THE MILITARY COMMANDER AND THE LAW

The Military Commander and the Law is a publication of The Judge Advocate General's School. This publication is used as a deskbook for instruction at various commander courses at Air University. It also serves as a helpful reference guide for commanders in the field, providing general guidance and helping commanders to clarify issues and identify potential problem areas. As with any publication of secondary authority, this deskbook should not be used as the basis for action on specific cases. Primary authority, much of which is cited in this edition, should first be carefully reviewed. Finally, this deskbook does not serve as a substitute for advice from the staff judge advocate.

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THE MILITARY COMMANDER AND THE LAW

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SOURCES OF COMMAND AUTHORITY

Article II, § 2 of the United States Constitution provides the original source of command authority to the President as Commander-in-Chief. Military command includes two distinct components: (1) operational control (OPCON) and (2) administrative control (ADCON).

Chain of Command

- The President and Secretary of Defense (SecDef) exercise authority, direction, and control of the Air Force through two distinct chains of command

  -- The operational branch runs from the President, through SecDef, to the commanders of combatant commands for missions and forces assigned or attached to their commands

  -- For purposes other than operational direction of forces assigned to the combatant commands, the chain of command runs from the President to SecDef to the Secretary of the Air Force (SecAF), and thereafter, as prescribed by SecAF in AFPD 51-6, *Command and Administrative Proceedings* and its implementing instructions. SecAF has shared administrative command and control with the combatant commander over Air Force forces assigned or attached to combatant commands.

- The chain of command within the Air Force runs from SecAF to the major command commanders to their subordinate commanders. SecAF exercises this command authority over Airmen through the Chief of Staff of the Air Force (CSAF).

The Concept of Command by Uniformed Military Personnel

- Concept of command carries dual functions

  -- Legal authority over people, including power to discipline

  -- Legal responsibility for the mission and resources

- Command devolves upon an *individual*, not a staff

  -- A commander is an officer who occupies a position of command pursuant to orders of appointment or by assumption of command

  -- A commander exercises control through subordinate commanders, principal assistants, and other officers to whom the commander has delegated authorities

-- Staff, including vice and deputy commanders, have no command functions. They assist the commander through advising, planning, researching, and investigating. Subordinate officers must issue all directives in the commander's name.

-- Commanders may delegate administrative duties or authorities to members of their staff and subordinate commanders as needed. However, delegating duties incident to the discharge of responsibilities does not relieve the commander of the responsibility to exercise command supervision.

-- Be mindful of the following constraints:

--- Duties specifically imposed on commanders by federal law, such as the UCMJ, shall not be delegated to staff officers

--- Duties that have been designated non-delegable by a higher authority shall not be delegated

--- A commander should exercise sound judgment and discretion in not delegating duties of clear importance

Command Authority over Active Duty Forces

- The commander's authority over military members extends to conduct of the members whether on or off the installation. The commander exercises authority by virtue of his/her status as a superior commissioned officer.

- Enlisted members take an oath upon enlistment to obey the lawful orders of their duly appointed superiors

- Articles 89, 90, 91, and 92 of the UCMJ prohibit disrespect towards, or the failure to obey, superior officers

Command Authority over Reservists

- Commanders always have administrative authority to hold reservists accountable for misconduct occurring on or off-duty, irrespective of their military status when the misconduct occurred

- Commanders have UCMJ authority over reservists only when in military status

Command Authority over Civilians

- The commander has authority over his/her civilian employees
  - The commander can give promotions and bonuses, as well as impose sanctions
  - AFI 36-series defines this relationship
- The commander has less authority over nonemployee civilians on base
  - As "mayor" of the base, the installation commander has authority to maintain order and discipline, and to protect federal resources
  - As a practical matter, this authority may be limited to detaining individuals for civilian law enforcement officials and barring them from the installation
  - The installation commander may bar an individual from the base for misconduct but must follow certain procedural requirements
  - The commander has no authority over civilians off base

References

U.S. Const. Art. II, § 2
UCMJ Arts. 89, 90, 91, and 92
AFPD 51-6, *Command and Administrative Proceedings* (13 November 2015)
AFI 51-604, *Appointment to and Assumption of Command* (11 February 2016), including administrative changes, 29 March 2016

COMMAND SUCCESSION

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

Appointment to Command

- Appointment to command occurs by an act of the President, the Secretary of the Air Force, or by his/her delegate

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

Assumption of Command

- Assumption of command is authorized under federal law and Air Force regulations when command passes to the senior military officer assigned to the organization who is present for duty and eligible to command

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

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

- Assumption of command may be permanent or temporary

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

  -- Absence or disability for only short periods does not incapacitate the commander and normally does not warrant an assumption of command by another officer

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

Method for Assumption or Appointment to Command

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

- Use standard memorandum format or use AF Form 35, *Announcement of Appointment To/Assumption of Command*, to document such orders. AFI 51-604, *Appointment to and Assumption of Command,* Attach. 2, sets out detailed instructions for preparing the AF Form 35. Consult AFI 33-328, *Administrative Orders*, for uniformity of order format and general order publishing guidance.

Resumption of Command after Temporary Absence

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

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

Special Rules and Limitations on Command

- No commander may appoint his own successor

- There is no title or position of "acting commander;" the term is not authorized

Limitations to Command based upon Type of Personnel

- Enlisted members cannot exercise command

- Civilians cannot exercise command

  -- Civilians may hold supervisory positions, and provide supervision to military and civilian personnel in a unit. However, civilians cannot assume "military command" or exercise command over military members within the unit. Except as limited by law, a civilian leader of a unit is authorized to perform all functions normally requiring action by the respective unit commander.

-- Units designated to be led by civilian directors will not have commanders and members of the unit or subordinate units may not assume command of the unit. Thus, designations of individuals to lead the unit should be conducted in advance in the event of a director's absence.

-- Functions which require a commander (e.g., imposition of nonjudicial punishment; initiation of administrative discharges) will be established by competent command authority, either by attaching military members for these limited purposes to a unit led by a commander, or by accomplishing these functions at a command level above the unit.

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

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

- Students cannot command an Air Force school or similar organization

- Judge Advocates may only exercise command if expressly authorized by The Judge Advocate General, as the senior ranking member among a group of prisoners of war, or under emergency field conditions

Limitations of Command Based Upon Organization

- Flying Units: May only be commanded by Line of the Air Force officers with a current aeronautical rating, as defined by AFI 11-402, *Aviation and Parachutist Service, Aeronautical Ratings and Aviation Badges*. The rated officer must hold a currently effective aeronautical rating or crewmember certification, and must be qualified for aviation service in an airframe flown by the unit to be commanded.

  -- Exception 1: Officers from other military departments who have USAF-equivalent crewmember ratings or certifications can command consolidated flying training organizations in accordance with appropriate interservice agreements

  -- Exception 2: Certain types of organizations, such as air base wings or groups, which have multiple missions that include responsibility for controlling or directing flying activities, are considered non-flying units and may be commanded by non-rated officers

- Command of Active Duty Units by Reserve Officers: Only reserve component officers on extended active duty orders can command organizations of the regular Air Force. "Extended active duty" is defined as a period of 90 days or more during which the officer is on active duty (other than for training) orders. The COMAFFOR or delegate may authorize reserve component officers not on extended active duty to command regular Air Force units operating under the COMAFFOR's authority, though COMAFFOR may delegate this authority no lower than the commanders of aerospace expeditionary wings for expeditionary units operating under the COMAFFOR's authority.

