(3) on the military judge. The certificate shall reflect the date and time of the military judge's ruling or order from which the appeal is taken, and the time and date of service on the military judge.
- (c) The matters forwarded under R.C.M. 908(b)(6), including an original and three copies of the verbatim record of trial (only those portions of the record that relate to the issue to be appealed), together with the certificate of notice of appeal will be forwarded to TJAG within 20 days from the date written notice of appeal is filed with the trial court for use by KCMR.
- (d) Following a decision of the KCMR, the Judge Advocate General will notify the military judge and the convening authority, who will cause the accused to be notified promptly as required by KRCM 908(c)(3). Whether the accused is notified orally on the record or by other means, the trial counsel's certificate as to the fact, date, and method of notification will be sent to TJAG, immediately.

#### 13-4. Appellate advice after trial.

Apart from the advice an accused has received pursuant to K.R.C.M 1010, the trial defense counsel will explain to the accused the rights to appellate review that apply to the case. The trial defense

counsel will submit for attachment to the record of trial a record of the advice given to the accused concerning appellate review and appellate counsel and the accused's election concerning representation by military or civilian counsel before KCMR. Counsel will also advise the accused regarding appeal to the Kansas Court of Appeals after a decision by the KCMR.

### **13-5. Waiver or Withdrawal of Appellate Review.**

(a) A waiver of appellate review or withdrawal of an appeal pursuant to Article 61 and KRCM 1110 shall be made on DD Form 2330 (Waiver/Withdrawal of Appellate Rights in General and Special courts-Martial Subject to Review by a Court of Military Review) or DD Form 2331 (Waiver/Withdrawal of Appellate Rights in General Courts-Martial Subject to Examination in the Office of The Judge Advocate General). (See App 18, MCM.) In GCM cases and in SPCM cases in which a BCD has been approved, review pursuant to KRCM 1112 will be completed before the record of trial is forwarded pursuant to paragraph 5-35.

(b) An accused may not revoke a waiver or withdrawal of appellate review made in substantial compliance with KRCM 1110. When, however, review under KRCM 1112 or KRCM 1201(b)(2) results in a rehearing, the accused is entitled to any applicable appellate rights, unless he or she again waives or withdraws further appellate review.

### **13-6. Identifying companion and other cases.**

(a) The trial counsel will annotate the cover of each record of trial forwarded for review under Article 66 to identify each person (grade, name, SSAN) tried or expected to be tried separately in a case potentially subject to appellate review pursuant to Article 66 for involvement in an offense that is the same as or related to one tried in the case being forwarded. These co-accuseds, co-actors, or co-conspirators, as the case may be, will be identified under a heading "Companion Cases". The purpose of this is to avoid conflicts of interest in the assignment of appellate defense counsel. If there are no companion cases, the words "no companion cases" will be entered under the above heading.

(b) In addition, the trial counsel will annotate the cover of each original record of trial forwarded for review under Article 66 to identify any prosecution witness or victim known to have been tried for any offense by court-martial subject to review pursuant to Article 66 so that potential conflicts of interest in the assignment of appellate defense counsel can be avoided.

### **13-7. Rules of appellate procedure.**

Cases reviewed by the Kansas Court of Appeals will follow the rule of that court. The Kansas Court of Military Appeals may promulgate rules of practice before that court, modeled upon AR 27-13.

### **13-8. Reserved.**

**13-9. Serving KCMR decisions on the accused.**

- (a) To protect the rights of the State and the accused, a copy of each KCMR decision (opinion or order disposing of an appeal or petition) must be served as expeditiously as possible on each accused, and counsel for the accused and a record maintained of the date and manner of service.
- (b) The Judge Advocate General is responsible for serving decisions on counsel for the accused.
- (c) The decision copy to be served on the accused, as well as a copy to be placed in the accused's MPRJ, will be sent to the GCM authority currently exercising jurisdiction over the accused. If the GCM authority who receives the correspondence is not currently exercising GCM authority over the accused, he or she will cause the correspondence to be sent by endorsement to the new GCM authority over the accused, ATTN: SJA.
- (d) Information copies of decisions shall be sent to the GCM authority exercising jurisdiction over the accused at the time of trial and the GCM authority who took initial action on the record of trial if one or both of them are different from, the GCM authority indicated in c, above.
- (e) The KCMR decision will be served on the accused in person whenever possible.
- (f) When personal service cannot be made the decision copy will be served by first class certified mail, return receipt requested.