- Command of Reserve Units by Regular Officers: Regular officers and reserve officers on extended active duty cannot command organizations of the Air Force Reserve (AFR) unless approved by HQ USAF/RE

- Medical/Healthcare Units: Only officers designated as a medical (including nurses), dental, veterinary, medical service, or biomedical sciences officer may command organizations and installations whose primary mission involves health care or the health profession

- Command of Installation: Officers quartered on an installation, but assigned to another organization not charged with operating that installation, cannot assume command of the installation by virtue of seniority

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References

AFI 11-402, *Aviation and Parachutist Service, Aeronautical Ratings and Aviation Badges* (13 December 2010), certified current, 5 February 2013

AFI 33-328, *Administrative Orders* (16 January 2007)

AFI 51-604, *Appointment to and Assumption of Command* (11 February 2016), including administrative changes, 29 March 2016

FUNCTIONS OF THE STAFF JUDGE ADVOCATE

The Staff Judge Advocate delivers professional, candid, independent counsel and legal capabilities to the command and the warfighter. The Staff Judge Advocate is the senior legal advisor at all levels of command.

Definitions

- Judge Advocate: An Air Force officer designated as such by The Judge Advocate General of the Air Force who:
  - -- Has graduate of a law school accredited by the American Bar Association
  - -- Is a licensed attorney in at least one state or U.S. territory/commonwealth
- Staff Judge Advocate (SJA): A senior judge advocate on extended active duty normally on the installation commander's staff
  - -- Serves as the legal advisor for the wing commander
  - -- Supervises the members of the base legal office
- Assistant Staff Judge Advocates (ASJA): Other judge advocates assigned to the SJA's office. ASJAs provide the needed legal services for the proper functioning of the air base. In this capacity, they may perform duties such as:
  - -- Chief of legal assistance
  - -- Chief of military justice
  - -- Chief of civil law
- Area Defense Counsel (ADC): A judge advocate performing defense counsel duties at an installation. The ADC is not affiliated with the base legal office and is not rated by the base SJA or base commander.
- Special Victims' Counsel (SVC): A judge advocate dedicated to exclusively providing special legal assistance and advice for courts-martial to victims of sexual assault

Functional Organization of the Base Legal Office

- The legal office provides a wide range of legal services to the wing commander and the base at-large. The following is a general overview of the divisions within a typical legal office and the services they provide:

  -- Military Justice Division: Advises commanders on discipline and military justice matters, including courts-martial and nonjudicial punishment under Article 15, UCMJ

  -- Adverse Actions Division: Advises commanders on, and prepares documents for, administrative discharges. Provides legal guidance related to quality force management tools such as control rosters, unfavorable information files, administrative demotions, letters of reprimand, letters of admonishment, letters of counseling, and records of individual counseling.

  -- Claims Division: Manages the processing of initial claims for and against the Air Force. Assists the Air Force Claims Service Center in processing household goods claims submitted by military members.

  -- International and Operations Law Division: Advises commanders on international and operational law issues such as foreign criminal jurisdiction, status of forces agreements, rules of engagement and targeting as well providing law of armed conflict training and guidance

  -- Civil Law Division: Administers various matters that may arise in a civil context, including, but not limited to contract law, labor law, environmental law, and general civil law, which includes issues such as private organizations, use of Air Force assets, personnel issues and noncriminal investigations such as reports of survey and line of duty determinations

  -- Legal Assistance and Preventive Law Division: Legal assistance attorneys provide advice on a range of legal issues including, but not limited to, adoption, consumer law, divorce and child custody, income taxes, the Servicemembers Civil Relief Act, and wills and estate matters. This division also provides free notary services.

References

UCMJ Art. 15
Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043
AFI 51-102, *The Judge Advocate General's Department* (19 July 1994)
AFI 51-108, *The Judge Advocate General's Corps Structure, Deployment, and Operational Support* (9 October 2014)

PERSONAL LIABILITY OF COMMANDERS AND SUPERVISORS

Federal employees (including military personnel) are generally entitled to Department of Justice representation if lawsuits are brought against them for acts they during their employment, if those acts do not violate federal statutes. Military personnel may only be held personally liable for damages in a civil lawsuit if the underlying incident was not associated with normal duty, or "outside the scope" of that individual's employment.

Liability for Constitutional Torts

- A constitutional tort is a violation of another's constitutional rights by a government employee. Constitutional tort actions are brought under 42 U.S.C. § 1983 against government employees seeking damages for the violation of a federal constitutional right.

- General Rule—Full Immunity: Personnel are generally not personally liable for alleged constitutional torts if committed within the scope of that person's employment with the federal government

  -- The administrative remedies given an aggrieved employee by the Civil Service Reform Act are construed by federal courts as "special factors" that protect federal supervisors from liability

  -- The relationship between military personnel, including civilian supervisors, was a "special factor" as long as the act had been "incident to service" at the time of the alleged wrong, based upon the circumstances at that time

  -- There need not be a superior/subordinate relationship for this immunity to apply, e.g., a civilian employee allegedly injuring an enlisted member

- Qualified Immunity: If there is no "special factor" in a case, the federal official is only entitled to qualified immunity. He is immune so long as his acts did not violate clearly established constitutional guarantees, e.g., those of which a "reasonable person" would have been aware.

- No Immunity: Misconduct by personnel "outside the scope" of military employment may subject the perpetrator to individual financial liability in the event of a lawsuit. This may include, for example, federal crimes and sexual harassment.

Liability for Common Law Torts

- The Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act") now gives federal employees absolute immunity from liability for state common law torts including negligence, libel, slander, assault, battery, trespass, as long as they were in the scope of employment at the time of the alleged incident

- The Department of Justice must certify that the employee was acting "in the scope" at the time of the incident, and that certification can be reviewed by the court hearing the lawsuit

Environmental Torts

- The major environmental statutes (Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act) provide immunity for federal employees acting in scope unless those statutes provide for criminal penalties

- Also, if a defendant is being tried for violating federal (not state) criminal law, the Department of Justice will generally decline representation

Representation of Federal Employees in Civil Lawsuits

- Should you or one of your personnel be served with any summons or complaint, immediately contact your servicing staff judge advocate

  -- Department of Justice representation is available in almost all cases if the employee was acting "within the scope of employment" and if the action was not a violation of a federal criminal statute

  -- Time standards for requesting representation and answering the complaint are extremely critical, so do not waste any time

- Private insurance at your own expense may be available to protect you against civil (not criminal) liability

References

The Civil Service Reform Act, 5 U.S.C. § 7101
Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 267
The Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679
Clean Water Act, 33 U.S.C. §§ 1251-1387
42 U.S.C. § 1983
Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*
Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)
Chappell v. Wallace, 462 U.S. 296 (1983)
Bush v. Lucas, 462 U.S. 367 (1983)
United States v. Stanley, 483 U.S. 669 (1987)
United States v. Carr, 880 F.2d 1550 (2d Cir. 1989)
Otto v. Heckler, 781 F.2d 754 (9th Cir. 1986), *modified*, 802 F.2d 337 (9th Cir. 1986)
Meyer v. United States Coast Guard, 644 F. Supp. 221 (E.D.N.C. 1986)
28 C.F.R. Part 50, Department of Justice Policy

ARTICLE 138 COMPLAINTS

Article 138 of the UCMJ gives any member of the Armed Forces who believes they have been wronged by their commanding officer the right to complain and seek redress. This right extends to regular Air Force (RegAF), Air National Guard (ANG) in Title 10 active duty status, and Air Force Reserve (AFR) while in federal service, whether on active duty orders, annual training, or inactive duty for training (IDT).

Scope of Article 138 Complaints

- Matters within the scope of Article 138 include discretionary acts or omissions by a commander that adversely affect the member personally and allegedly are:

  -- A violation of law or regulation;

  -- Beyond the legitimate authority of that commander;

  -- Arbitrary, capricious, or an abuse of discretion; or

  -- Clearly unfair, or unjust (e.g., selective application of administrative standards/actions)

- Matters beyond the scope of Article 138:

  -- Acts or omissions not initiated, carried out, or approved by the member's commander

  -- Submissions seeking reversal or modification of non-discretionary command actions (e.g., mandatory Unfavorable Information File (UIF))

  -- Complaints challenging a commander's decision not to provide redress or complaints against the general court-martial convening authority (GCMCA) related to the resolution of an Article 138 complaint (allegations that the commander or GCMCA failed to act or forward the complaint, however, are within the scope of Article 138)

  -- Submissions on behalf of another person

  -- Complaints seeking disciplinary action against another

- Matters within the scope of Article 138, but more appropriately addressed by alternative review processes:

  -- Submissions requesting relief which the commander and the GCMCA lack authority to grant, such as an action requiring approval by the Secretary of the Air Force (SecAF);

  -- Disciplinary action under the UCMJ, including nonjudicial punishment under Article 15 (deferral of post-trial confinement, however, is within the scope of Article 138);

  -- Challenges to any evaluation report which affects a member's military career (e.g., Officer Performance Reports, Enlisted Performance Reports, Promotion Recommendation Forms, etc.,) addressed by the Evaluation Reports and Appeals Board (ERAB);

  -- Relief from an assessment for pecuniary liability (Secretary of the Air Force Remissions Board (SAFRB));

  -- A suspension from flying status (Flying Evaluation Board (FEB))

Article 138 Procedures

- Member Filing Deadline: The member must the complaint within 90 days of the alleged wrong; the commander may waive the time requirement for good cause

- Burden of Persuasion: The member has the responsibility to prove one of the factors under Article 138. The commander is presumed to have acted properly.

- Staff Judge Advocate (SJA) Consultation: The commander must consult the SJA before taking action

- Evidence: The commander may consider evidence in addition to matters attached to the initial application

- Commander Initial Decision Deadline: No later than 30 days after receipt of the initial application for redress, the commander must notify the member in writing that:

  -- A decision regarding the requested relief has been deferred to gather additional facts (such a notice shall be sent every 30 days until the fact gathering is complete);

  -- The requested relief is granted; or

-- The request is wholly or partially denied, because:

--- The requested relief is not warranted;

--- The submission is outside the scope of Article 138, UCMJ;

--- The submission is untimely; or

--- There is a more appropriate channel for reviewing the complaint

- If the commander denies the requested relief because there is a more appropriate channel for review or the commander lacked authority, the commander must:

  -- Forward the complaint and evidence to the appropriate processing office; or

  -- Return the submission to the member and direct the member to the appropriate office;

  -- If appropriate, inform the member of their right to file an application with the Air Force Board for Correction of Military Records

- GCMCA Review—denied complaints: If the commander wholly or partially denies the initial application for redress, the member may request review by the GCMCA within 30 days

- GCMCA Review—no commander response to complaint: If the member has received no response to the application for redress within 30 days from the date of submission, the member may request GCMCA review within 60 days from the date of the initial application

- GCMCA Review—delayed action on complaints: If the commander notified the member the application was being deferred pending additional fact gathering, the member may request GCMCA review, but must wait until 90 days after the initial application for redress

GCMCA's Responsibilities

- May investigate and/or document findings, but may not delegate the authority to act

- Will forward complaints to the subordinate commander who allegedly committed the wrong if the subordinate commander was not given the opportunity to provide redress. Any new allegations added by a member when seeking GCMCA review will be forwarded to subordinate commanders for initial review.

- Must obtain a written legal review from the servicing SJA before responding. The SJA legal review is privileged attorney work product and not releasable.

- Not later than 60 days after receipt of the formal complaint, the GCMCA must notify the member that:

  -- A decision regarding the requested relief has been deferred for the completion of a proceeding or additional inquiry;

  -- The requested relief is granted;

  -- The requested relief is denied as outside the scope of Article 138, UCMJ;

  -- The requested relief is denied as untimely; or

  -- The requested relief is denied as there is a more appropriate channel for review

- If relief is denied because there is a more appropriate channel for review or the GCMCA lacks the authority to grant the requested relief, the GCMCA will:

  -- Forward the complaint and evidence to the appropriate processing office; or

  -- Return the submission to the member and direct the member to the appropriate office; and

  -- If appropriate, inform the member of their right to file an application with the Air Force Board for Correction of Military Records

  -- If the GCMCA believes the requested relief should be granted and the authority to grant the relief requested resides with another GCMCA, MAJCOM, or the Secretary of the Air Force, the GCMCA should include the recommendation in the final action

- After taking final action and notifying the member, the GCMCA will send a complete copy of the file to AF/JAA. Include the member's personal mailing address.

Secretary of the Air Force (SecAF) Review

- AF/JAA exercises SecAF authority for final review of formal Art. 138 complaints

- AF/JAA provides the member with written notification of the completion of the review process and any further action taken on the complaint (and, if applicable, the reasons for that action)

- AF/JAA will provide the GCMCA and servicing SJA a copy of the final decision

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References

UCMJ Art. 138
AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice* (28 July 2015)
AFPD 51-9, *Civil Law for Individuals* (30 July 2015)

SPECIAL COURT-MARTIAL CONVENING AUTHORITY DUTIES

The special court-martial convening authority (SPCMCA) is a statutory position under the UCMJ which is typically held by the wing commander. SPCMCA duties can be divided into two categories: (1) military justice and (2) administrative action.

Military Justice Duties

- Search and Seizure of Evidence: Appoints officers to serve as military magistrates to authorize apprehensions, and searches and seizures of potential evidence for possible disciplinary matters

- Pretrial Confinement: Appoints pretrial confinement reviewing officers (PCRO), who should be officers with sound, impartial judgment to hold hearings and make determinations of whether an accused should be continued in pretrial confinement awaiting trial

- Disposition of Court-Martial Charges:

  -- Serves as the "Sexual Assault Initial Disposition Authority" for all unrestricted reports of rape, sexual assault, forcible sodomy, and attempts to commit any of those offenses by members of their command

  -- Refers charges and specifications to special or summary courts-martial

  -- Appoints Article 32, UCMJ, preliminary hearing officers (PHO) (if the SPCMA believes a general court-martial (GCM) may be the appropriate forum for the charge) and forwards the charges and specifications, to the General Court-Martial Convening Authority (GCMCA) for disposition

- Special and Summary Court-Martial Duties:

  -- Details court-martial panel members

  -- Approves pretrial agreements (PTAs) for an accused

  -- Takes action on findings and sentences

Administrative Action Duties

- Review of Requests for Administrative Discharge In Lieu of Court-Martial: Disapproves or recommends approval of requests for discharge in lieu of court-martial

  -- If the SPCMCA desires the request for discharge in a special court-martial ***approved***, he/she must forward it to the GCMCA, with a recommendation for approval and appropriate characterization of discharge

  -- If the Article 32 report has been forwarded to the GCMCA, the SPCMCA forwards the request for discharge to the GCMCA, with a recommendation for action on request

  -- Exception: If the SPCMCA has ordered an Article 32 hearing, but the Article 32 report has not been forwarded to the GCMCA, *the SPCMCA may disapprove the request*

- Discharge Boards:

  -- Convenes discharge boards, depending upon the status of the respondent and acts on the findings and recommendations of the board

    --- Note that only general officers may convene commissioned officer discharge boards

  -- Acts as separation authority for enlisted discharges depending upon the status of the respondent, the basis for the discharge, and/or the findings and recommendations of the board

    --- Note that the Secretary of the Air Force serves as the separation authority for commissioned officers

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References

Manual for Courts-Martial, United States, Part II (2012)

Memorandum, *Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases* (20 Apr 2012)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

UNLAWFUL COMMAND INFLUENCE

As the military courts have often emphasized, unlawful command influence (UCI) is the mortal enemy of military justice. There are two types of unlawful command influence recognized by military courts: (1) actual UCI (i.e., actual impact on a court-martial undermining the fairness of the proceedings); (2) apparent UCI (i.e., no actual impact to fairness in the proceedings, rather the appearance of unfairness when observed by an objective member of the public). The courts have been equally quick, however, to distinguish proper command influence from UCI. The key is to understand what constitutes proper involvement by the commander, and what crosses the line into UCI.