**13-10. Cases remanded by the KCMR or KCA.**

- (a) When a decision of the KCMR or KCA directs or authorizes further proceedings, such as a rehearing, a limited hearing, or a new action by the convening authority, the accused must be located and furnished a copy of the decision. Further proceedings in KCMR cases need not be delayed, however, solely to permit an accused to petition KCA for a grant of review or otherwise appeal the matter.
- (b) Any special instructions deemed necessary to carry out the mandate of the Court will be transmitted by the Clerk of Court with the record of trial remanded.
  - (1) The original and any copies of a record of trial remanded for further proceedings must remain intact except for documents needed for reintroduction in the further proceedings, such as the original charge sheet and exhibits to be readmitted into evidence.
    - (A) Documents and copies of documents withdrawn should be replaced if not used, or, if used, replaced by a trial counsel memorandum explaining their disposition. In particular, the original copies of a decision of a Court, action of a convening authority, post-trial review or recommendation, pretrial advice, and Article 32 investigation must not be withdrawn.
    - (B) All copies of the record remanded should be returned with the record of further proceedings except that, if action on the sentence is such that no further review pursuant to Article 66 or 67 is required, only the original record need be returned to the Clerk of Court.
  - (2) In addition to any new document in the nature of a pretrial advice and referral to a court-martial, the authenticated record of further proceedings must be accompanied by the original of any new action by a convening authority and the same number of copies of an order

promulgating the action as required when a record is initially forwarded for review pursuant to Article 66 or 69, as the case may be.

(3) In the absence of specific advice to the contrary, the GCM authority should consider that an accused's right to speedy disposition of criminal charges, right to address matters to a convening authority, and right of counsel to comment on a staff judge advocate's recommendation to the convening authority apply to the further proceedings.

**13-11. Leave pending appellate review.**

An accused who is under sentence to a dismissal or punitive discharge, approved by the convening authority and unsuspended, may, under AR 630-5, voluntarily or involuntarily be authorized by the officer exercising GCM jurisdiction to take leave, including excess leave, until there is a final judgement in the case.

## CHAPTER 14

### APPLICATION FOR RELIEF UNDER ARTICLE 69 OF THE UNIFORM CODE OF MILITARY JUSTICE

#### 14-1. General.

- (a) This chapter implements KRCM 1201(b)(3) and Article 69(b), KCMJ. It prescribes the procedures for applying to The Judge Advocate General for relief from the findings or sentence in a SPCM or SCM court-martial case that has been finally reviewed but has not been reviewed by the KCMR.
- (b) TJAG may vacate or modify the findings or sentence in whole or in part and may grant relief on grounds of-
- (1) Newly discovered evidence.
  - (2) Fraud on the court.
  - (3) Lack of jurisdiction over the accused or the offense.
  - (4) Error prejudicial to the substantial rights of the accused.
  - (5) Appropriateness of the sentence (except that the quality of the behavior or duty performance of the accused after trial or any evidence of personal hardship not admitted at trial is normally not a basis on which relief on grounds of sentence, appropriateness may be considered).
- (c) A request for relief according to this chapter is not a part of the appellate process in a court-martial case. No provision exists for a hearing or personal appearance before TJAG.
- (d) Relief under Article 69(b), KCMJ, the Kansas Rules for Courts-martial, and this chapter is authorized only when the court-martial is final within the meaning of KRCM 1209(a)(2) and when at least one of the grounds set forth in b, above, has been established to the satisfaction of TJAG. If TJAG sets aside the sentence, he may, except when the setting aside is based on lack of sufficient evidence to support the findings, order a rehearing. A new trial may be granted only under Article 73, KCMJ. The denial of relief by TJAG under the provisions of this chapter does not preclude application on clemency grounds under Article 74, KCMJ.

#### 14-2. Procedures for making application.

- (a) Application for relief should be made by Petition to The Judge Advocate General. For a sample, DA Form 3499 (Application for Relief from Court-Martial Findings and/or Sentence under the Provisions of Title 10, United States Code Section 869), which may be obtained through normal publications supply channels, may be consulted.
- (b) Failure to file within the prescribed time may be excused by TJAG for good cause established by the accused.