Lawful Command Involvement in Military Justice

- Superior commanders are **NOT** prohibited from establishing and communicating policies necessary to maintain good order and discipline. They are also free to pass on their experience and advice regarding disciplinary matters without impacting the discretion of their subordinates in the matter. Examples of proper or lawful command involvement are:

  -- Withholding a subordinate commander's authority to act in an individual case or types of cases and impose punishment oneself

  -- Requesting a subordinate to reconsider his/her action in light of new evidence

  -- Consulting with subordinates on judicial decisions at the subordinate's request; how- ever, the subordinate alone must decide what action to take

  -- "Tough talk" policy letters, talks and briefings on issues of concern are permissible so long as they do not show an overly determined attitude or attempt to influence the finding and sentence in a particular case

  -- **Focusing on problem areas is permissible,** such as: characterizing illegal drug use as a threat to combat readiness or referring to "ferreting out" illegal drug dealers as a legitimate command concern

Unlawful Command Influence

- Generally: No person subject to the UCMJ may attempt to coerce or, by any unauthorized means, influence the action of a court-martial, as it impacts an accused's right to a fair trial

- Actual UCI: The actions of someone acting with the "mantle of command" affecting the disposition of a case, and prejudicing the accused

- Apparent UCI: When the actions of someone acting the "mantle of command" would create in the mind of an objective observer, fully informed of all the facts and circumstances, a significant doubt about the fairness of the proceeding

- Superior commanders must not make comments that would imply they expect a particular result in a given case or type of cases, such as:

  -- Calls for Punitive Discharge in an Entire Category of Cases: A commander states at an officers' call that all drug users must be removed from the Air Force. Potential court members for an upcoming court involving drugs are present. The inference may be that the commander expects the court to impose a punitive discharge.

  -- Public Criticism of "Low" Court-Martial Punishments: A commander makes comments on his displeasure at the light sentences adjudged by previous courts. The concern is future panel members may adjudge a harsher sentence than they might otherwise in order to please the commander.

  -- Discouraging Witness Testimony on Behalf of an Accused: A commander expresses his concern about court-martial cases in which subordinate commanders preferred charges, recommended a court, and then testified during sentencing on behalf of the accused. The suggestion was that they refrain from testifying for the accused in upcoming courts. Any attempt to discourage a witness from testifying, even unintentional actions, is improper.

  -- Public Comments Opining on the Accused's Guilt Prior to Trial: A commander, speaking informally to a group of officers, jokingly says he does not care how long a particular court takes, as long as the members "hang the SOB." The impression is that he believes the accused to be guilty and expects the members to agree.

- Each commander in the chain must remain free to exercise his/her own discretion to impose discipline without inappropriate interference from a superior commander

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

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

References

UCMJ Art. 38

Rule for Courts-Martial 104 (2015)

Rule for Courts-Martial 306 (2015)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

SERVING AS A COURT MEMBER

At some time in your military career you may be detailed to sit as a member of a court-martial. Court members serve essentially the same function in a military court-martial as jurors serve in civilian courts. When serving as a court-martial member, that service becomes the primary duty of that Airman until the close of the trial.

Selection

- When convening a court-martial, the convening authority personally selects members who are "best qualified" for this duty. Pursuant to Article 25(d)(2) of the UCMJ factors used in court member selection include: age, education, training, experience, length of service, and judicial temperament.

- Prior to sitting as a member in a court-martial, court members are usually asked to complete a court member data sheet with personal and professional information. This data sheet provides counsel for both sides information about a member's background and assists them in determining whether there is reason to excuse that particular member from sitting on the court.

- Once detailed to sit on a court-martial, a member must avoid allowing others to speak about upcoming cases in their presence to maintain impartiality

Excusal

- Excusal Requests Prior to Trial: Requests to be excused from court member duty *should be* based on good cause

  -- Requests should be written and forwarded to the convening authority through his/her staff judge advocate (SJA)

  -- Members detailed to a court-martial should not depart the local area on leave or on temporary duty assignment (TDY) without coordination with the SJA unless they have been properly relieved from duty

- Excusal Requests During Trial: After the court-martial is assembled, the convening authority may only excuse court members for good cause

Voir Dire

- Trial and defense counsel, as well as the military judge, are entitled to ask court members questions at trial to ensure impartiality. This questioning is referred to as "voir dire," and occurs prior to the court members hearing any evidence in the case.

- Both the trial and defense counsel can challenge any member for cause. The military judge rules on challenges for cause. If the military judge grants a challenge to a court-martial panel member, that member is released from the court-martial and may return to their normal duties.

Duties at Trial—Findings

- The "findings" phase of the court-martial is the guilt/innocence phase of the court-martial

- If the accused pleads "not guilty," the court members receive evidence, arguments from counsel, and instructions on the law from the military judge in order to determine whether the accused is guilty or not guilty

- Court members are given an opportunity to question witnesses after the counsel have completed their examinations. Both counsel will review any question and may object to it. The military judge will rule on the objection.

- The members must be convinced beyond a reasonable doubt that the evidence presented during the trial shows the accused committed the offense to find the accused "guilty." The decision of the court is called the "finding."

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

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

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

Duties at Trial—Sentencing

- If the accused is found "guilty," the court members will hear evidence and listen to arguments from counsel recommending a sentence, and receive instructions from the military judge on sentencing procedures. Members then deliberate and decide on an appropriate sentence. The president announces the sentence in open court in the presence of accused and counsel.

- If the accused pleads "guilty," but decides to be sentenced by members rather than just the judge alone, the same sentencing procedures apply as when the accused is found "guilty" by members

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References

UCMJ Arts. 25 and 39
Rules for Courts-Martial 501-505, 804-807, 813, 901, 911-1007 (2015)
U.S. Dep't of Army Pam. 27-9, Legal Services: *Military Judges' Benchbook* (2015)

TESTIFYING AS A WITNESS

You or one of your subordinates may be called to testify at a court-martial or other administrative hearing. Under the UCMJ both the prosecution and defense are entitled to equal access to all witnesses and evidence. No Airman should attempt to influence the testimony of a court-martial witness.

- Either the trial counsel or defense counsel may call witnesses during the findings portion of the trial to provide evidence of the offense or for the defense to the charge

- Either counsel may also call witnesses during the sentencing portion of the trial. A sentencing witness may be called to testify about a variety of things, such as the character of the accused, the impact of the offenses on the unit, or relating an opinion about the accused's rehabilitative potential.

  -- You will not be allowed to testify about your opinion as to an appropriate sentence, including whether or not the accused should be punitively discharged from military service

  -- When testifying about the accused's potential for rehabilitation, the witness must have knowledge of the accused as a "whole person"

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

- Immediately report any attempts to influence your testimony to the staff judge advocate

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References

UCMJ Art. 46
Rule for Courts-Martial 1001 (2015)

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CHAPTER TWO: QUALITY FORCE MANAGEMENT

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ADMINISTRATIVE COUNSELINGS, ADMONITIONS, AND REPRIMANDS

Counselings, admonitions, and reprimands are quality force management tools available to supervisors, superiors, and commanders. These management tools are designed to improve, correct, and instruct those who depart from standards of performance, conduct, bearing, and integrity and whose actions degrade the individual and unit's mission. These tools are intended to correct rather than punish behavior. When properly used, they help maintain established Air Force standards and enhance mission accomplishment.

What Action is Appropriate

- The Basics: AFI 36-2907, *Unfavorable Information File (UIF) Program*, Chapter 4, contains guidance on administrative letters of counseling, admonitions, and reprimands. The counseling is the lowest level of administrative action. An admonition is more severe than a counseling. A reprimand is more severe than an admonition and carries a stronger degree of official censure.

- Primary Considerations: The decision to formally counsel, admonish, or reprimand should be based primarily on two factors:

  -- Nature of the incident: The seriousness of the member's departure from Air Force standards should be considered before deciding what type of action to take. Counselings, admonitions, and reprimands may be administered for **ANY** departure from Air Force standards. Unlike nonjudicial punishment under Article 15 of the UCMJ, they are **NOT** limited to offenses punishable by the UCMJ.

  -- Previous disciplinary record of the member: Counselings, admonitions, and reprimands should be used as part of a graduated pattern of discipline in response to repeated departures from standards

Issuing the Counseling, Admonition, or Reprimand

- Who May Issue: Commanders, supervisors, and other persons in authority

- Form of the Action: May be either verbal or written. However, actions should usually be in writing to document the deviation as well as reinforce the importance of correcting the behavior. A verbal counseling may be recorded on an AF IMT 174, *Record of Individual Counseling* (RIC).

- AFI 36-2907: Letters of counseling (LOCs), letters of admonition (LOAs), and letters of reprimand (LORs) must comply with AFI 36-2907

  -- A sample format for an LOC, LOA, or LOR along with its endorsements follows this section as an attachment

  -- **Failure to follow the requirements for drafting and maintaining** these documents could limit the use of the documents in a subsequent proceeding such as a court-martial or discharge proceeding

  -- Additionally, failure to follow the requirements may undermine the Airman's confidence in the fairness and integrity of the administrative process

Procedures

- Standard of Proof: Investigate to determine the infraction occurred. The standard of proof is "preponderance of the evidence" i.e., more likely than not that the alleged misconduct occurred. No formal rules of evidence apply.

- Draft the Letter: Prepare the letter according to the requirements of AFI 36-2907 (set forth below). LOCs, LOAs, and LORs should be typed on official letterhead. The letter must state the following:

  -- What the member did or failed to do, citing specific incidents and their dates. Since an LOC, LOA, or LOR is not limited to offenses punishable by the UCMJ, it is not always possible to cite specific violations of the UCMJ; however, if the member has violated a UCMJ article that violation should normally be included in the language of the letter.

  -- What improvement is expected

  -- That further deviation may result in more severe action

  -- That the member has 3 duty days to respond and provide rebuttal matters (45 calendar days for non-extended active duty (EAD) reserve or Air National Guard (ANG) members)

  -- That all supporting documents become part of the record

  -- That the person who initiates the LOC, LOA, or LOR has 3 duty days to advise the individual of their decision regarding any comments submitted by the individual (45 calendar days for non-EAD Reserve or ANG members)

- Notify the Individual:

  -- Read the individual the letter

  -- Have the member immediately acknowledge receipt on the original letter by filling in the date received and signing. If the member refuses to acknowledge receipt, the person who issued the letter should write on the original letter beneath the member's signature block in the acknowledgement section, "<<Rank and Name of Member>> refused to acknowledge receipt."

  -- Give the member a copy of the letter

- Time to Respond: Provide the member with 3 full duty days for active duty members, 45 days for non-EAD Air Force Reseve (AFR) and ANG members. During this time, the member may wish to consult with an Area Defense Counsel. The member may respond prior to the expiration of the time to respond; however, the issuer of the letter should not pressure the member into responding prior to expiration of the allowed time.

  -- If the member refuses to complete or sign the indorsement, the person who issued the letter should write on the original letter beneath the member's signature block, "<<Rank and Name of Member>> failed to provide matters in response to this letter within 3 duty days (45 days for reserve/ANG members) and refused to complete the 1st Ind," along with the issuer's signature block, signature, and the date.

- Response: If the member submits a response, advise the member of the final decision within 3 duty days of the submission of the response

  -- Issuer may withdraw the action or leave the action as written. Withdrawing the action does not bar the issuer from taking alternate appropriate action e.g., withdrawing an LOR and initiating an LOA.

  -- If using an indorsement similar to that in the attachment, the issuer of the letter should fill in the date of the indorsement, strike through the inapplicable language in parentheses, and sign the indorsement

  -- Attach any matters the member submits in response to the original letter

- Inform Leadership: Issuer may, and generally should, inform the member's chain of command of the action. If appropriate or requested, send the letter with all indorsements, and any documents submitted by the member to the member's superiors or

commander for information, action, or approval for entry in the member's Personnel Information File (PIF), UIF, or both.

- Privacy Act Requirements: Written counselings, admonitions, and reprimands are subject to the rules of access, protection, and disclosure outlined in AFI 33-332, *Air Force Privacy and Civil Liberties Program*. Therefore, all LOCs, LOAs, and LORs must contain a paragraph outlining the applicability of the Privacy Act to the document. Copies held by supervisors, commanders, and those filed in a member's UIF or PIF are subject to the same Privacy Act rules.

Record Keeping

- LOCs, LOAs, and LORs will often be placed in a PIF or UIF. The disposition rules follow:

Rules for LOC, LOA, and LOR Disposition		
Letters Issued to Enlisted	**Type of Letter**	**Disposition**
	LOC	**May** be placed in PIF or UIF
	LOA	**May** be placed in PIF or UIF
	LOR	**May** be placed in PIF or UIF
Letters Issued to Officers	**Type of Letter**	**Disposition**
	LOC	**May** be placed in UIF and **must** be placed in PIF if not placed in UIF
	LOA	**May** be placed in UIF and **must** be placed in PIF if not placed in UIF
	LOR	**Must** be placed in UIF. Initiate Officer Selection Record (OSR) determination.

- Commanders who wish to establish a UIF on optional letters (LOCs, LOAs, and LORs for enlisted members and LOCs and LOAs for officers) must notify the member on an AF IMT 1058, *Unfavorable Information File Action* before establishing a UIF. LORs issued to officers must be filed in a UIF via AF IMT 1058, but the commander does not

need to submit the AF IMT 1058 to the officer because the officer is provided with an opportunity to refute the LOR when it is initially presented.

- Officers who receive an LOR will be subject to an Officer Selection Record (OSR) determination by the officer's senior rater. Procedures for the determination may be found in AFI 36-2608, *Military Personnel Records System*, para. 8.3.

Reserve/Guard Members

- Commanders, supervisors, and other persons in authority can issue administrative counselings, admonitions, and reprimands to Reserve and ANG members who commit an offense while in civilian (non-Title 10) status. Additionally, AFI 36-2907 applies to ANG personnel on Title 32 status except when otherwise directed by the state.

- When issuing an LOC, LOA, or LOR to a Reserve or ANG member, follow the procedures listed above with the following exceptions:

  -- If the member has departed the duty area, the commander may send the letter via certified mail to the member's address or best available address, and the individual will be presumed to be in receipt of this official correspondence

  -- Non-EAD Reservists and ANG personnel have 45 calendar days from the date of receipt of the certified letter to acknowledge the notification, intended actions, and provide pertinent information before the commander makes a final decision. In calculating the time to respond, the date of receipt is not counted. If the member mails the acknowledgment, the date of the postmark on the envelope will serve as the date of acknowledgment.