**14-3. Submission of application.**

(a) When an applicant seeks relief from the findings or sentence, or both, of a SPCM or SCM and is a member of the command that convened the court-martial (or of a unit within the same GCM jurisdiction) the application will be sent through the offices of the SJA of that GCM jurisdiction. That office will forward the application to TJAG with-

- (1) The original record of trial.
- (2) Copies of all court-martial orders in the case.
- (3) Any matter related to the allegations of the applicant.
- (4) Appropriate comment on these allegations.

(b) All other applications will be submitted directly to The Judge Advocate General.

**14-4. Timeliness.**

(a) Timely submission of an application for relief is necessary. As time passes, it may become difficult, if not impossible, for the applicant to establish the facts upon which relief could have been granted.

(b) Applicants are encouraged to consult a member of the JAGC, when available, before preparing an application for relief.

**CHAPTER 15**

**RESERVED**

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**CHAPTER 16**

**ALLEGATIONS OF MISCONDUCT AND  
SUSPENSION OF COUNSEL AND MILITARY JUDGES**

**SECTION I**

**GENERAL**

**16-1. Scope.**

This chapter implements and amplifies KRCM, 109. It sets forth standards and procedures for handling complaints by and against counsel, including civilian counsel, and military judges. Counsel before court-martial, appellate counsel, and military judges play a vital role in the preservation of military justice and discipline. A consequent obligation of this role is the maintenance of the highest standards of ethical conduct. Fundamental ethical principles are available as guides in maintaining this integrity (para 5-8).

**16-2. Withdrawal of certification by TJAG.**

Nothing contained in this regulation is to be construed as a limitation on the power of TJAG to issue or withdraw-

- (a) Any certification of qualification to act as military judge made pursuant to Article 26, KCMJ, or
- (b) Any certification of competency to act as counsel before GCM made pursuant to Article 27(b), KCMJ.

**SECTION II**

**SUSPENSION OF COUNSEL**

**16-3. General.**

- (a) Action may be initiated to suspend counsel (KRCM 109) when a person acting or about to act or likely to act as counsel before proceedings governed by the KCMJ or the KMCM-
  - (1) Is or has been guilty of professional or personal misconduct of such a serious nature as to show that he or she is lacking in integrity or good demeanor, or
  - (2) Is otherwise unworthy or unqualified to perform the duties of counsel.
- (b) Action to suspend under this chapter is appropriate in the case of a person who-

- (1) Is certified as qualified to perform the duties of counsel of GCM under Article 27(b), KCMJ, or
- (2) Has been selected or obtained as counsel by the accused under Article 38(b), KCMJ, or
- (3) Has appeared as counsel for the accused in proceedings governed by the KCMJ or the KMCM or is likely to represent the accused at such proceedings in the future.

**16-4. Grounds for suspension.**

(a) Grounds for suspension include, but are not limited to-

- (1) Any violation of the Kansas Rules of Professional Conduct;
- (2) Conviction of a felony or any offense involving moral turpitude;
- (3) Conviction, receipt of nonjudicial punishment, or nonpunitive disciplinary action for a violation of Article 98, KCMJ, K.S.A. 48-3023.
- (4) Attempting to act as counsel in a case involving a security matter by one who is a security risk.
- (5) Disbarment or suspension by a Federal, State, or foreign court.
- (6) Suspension from practice as counsel before courts-martial by the JAG of an active military component or by the United State Court of Appeals for the Armed Forces.
- (7) Flagrant or continued violations of any specific rules of conduct prescribed for counsel in paragraph 5-8 of this regulation, or other applicable standards.
- (8) Violation of the Army Rules of Professional Conduct for Lawyers (DA Pam 27-26) or other applicable ethical standards, whether such misconduct occurs before a military court or other tribunal. However, in the event of a conflict between the Kansas Rules of Professional Conduct and any other rule or standard, the Kansas Rules of Professional Conduct shall apply.

**16-5. Action to Suspend Military Counsel.**

(a) General. Action to suspend a person from acting as counsel before courts-martial or as appellate counsel may be initiated when other available remedial measures including punitive action-

- (1) Are inappropriate.
- (2) Have failed to induce proper behavior.

(b) Remedial measures. Full consideration will be given to the appropriateness and effectiveness of such measures as-

- (1) Admonition.

- (2) Instruction.
- (3) Temporary suspension.
- (4) Proceedings in contempt.
- (5) Nonjudicial punishment under Article 15, KCMJ.
- (6) Trial by court-martial.
- (7) Relief of the person from duties as appointed counsel, assistant counsel, or appellate counsel.

(c) By a court-martial. The trial judge or court-martial without a trial judge may determine initially and on his or her or its own motion whether a person is qualified to act as counsel before the court-martial in a particular case. If a counsel is guilty of misconduct, the trial judge or a court-martial without a trial judge may admonish him or her. If the misconduct is contemptuous, the trial judge or court-martial may punish him or her (KCMJ, Article 48; KRCM 109). If admonition or punishment is inappropriate or fails to achieve the desired standard of behavior, the court should adjourn and report the fact to the supervising staff or command judge advocate or The Judge Advocate General.

(d) By an appellate court. Action to suspend a person acting as appellate counsel before the KCMR will be referred to TJAG.

(e). No action taken by NG personnel shall relieve attorneys involved from taking such additional or other action as may be required by the Kansas Rules of Professional Conduct.

#### **16-6. Action to suspend civilian counsel.**

Violations of the standards described in para. 16-4 may also be ground for the suspension or withdrawal by TJAG of the privilege of civilian counsel to appear before courts-martial.

#### **16-7. Modification or revocation of suspension or decertification.**

The Judge Advocate General may (on petition of a person who has been suspended or decertified as counsel (KCMJ, Art.27(b)), and on good cause shown) modify or revoke an order to suspend or decertify.

#### **16-8. Removal of counsel or reassignment of duties.**

Nothing in this chapter will prevent the military judge or other appropriate official from removing a counsel from acting in a particular court-martial, nor prevent the permanent reassignment or assignment temporarily to different duties prior to, during or subsequent to proceedings conducted under the provisions of this chapter.

**SECTION III**  
**SUSPENSION OF MILITARY JUDGES**

**16-9. General.**

Action may be initiated to suspend or revoke the decertification to act as military judge (KCMJ, Article 26, R.C.M. 109) when a person acting or about to act as trial or appellate judge-

- (a) Is or has been guilty of personal or judicial misconduct or unfitness of such a serious nature as to show that he or she is lacking in integrity or judicial demeanor, or
- (b) Is otherwise unworthy or unqualified to perform the duties of a military judge.

**16-10. Grounds.**

A Military judge may be censured, suspended from acting as military judge, or removed from the judicial role by revocation of his or her certification (UCMJ, Art. 26) for actions that-

- (a) Constitute judicial misconduct, or unfitness, or
- (b) Violate the Kansas Rules of Judicial Conduct, the Army Rules of Professional Conduct for Lawyers, or other applicable standards. The Kansas Rules of Judicial Conduct govern any conflict or inconsistency between or among applicable rules.

**16-11. Removal of a military judge.**

(a) Action to suspend a person from acting as military judge, or to revoke his or her certification as military judge, may be initiated when other available remedial measures are inappropriate or have failed to induce proper behavior. Accordingly, consideration will be given to other measures such as-

- (1) Relief from duties as military judge.
- (2) Censure.
- (3) Admonition.
- (4) Instruction.
- (5) Other sanctions, including punitive ones as may be warranted.

(b) In appropriate cases, TJAG may temporarily suspend military judges from participation in the trial of cases or appellate judges from participating in the appellate review of cases until completion of the inquiry.

(c) Nothing in this regulation shall relieve attorneys from taking such additional or other action as may be required by the Kansas Rule of Professional Conduct or the Kansas Rules of Judicial Conduct.

**16-12. Procedure.**

Information on alleged judicial misconduct or unfitness will be reported to The Judge Advocate General. The Judge Advocate General may utilize any reasonable procedure, including investigation under AR 15-6, to investigate such allegation.

**16-13. Modification or revocation of suspension or decertification.**

The Judge Advocate General may (on petition of a person who has been suspended or decertified as a military judge (KCMJ, Art. 26) and on good cause shown) modify or revoke a prior order to suspend or decertify.

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**CHAPTER 17**

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**CHAPTER 20**  
**COMPLAINTS UNDER ARTICLE 138, UCMJ**

**SECTION I**

**GENERAL**

**20-1. Purpose.**

This chapter establishes procedures for the preparation, submission, and disposition of complaints made pursuant to Article 138, Kansas Code of Military Justice (KCMJ), by a member of the Armed Forces against a commanding officer.

**20-2. Applicability.**

This chapter applies to all members of the Kansas National Guard when not on active duty in Federal service.