  -- The initiator has 45 calendar days from the receipt of the certified letter or personal delivery to advise the member of his/her final decision regarding any comments submitted by the member

References

UCMJ Art. 15
AFI 33-332, *Air Force Privacy and Civil Liberties Program* (12 January 2015)
AFI 36-2608, *Military Personnel Records System* (26 October 2015)
AFI 36-2907, *Unfavorable Information File (UIF) Program* (26 November 2014)
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016
AF IMT 174, *Record of Individual Counseling*
AF IMT 1058, *Unfavorable Information File Action*

Attachment

Sample Letter of Counseling/Admonishment/Reprimand

Suggested Format for Letters of Counseling, Admonitions, and Reprimands

[1.75 inches from top of page; flush with the right margin] 6 May 2014

MEMORANDUM FOR RANK FIRST M. LAST

FROM: ORG/SYMBOL [Issuer's organization and office symbol]

SUBJECT: Letter of [Counseling (LOC)] [Admonition (LOA)] [Reprimand (LOR)]

1. Investigation has disclosed [briefly describe what the member did and/or failed to do, citing the specific incident(s) and date(s)]. [For this example, the LOR is being issued on 6 May 2014. Thus, the 1st Indorsement (1st Ind) is dated the same day; the 2d Ind is dated three (3) duty days later; and the 3d Ind is dated three (3) duty days after the 2d Ind. Be aware that the first indorsement that occurs on any page other than the letterhead page must include the citation line for the letter. In this example, the 1st Ind is the first indorsement to occur on a new page. The citation line for the indorsement memorandum consists of the indorsement number followed by the ORG/SMBOL, SUBJECT, and date of the original memorandum. The citation line ends with the indorsement date: for disciplinary actions this should be the same as the LOR date.]

2. You are hereby [counseled.] [admonished.] [reprimanded!] [Briefly discuss the impact of what the member did or failed to do and what improvement is expected.] Your conduct is unacceptable and any future misconduct may result in more severe action.

3. The following information required by the Privacy Act is provided for your information. AUTHORITY: 10 U.S.C. § 8013. PURPOSE: To obtain any comments or documents you desire to submit (on a voluntary basis) for consideration concerning this action. ROUTINE USES: Provides you an opportunity to submit comments or documents for consideration. If provided, the comments and documents you submit become a part of the action. DISCLOSURE: Your written acknowledgment of receipt and signature are mandatory. Any other comments or documents you provide are voluntary.

4. [For active duty or Reserve members on EAD:] You will acknowledge receipt of this letter immediately by signing the acknowledgement below. Within three (3) duty days from the day you received this letter, you will sign the 1st Ind below. Any comments or documents you wish to be considered concerning this letter must be submitted at that time. You will be notified of my final decision regarding any comments submitted by you within three (3) duty days.

[For non-EAD Reserve members:] You have 45 calendar days from the day you received this letter to acknowledge the notification and provide any comments or documents you wish for me to consider. You will be notified of my final decision regarding any comments submitted by you within 45 calendar days.

HOLDEN T. LINE, Capt, USAF
[Issuer's Duty Title, Organization]

1st Ind to ORG/SYMBOL, 6 May 2014, Letter of Reprimand (LOR) 6 May 2014

ORG/SYMBOL [Organization and office symbol for person signing 1st Ind]

MEMORANDUM FOR ORG/SYMBOL [Issuer's organization and office symbol]

I acknowledge receipt and understanding of this letter on _____ at____ hours. I understand that I have three (3) duty days form the date I received this letter to provide a response and that I must include in my response any comments or documents I wish to be considered concerning this letter.

INHOT W. WOTTER, Rank, USAF

2nd Ind, Rank Inhot W. Wotter 9 May 2014

MEMORANDUM FOR ORG/SYMBOL [Issuer's organization and office symbol]

I have reviewed the allegations contained in this letter. (I am submitting the attached documents in response) ~~(I hereby waive my right to respond)~~.

INHOT W. WOTTER, Rank, USAF

3d Ind, ORG/SYMBOL [Issuer's organization and office symbol] 12 May 2014

MEMORANDUM FOR RANK INHOT W. WOTTER

I have considered the response you submitted on_____. (The letter of reprimand remains in effect) ~~(I have decided to withdraw the letter of reprimand)~~.

HOLDEN T. LINE, Capt, USAF
[Issuer's Duty Title, Organization]

UNFAVORABLE INFORMATION FILES

The unfavorable information file (UIF) provides commanders with an official and single means of filing derogatory data concerning an Air Force member's personal conduct and duty performance. With some exceptions, the commander has discretion as to what should be placed in a UIF and what should be removed.

About the UIF

- The UIF is an official record of unfavorable information about an individual. It documents administrative, non-judicial, or judicial censures of the member's performance, responsibility, and behavior.

- The UIF is maintained by the base UIF monitor appointed by the Force Support Squadron superintendent/director

- Attachments 1 and 2, below, summarize when the establishment of a UIF is optional and when it is mandatory

Establishing a UIF

- Authority to Establish UIFs: Must be established by a commander on G-Series orders

- Contents of UIF: A UIF may only be established when some form of derogatory data is entered into it. In other words, a UIF must be populated with a record of unfavorable information or it ceases to exist. Common UIF documents include letters of reprimand (LORs), admonition (LOAs), and counseling (LOCs); records of nonjudicial punishment under Article 15 (Art 15), UCMJ; control roster actions; documented instances of discrimination or sexual harassment; civilian convictions; and records of courts-martial.

- Documenting UIF: The UIF is generally established through the use of an AF Form 1058, *Unfavorable Information File Action*. This form notifies military members of the commander's intent to establish a UIF and provides the member with 3 duty days to respond (45 days for non-extended active duty (EAD) Reservists and Air National Guard (ANG) members). Some unfavorable actions (e.g., court-martial convictions) do not require the use of AF Form 1058.

- Mandatory UIF Filings: Certain unfavorable information requires mandatory filing into a UIF. Examples of actions requiring mandatory filing include conviction by a court martial and Art 15s received by officers. Actions that require mandatory reporting do not require the use of an AF Form 1058.

- Discretionary UIF Filings: Records of unfavorable information that do not require mandatory filing are included in a UIF at the discretion of the commander

Retention and Disposition

- Standard UIF Retention Time: The retention time depends on the nature of the document and the rank of the member. Removal of the document from the UIF is automatic at the end of the retention period. UIFs with no derogatory data contained within them are destroyed.
  - -- Enlisted UIF filings: 1 year-2 years
  - -- Officer UIF filings: 2-4 years
- Early Removal of UIF Filings: Commander's may remove documents from the UIF early by initiating action via AF Form 1058, or via memorandum
  - -- Early removal of derogatory data is **NOT AUTHORIZED** if the member is still serving punishment
  - -- The authority to remove documents early from the UIF is contained in the tables at the end of this section

Access and Review

- Access: Only commanders and the following individuals may view UIFs:
  - -- Member who has the UIF
  - -- First sergeants
  - -- Rating officials, when preparing to write or endorse a performance report, make a promotion recommendation, or recommend reenlistment
  - -- Senior Air Force officer or commander of an Air Force element in a joint command
  - -- Air Force element section commander in a joint command
  - -- Military Personnel Flight (MPF) personnel, Inspector General (IG) personnel, inspection team members, legal office personnel, law enforcement personnel, Military Equal Opportunity (MEO) personnel, and substance abuse counselors authorized by the commander to review the document in the course of their official Air Force duties

- -- Program managers for Air Force Reserve programs

- Review: All UIFs require periodic review to ensure continued maintenance of documents in the UIF is proper

- Mandatory UIF Reviews by Commanders:

  - -- Within 90 days of assuming or being appointed to command

  - -- Annually, with the assistance of the staff judge advocate

  - -- Whenever individuals are being considered for, among other things, promotion, reenlistment, permanent change of station, personnel reliability program duties, retraining, enlisted performance reports (EPRs), or officer performance reports (OPRs)

  - -- Whenever Reserve and ANG members are being considered for in-residence professional military education or Reserve short courses, a statutory tour or an active duty tour over 30 days, or appointment or enlistment into the Air Force Reserve

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References

AFI 36-2608, *Military Personnel Records System* (26 October 2015)
AFI 36-2907, *Unfavorable Information File (UIF) Program* (26 November 2014)
AF IMT 1058, *Unfavorable Information File Action*
AF Form 3070A, *Record of Nonjudicial Punishment Proceedings* (AB through SSgt)
AF Form 3070B, *Record of Nonjudicial Punishment Proceedings* (TSgt through CMSgt)
AF Form 3070A, *Record of Nonjudicial Punishment Proceedings* (Officer)

Attachments

UIF Requirements for Enlisted Personnel
UIF Requirements for Officers

UIF Requirements for Enlisted Personnel

Document	Mandatory? (see Note 1)	Use AF Form 1058?	Disposition Date	Early Removal Authority
LOC, LOA, or LOR	No	Yes	1 year from the date of the commander's UIF decision (signs section V of AF Form 1058)	Unit commander or higher
Incidents involving discrimination or sexual harassment of personnel	No	Yes		
Placement upon the control roster	Yes	Yes		
Art 15 when punishment is **NOT** suspended or does **NOT** exceed 30 days	No	No (use AF Form 3070)	1 year from the date of the commander's NJP decision (signs item 4 of AF Form 3070)	Unit commander or higher (see Note 2)
Art 15 when punishment is suspended **OR** when the punishment period is 31 days or more	Yes	No (use AF Form 3070)	2 years from the date of the commander's NJP decision (signs item 4 of AF Form 3070)	
Civilian court conviction that carries a possible sentence of confinement for 1 year or less (see Note 3)	No	Yes	1 year from the date of the commander's UIF decision (signs section V of AF Form 1058)	Unit commander or higher
Civilian court conviction that carries a possible sentence of confinement for more than 1 year (see Note 3)	Yes	No	2 years from the date the sentence was final	
Conviction adjudged by court martial	Yes	No	2 years from the date the sentence was adjudged	Wing commander or the convening authority, whichever is higher (see Note 2)

UIF Requirements for Officers

Document	Mandatory? (see Note 1)	Use AF Form 1058?	Disposition Date	Early Removal Authority
LOC or LOA	No	Yes	1 year from the date of the commander's UIF decision (signs section V of AF Form 1058)	Wing commander or their designee or issuing authority, whichever is higher
Incidents involving discrimination or sexual harassment of personnel	No	Yes		
Placement upon the control roster	Yes	Yes		
LOR	Yes	Yes (see Note 4)	2 years from the date the commander signs section V of AF Form 1058	
Art 15	Yes	No (use AF Form 3070)	2 years from the date of the commander's NJP decision (signs item 4 of AF Form 3070)	Wing commander or the imposing commander, whichever is higher (see Note 3)
Civilian court conviction that carries a possible sentence of confinement for 1 year or less (see Note 3)	No	Yes	1 year from the date of the commander's UIF decision (signs section V of AF Form 1058)	Wing commander or their designee
Civilian court conviction that carries a possible sentence of confinement for more than 1 year (see Note 3)	Yes	No	2 years from the date the sentence was final	
Conviction adjudged by court martial	Yes	No	4 years from the date the sentence was adjudged	Wing commander or the convening authority, whichever is higher (see Note 2)

Notes:

1. Commanders decide what to do with optional UIF documents. After initially deciding not to establish a UIF, commanders may elect to establish a UIF or include an earlier administrative action in a previously established UIF if the date of the action or document is within 6 months from the date of the action. This does not apply to individuals who have reenlisted since the date of the document.
2. Punishment must be completed prior to early removal.
3. Also includes actions tantamount to a finding of guilty. The conviction may be from a foreign or domestic court.
4. Use AF Form 1058 to enter the LOR into the UIF, but the commander does not need to submit the AF Form 1058 to the officer since the officer is provided an opportunity to respond to the LOR when it is initially presented.

CONTROL ROSTERS

A control roster is a "watch list" for individuals whose duty performance is substandard or who fail to meet or maintain Air Force standards of conduct, bearing, and integrity, on- or off-duty. Individuals placed on a control roster are ineligible for a permanent change of station (PCS) (except for mandatory PCS), permanent change of assignment (PCA), temporary duty assignment (TDY), or attend formal training. Also, eligibility for promotion and re-enlistment is limited. Commanders at all levels are authorized to use a control roster.

Purpose

- Control roster is a rehabilitative tool

- Control rosters assist commanders in controlling or evaluating a member's performance and provide the member an opportunity to improve that performance

- Other rehabilitative tools should be considered before placing a member on the control roster

- A single incident of substandard duty performance or an isolated breach of standards not likely to be repeated should not ordinarily be a basis for a control roster action

- Placing an individual on the control roster is not a substitute for more appropriate administrative, judicial, or nonjudicial action. Additionally, individuals are not shielded from other appropriate actions by virtue of being placed on the control roster.

Procedure

- <u>Authority to Place Members on Control Roster</u>:

  -- Enlisted: Commanders at all levels have the authority to add enlisted members to or remove them from the control roster

  -- Officers: Commanders at all levels have the authority to add officers (if the commander is senior to the officer) to a control roster, but officers can only be removed from a control roster by the wing commander or issuing authority, whichever is higher in rank

- Document control roster action on AF Form 1058, *Unfavorable Information File Action*

- Member Response to Control Roster Action:

  -- Active Duty: Acknowledge receipt of the action and has **3 duty days** to respond

  -- Non-Extended Active Duty (EAD) Reserve or Air National Guard (ANG) Members: If on duty, acknowledge receipt of the action, and then has **3 duty days** to respond. If member departs the duty area prior to these 3 duty days, serve via certified mail to the member's home address or best available address. Member is presumed to have received this correspondence and has **45 calendar days** to acknowledge the notification and provide pertinent information before a final decision is made.

- Duration of Control Roster:

  -- Active Duty: Up to 6 months

  -- Non-EAD Reserve or ANG: Up to 12 months

- If the member's conduct or performance does not improve during the observation period, the commander should consider whether a more severe response is required, such as initiating an administrative discharge

- Commanders may direct an Officer Performance Report (OPR) or Enlisted Performance Report (EPR) before entering or removing the person from the control roster, or both

- Unfavorable Information File (UIF) action is required if an individual is placed on the control roster

- Control roster is maintained by the UIF monitor

Consequences

- PCS/PCA reassignment is limited. For Reserve and ANG assignments, individuals remain eligible for PCS while on the control roster, though the gaining commander or Individual Mobilization Augmentee (IMA) program manager will decide if the assignment is appropriate.

- All formal training must be canceled

- Eligibility for promotions and reenlistments is limited

- Placement on the control roster requires mandatory filing in the member's UIF

References

AFI 36-2608, *Military Personnel Records System* (26 October 2015)
AFI 36-2907, *Unfavorable Information File (UIF) Program* (26 November 2014)
AF Form 1058, *Unfavorable Information File Action*

ADMINISTRATIVE DEMOTIONS

An administrative demotion is a quality force management tool commanders have to help ensure a quality enlisted force. Administrative demotions are intended to place Airmen at a rank commensurate with their skill level and ability. Administrative demotions are not intended to be punitive, nor should they be used as a replacement for more appropriate action under the UCMJ.