**20-3. Policy.**

(a) Resolution of complaints. The Department of the Army policy is to resolve complaints at the lowest level of command and to provide adequate administrative procedures for such resolution. Article 138, KCMJ, is one of several methods available. It provides for consideration at three successive levels.

(1) The first attempt to resolve a perceived wrong must be between the soldier and the commanding officer whom the soldier believes committed the wrong. If conventional measures are unsuccessful, the soldier may submit a request for redress under Article 138 (para 20-6). Every reasonable measure should be taken to resolve complaints at this level.

(2) The principal responsibility for acting on Article 138 complaints lies with the officer exercising general court- martial jurisdiction over the respondent at the time of the alleged wrong.

(3) The action of the officer exercising general court- martial jurisdiction is reviewed at the office of The Adjutant General.

(b) Right to complain. A member of the National Guard has a statutory right to submit an Article 138 complaint. Commanders will not restrict the submission of such complaints or retaliate against a member for submitting a complaint.

(c) Complaint to be forwarded. Every Article 138 complaint will be expeditiously forwarded to the officer exercising general court-martial jurisdiction unless voluntarily withdrawn by the complainant.

(d) Complainant not a participant. A soldier who submits an Article 138 complaint does not have a right to participate in any ensuing procedures under this regulation. However, the soldier may be asked to testify, provide additional information, or otherwise assist in resolving the complaint.

(e) Presumption of regularity. If the available evidence does not establish the validity of a complaint, despite vigorous good faith efforts to do so, a commanding officer is presumed to have acted properly.

(f) Processing complaints through command channels. Complaints are processed in the chain of command. Area jurisdiction and attachments and assignments for KCMJ or other administrative purposes do not affect the processing of Article 138 complaints.

(1) When forwarding a complaint to the general courts-martial convening authority over the respondent, intermediate commanders may deviate from strict adherence to command channels if such deviation will facilitate action on the complaint.

(2) No commander who has a direct interest in the complaint will be bypassed. Commanders with general courts-martial jurisdiction should communicate directly with equivalent or higher commanders or agencies.

#### **20-4. Explanation of terms.**

For purposes of this chapter, these terms used in Article 138 are defined as follows:

(a) Member. A member of the Kansas National Guard (Army or Air) subject to the KCMJ. A member who has submitted an Article 138 complaint is referred to in this regulation as the complainant.

(b) Commanding officer. An officer in the complainant's chain of command, up to and including the first officer exercising general court-martial jurisdiction over the complainant, authorized to impose nonjudicial punishment (Article 15, KCMJ) on the complainant (whether or not the authority to impose nonjudicial punishment or to exercise general court-martial jurisdiction has been limited or withheld by a superior commander). A commanding officer against whom an Article 138 complaint has been made is referred to in this regulation as the respondent (This should not be confused with the respondent designated in connection with formal proceedings under AR 15-6.)

(c) Superior commissioned officer. A commissioned officer in the complainant's current chain of command who is senior to the complainant in grade, rank, or position.

(d) Officer exercising general courts-martial jurisdiction. The first officer (or that officer's successor) in the respondent's chain of command who had general courts-martial jurisdiction over the respondent at the time of the alleged wrong. That officer's authority to act on Article 138 complaints will not be affected by limitations on his or her authority to convene courts, such as those occurring as a result of area jurisdiction or the attachment or assignment of individuals for KCMJ purposes. If there is no such officer below The Adjutant General this term refers to the officer (or that officer's successor) who actually exercises general courts-martial jurisdiction over the respondent at the time of the alleged wrong.

(e) Wrong. A discretionary act or omission by a commanding officer, under color of State military authority, which adversely affects the complainant personally and which is-

(1) In violation of law or regulation;

(2) Beyond the legitimate authority of that commanding officer;

(3) Arbitrary, capricious, or an abuse of discretion; or

(4) Materially unfair.

(f) Redress. Authorized action by any officer in the complainant's chain of command to effect the revocation of a previous official action or otherwise to restore to the complainant any rights, privileges, property, or status lost as a result of a wrong.

#### **20-5. Inappropriate subject matter for Article 138 complaints.**

(a) General. The procedures prescribed in this chapter are intended to ensure that an adequate official channel for redress is available to every soldier who believes the soldier's commanding officer wronged the soldier. For many adverse actions, however, there are other, more specific channels and procedures to ensure the soldier has an adequate opportunity to be heard. Those specific procedures usually are more effective and efficient for resolving such matters, and Article 138 procedures should neither substitute for nor duplicate them. Generally, an action is an inappropriate subject for resolution under Article 138 procedures when-

(1) Review is specifically provided by the KCMJ or the action is otherwise reviewable by a court authorized by the KCMJ or by a military judge.

(2) It is taken pursuant to the recommendation of a board authorized by regulation at which the complainant was substantially afforded the rights of a respondent (see chap. 5, AR 15-6).

(3) Army regulations specifically authorize an administrative appeal.

(4) It is a commander's recommendation or initiation of an action included in (1), (2), or (3) above.

The fact that the wrong complained of could be redressed by the Army Board for the Correction of Military Records (AR 15-185) or the Army Discharge Review Board (AR 15-180) does not make Article 138 inappropriate.

(b) Examples. Examples of actions for which Article 138 is inappropriate include-

(1) Matters relating to court-martial, nonjudicial punishment, confinement, and similar actions taken pursuant to the KCMJ, the Kansas Manual for Courts-Martial, or military criminal law regulations.

(2) Officer or enlisted elimination actions (AR 635-100; AR 635-200).

(3) MOS reclassification board actions (AR 600-200).

(4) Withdrawals of flying status (AR 600-107).

(5) Appeals from findings of pecuniary liability. (See AR 37-103 and AR 735-11 for examples.)

(6) Appeals from administrative reductions in enlisted grades (AR 600-200).

(7) Appeals from officer evaluation reports (AR 623-105) or enlisted evaluation reports (AR 600-205).

(8) Filing of adverse information (e.g., administrative reprimand) in official personnel records (AR 600-37).

(c) Referral to alternate channels. When the officer exercising general court-martial jurisdiction receives an Article 138 complaint apparently involving an adverse action for which more specific channels and procedures are available, the officer will act on it as prescribed in paragraph 20-11. A decision to leave the matter to be processed in those alternate channels and to so advise the complainant (para 20-11(b) (1)) constitutes proper measures for redressing the wrong complained of under Article 138.

## SECTION II

### MAKING A COMPLAINT

#### 20-6. Request for redress.

(a) Request by the member. Before submitting a complaint under Article 138, a member must make a written request for redress of the wrong to the commanding officer the member believes has wronged the member. The request for redress-

(1) Generally should be prepared in the format shown in Figure 20-2, AR 27-10.

(2) Must clearly identify the commanding officer against whom it is made, the date and nature of the alleged wrong and, if possible, the specific redress desired.

(3) Will be submitted through command channels to the commanding officer who is alleged to have committed the wrong. (For exception to this procedure, see paragraph 1-3(f).)

(b) Response by the commanding officer. A commanding officer receiving a request for redress submitted under this regulation will respond in writing, within 15 days. (Paras 20-10(a) and 20-11(b) may be used as a guide in determining action on the request.) If a final response within 15 days is not possible, an interim response will be provided that indicates the estimated date of a final response.

#### 20-7. Complaint.

A member may submit an Article 138 complaint for any act or omission by the member's commanding officer which the member believes to be a wrong (para 20-4(e)) and for which the member has requested redress and been refused. A member who, through no fault of the member's own, has not received a final response within 15 days may elect to treat that as a refusal of redress.

(a) Form. Figures 20-3 and 20-4, AR 27-10, contain sample formats for Article 138 complaints. The complaint should-

- (1) Be in writing and signed by the complainant.
  - (2) Identify the complainant as a member of the Kansas National Guard and subject to the KCMJ.
  - (3) Identify the complainant's current military organization and address.
  - (4) Identify the complainant's military organization at the time of the wrong.
  - (5) Identify the commanding officer whose act or omission is complained of.
  - (6) Indicate the date a written request for redress was submitted to that commanding officer and either that-
    - (A) The request was refused, in whole or in part, and the date thereof, or
    - (B) A final response was not received within 15 days.
  - (7) Include a statement that it is a complaint submitted under the provisions of Article 138 and this regulation.
  - (8) Clearly and concisely describe the specific wrong complained of. When not readily apparent, state the reason the complainant considers it a wrong.
  - (9) State the specific redress the complainant seeks. Unless it is readily apparent, state the reason the complainant considers that redress appropriate.
  - (10) Have attached to it-
    - (A) The complainant's request to the complainant's commanding officer for redress and the commanding officer's response, if any.
    - (B) Any supporting information or documents the complainant desires to be considered.
- (b) Submitting the complaint.
- (1) The complainant will deliver the complaint to the complainant's immediate superior commissioned officer within 90 days of the date of complainant's discovery of the wrong, excluding any period during which the request for redress was in the hands of the respondent.
  - (2) If the complainant corrects and resubmits the complaint after the officer exercising general court-martial jurisdiction has returned it as deficient (para 20-10(a)), the days the complaint was in military channels between submission by and return to the complainant will also be excluded in computing the 90-day period.
- (c) Withdrawal. The complainant may withdraw the complaint at any time before final action is taken by The Adjutant General or the Governor. If a complaint is withdrawn, it must be a completely voluntary act on the part of the complainant.
- (1) Prior to receipt by the officer exercising general court-martial jurisdiction, the complaint may be withdrawn by an oral request of the complainant.

(2) After receipt by the officer exercising general court-martial jurisdiction, the complainant must submit a written request to the officer in possession of the complaint.

**20-8. Legal advice.**

(a) Complainant. A member who desires to submit an Article 138 complaint may-

(1) Consult a military lawyer for advice and assistance in drafting the complaint. Such advice will include whether, under the circumstances, an Article 138 complaint is authorized and appropriate. The member also should be advised of any other laws or regulations under which he may proceed to seek redress. In connection with Article 138 complaints, a military lawyer will be provided only for such consultation and advice, but not to represent the member in any ensuing Article 138 proceedings.

(2) Consult or retain other legal counsel at no expense to the Government. Such counsel may attend any proceedings under this regulation which are open to other members of the public, but may not participate in them.

(b) Respondent. A commanding officer who receives a request for redress or against whom an Article 138 complaint is submitted may obtain necessary legal advice from the commanding officer's servicing judge advocate.

### SECTION III

#### ACTION ON THE COMPLAINT

**20-9. Action by the person receiving the complaint.**

(a) Forwarding. A superior commissioned officer who receives an Article 138 complaint will promptly forward it to the officer exercising general court-martial jurisdiction. Any other person receiving a complaint (except the officer exercising general court-martial jurisdiction) will forward it to the complainant's immediate superior commissioned officer or to the officer exercising general court-martial jurisdiction.

(b) Other action. The person receiving the complaint, or through whom it is forwarded, may add pertinent material to the file or grant any redress within that person's authority. If either action is taken it will be noted in the transmittal.

**20-10. Determination not required by officer exercising general court-martial jurisdiction.**

(a) Deficient complaint.

(1) If a complaint does not substantially meet the requirements of Article 138, as implemented by this chapter, no determination as to the merits of the complaint is required. Unless the deficiency is waived (see b below), such a complaint will be returned to the complainant with a written explanation of the deficiency and, if correctable, how it may be corrected.

(2) Neither the deficient complaint nor the convening authority's actions on the complaint are forwarded to HQDA.

(b) Waivers.

(1) Except as provided in (2) and (3) below, the officer exercising general court-martial jurisdiction may waive deficiencies when that officer considers it necessary in the interest of fairness.

(2) The following deficiencies should be waived only for, good cause. The reason waiver is considered appropriate will be explained in the correspondence forwarding the complaint (para 20-11(d) or 20-11 (b)(2)(c))

(A) The complaint was not delivered to complainant's superior commissioned officer within 90 days of the date of discovery of the wrong.

(B) Redress has not been requested and refused.

(C) The complaint is repetitive in that it is substantially the same as a previous complaint by the same complainant on which official action has already been taken.

(3) The following deficiencies may not be waived:

(A) The complainant was not a member of the National Guard and subject to the KCMJ when the complaint was delivered to his superior commissioned officer.

(B) The wrong complained of was not a discretionary act or omission, or it was not by the complainant's commanding officer, or it was not under color of State military authority, or it did not adversely affect the complainant personally (para 20-4(e)).

(C) The complaint does not adequately identify a respondent or the wrong complained of.

(c) Transfer of complaint. Jurisdiction to act on an Article 138 complaint lies with the officer exercising general court-martial jurisdiction described in paragraph 20-4(d). If the respondent has been transferred after the alleged wrong, the officer exercising general court-martial jurisdiction may transfer action on the Article 138 complaint to the first general court-martial convening authority in the respondent's current chain of command. However, the action may be transferred only if that convening authority consents and if the transfer will facilitate compliance with this regulation. Thereafter, the officer to whom the complaint was transferred is responsible for all actions prescribed by this regulation for the officer exercising general court-martial jurisdiction.

(d) Withdrawal of complaint. Once a voluntary request for withdrawal has been received, no further action will be taken under this chapter. This does not preclude other appropriate action to resolve any matters raised by the complaint.

**20-11. Determination required by officer exercising general court-martial jurisdiction.**

Except when that officer's determination is not required on the Article 138 complaint (para 20-10), the officer exercising general court-martial jurisdiction will take the following actions:

(a) Examination into the complaint. The officer exercising general court-martial jurisdiction will examine into the complaint. Except as provided below, the nature and method of the examination is discretionary with this officer. The examination may be delegated, but not to a person subordinate to the respondent in the chain of command nor, except for good cause explained in the correspondence forwarding the complaint ((d) or (b)(2)(c) below), to a person junior in rank to the respondent. Examinations so delegated will be conducted in accordance with AR 15-6 and will include a specific recommendation regarding the appropriateness of the redress requested and of any other corrective action.

(1) Cases of the type described in paragraph 20-5. Unless the officer, exercising general court-martial jurisdiction believes that established channels for redressing the alleged wrong would be inadequate in the particular case, the examination will be limited to determining whether the other channels are, in fact, available for resolving the alleged wrong.

(2) All other cases. Specific findings will be made as to whether the act or omission complained of was-

- (A) In violation of law or regulation.
- (B) Beyond the legitimate authority of the respondent.
- (C) Arbitrary, capricious, or an abuse of discretion.
- (D) Materially unfair.

(b) Action on the complaint. The officer exercising general court-martial jurisdiction must act personally on the Article 138 complaint. This authority may not be delegated. After examination into the complaint is completed, such officer will take the first of the following actions which applies to the particular complaint:

(1) If the alleged wrong is of the type described in paragraph 20-5, unless the officer exercising general court-martial jurisdiction believes that established channels for redressing the alleged wrong would be inadequate in the particular case, such commanding officer will advise the complainant that-

- (A) The alleged wrong already is being considered in other official channels, if that is the case; or
- (B) A more appropriate official channel is available to redress the alleged wrong. The officer will specify that channel, any applicable regulation under which the complainant may proceed, and any military assistance available to the complainant in using that channel.

(2) Determine the merits of the complaint and of the redress requested.

- (A) If no redress is appropriate, such officer will deny the redress.
- (B) Such officer will grant whatever redress is appropriate and is within such officer's authority to provide.

(C) If such officer determines redress is appropriate which is beyond such officer's authority to provide but which another commander or agency could provide, such officer will forward the following to the commander or agency with the necessary authority:

- (1) The documents described in (d)(1) through (3) below.
- (2) An explanation of why such officer considers redress appropriate.
- (3) Such officer's specific recommendations as to what redress should be granted.
- (4) A request that, upon completion of the action, the file be forwarded to The Adjutant General.

(c) Notice to the complainant. The officer exercising general court-martial jurisdiction will notify the complainant in writing of the action taken on the complaint.

(d) Forwarding complaint to The Adjutant General. Upon completion of action on the complaint, the officer exercising general court-martial jurisdiction (or the commander to whom the complaint was forwarded under (b)(2)(C) above) will forward the following to The Adjutant General, Attn: Staff Judge Advocate:

(1) The complaint, the original request for redress, the refusal thereof, and any supporting materials submitted by the complainant.

(2) The results of the examination into the complaint, together with any supporting documentation from (a) above).

(3) A copy of the notice to the complainant ((c) above).

(4) An endorsement or letter of transmittal-

(A) Indicating that the officer exercising general court-martial jurisdiction (or the commander to whom the complaint was forwarded) personally acted on the complaint.

(B) Describing such officer's action ((b) above) and the reasons therefor.

(C) When applicable, explaining any waiver of deficiencies in the complaint (para 20-2(b)) or inadequacy of established channels ((b)(1) above).

(e) If the convening authority is The Adjutant General, this submission shall be prepared for review and advice by TJAG.

#### **20-12. Action by The Adjutant General.**

(a) Upon receipt by The Adjutant General, each Article 138 file will be reviewed by The Judge Advocate General (or that officer's designee) on behalf of The Adjutant General. The Judge Advocate General may, in that officer's discretion, return the file for additional information or investigation or for other action.

(b) The complainant, the respondent, and the officer exercising general court-martial jurisdiction will be informed of the final disposition of the complaint.

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