Demotion and Appellate Authorities

- Demotion Authority:
  - -- E-7 and below: Group commander (or equivalent level commander)
  - -- E-8 and E-9: MAJCOM/CC, FOA/CC, or DRU/CC (unless delegated to the CV, CS, MP, DP, or NAF/CC). For Reserve members, AFRC/CC is the demotion authority for E-8 and E-9 although this may be delegated to NAF commanders.
- Appellate Authority: Next level commander above the demotion authority commander

Reasons for Demotion

- Basis for a Demotion Includes:
  - -- Officer trainees or pipeline students if eliminated from training
  - -- Termination of student status of members attending TDY Air Force schools
  - -- Failure to maintain or attain the appropriate skill/grade level
  - -- Failure to fulfill non-commissioned officer (NCO) responsibilities, as defined in AFI 36-2618, *The Enlisted Force Structure*
  - -- Failure to keep fit
  - -- Failure to perform
  - -- Not participating in reserve training, per AFI 36-2254, Vol 1, *Reserve Personnel Participation* (Reserve members)
- Do not use administrative demotions when UCMJ action is better suited

- The basis for the demotion must have occurred in the current enlistment **unless** the commander does not become aware of the facts and circumstances until the subsequent enlistment

- In cases where demotion actions may be appropriate, members should be given the opportunity to overcome their deficiencies prior to the initiation of the action

Due Process

- Consult with the staff judge advocate (SJA) and Military Personnel Flight (MPF) prior to action:

  -- SJA: Legal sufficiency review of proposed demotion

  -- MPF: Administrative assistance in assembling and routing the demotion action

- Notify the Member: Member's commander (usually squadron commander) notifies the member in writing of (1) the intention to recommend demotion, (2) the basis for the action, (3) the demotion authority (if other than the initiating commander), (4) the recommended grade, and (5) specific reasons for the demotion and a complete summary of the supporting facts

- Member Response: The member has the right to counsel and to respond within 3 duty days (30 calendar days for non-extended active duty (EAD) Reserve members) orally, in writing, or both

  -- Members eligible for retirement may apply for retirement in lieu of demotion

- Initiating Commander Decision: Following the member's response, if the commander elects to continue the proceedings, the case file is forwarded to the demotion authority for action

- Demotion Authority Action: The demotion authority fully reviews the initiating commander's recommendation, the member's response, and the member's entire military record prior to taking action

  -- Demotion authority can do the following: (1) decline to demote the member, (2) approve the demotion recommendation, or (3) approve a greater or lesser demotion than recommended

- Appeal: The member may appeal the decision to the demotion authority. The appeal is first reviewed by the demotion authority. If the demotion authority does not grant the appeal, the appeal will be sent to the next higher commander for a decision.

"Demotable" Grades

- The following demotions are permitted:

  -- E-2 may be demoted to E-1

  -- E-3 may be demoted to E-2

  -- E-4 through E-9 may be demoted to E-3; however, a demotion of three or more grades is only appropriate when no reasonable hope exists that the member will ever show the proficiency, leadership, or fitness that earned the initial promotion

- High Year Tenure (HYT) Implications from Administrative Demotions: Administrative demotions may trigger mandatory HYT separations from the service. When a member is demoted, the member assumes the HYT restrictions of that grade and will be separated within 120 days of the effective date of demotion. HYT dates follow:

  -- When reduced to SrA and below: 8 years

  -- When reduced to SSgt: 15 years

  -- Personnel with 16 or more years total active federal military service (TAFMS): "Lengthy Service Qualified;" HYT revised to the 20-year point

  -- SMSgt and below over 20 years: HYT revised to the last day of the 6th month following demotion effective date

Restoration of Grade

- Once the demotion action is complete, the demotion authority may, if appropriate, restore the member's original grade between 3 months and 6 months after the effective date of the demotion

Demotion of Reserve Members

- Rules governing demotion of reserve a member is similar in concept to the rules governing active duty members; however, the processing differs. See AFI 36-2502, *Airmen Promotion/Demotion Actions*, Chapter 9, for the procedures.

- Immediate commander can, when necessary, use certified mail sent to the Reserve member's address or best available address when notifying a Reserve member of his/her intent to recommend demotion, and, when applicable, his/her intent to forward the demotion action to the demotion authority

- Demotion authority may also use certified mail to notify a Reserve member of his/her decision to demote the member and of the member's right to appeal. Reserve members not on EAD have 30 calendar days to submit his/her appeal.

References

AFPD 36-25, *Military Promotion and Demotion* (7 May 2014)
AFI 36-2254, Vol 1, *Reserve Personnel Participation* (26 May 2010)
AFI 36-2502, *Airman Promotion/Demotion Programs* (12 December 2014), incorporating Change 1, 27 August 2015
AFI 36-2618, *The Enlisted Force Structure* (27 February 2009), certified current 23 March 2012

SELECTIVE REENLISTMENT

The selective reenlistment program (SRP) is designed to ensure only enlisted members who consistently demonstrate the capability and willingness to maintain high professional standards are afforded the privilege of continued military service. The program identifies members nearing the end of their current term of service and provides a process for the commander to deny reenlistment.

Standard for Denial of Reenlistment

- Commanders have total SRP selection authority (as long as no other factors barring immediate reenlistment exist)

- Commanders may non-select any Airman for SRP as long as the Airman is in his/her "SRP window"

- Commanders will not use the SRP to deny reenlistment when involuntary separation is more appropriate

Immediate Supervisor's Role

- Immediate supervisors are responsible for ensuring members meet quality standards

- Supervisors (and commanders) are notified by the Military Personnel Section (MPS) when Airmen are nearing the end of their term of enlistment and are subject to SRP consideration. The supervisor provides recommendations for selection/non-selection to the commander.

- SRP recommendations are made using AF Form 418, *Selective Reenlistment Program Consideration*

Commander's Role

- Commanders determine whether a member should be denied reenlistment

  -- Decisions to deny reenlistment should be based on a demonstrated lack of capability and an unwillingness to maintain high professional standards. Unit commanders consider the supervisor's recommendation, the member's duty performance, and career force potential before making a decision.

-- The commander should also consider (1) Enlisted Performance Reports (EPRs), (2) unfavorable information from any substantiated source, (3) the Airman's willingness to comply with AF standards, and (4) the Airman's ability to meet required training and duty performance levels

- Commanders may reverse their SRP decisions at any time

Member Appeals of Denial of Reenlistment

- If the supervisor recommends non-selection or the commander non-concurs with the supervisor's recommendation to allow the member to reenlist, the commander must notify the member of the specific reasons for non-selection, areas needing improvement, appeal opportunity, promotion ineligibility, and the possibility of future reconsideration and selection

- Member Notification of Intent to Appeal: The member has 3 workdays to notify the commander of whether they intend to appeal the reenlistment denial (AF Form 418, Block V)

- Member Submission of Appeal: If the member decides to appeal, the member has a total of 10 workdays to submit the appeal itself. Member submits the appeal to the MPS for processing.

  -- Appellate authorities

    --- Group Commander: First term Airmen and retirement eligible Airmen

    --- Wing Commander: Second term Airmen and career Airmen with fewer than 16 years of service at the end of their current enlistment

    --- Secretary of the Air Force (SecAF): Airmen with more than 16 years of service but less than 20 years of service at the expiration of their current enlistment

  -- Any commander in the reviewing chain may approve an Airman's appeal as it is routed to the ultimate appellate authority

- Legal Review of Reenlistment Denial Appeals: A legal review is required when a member appeals SRP decisions. It is recommended that commanders contact the servicing legal office prior to notifying a member of a non-selection decision.

Collateral Impact of Reenlistment Denials

- SRP non-selection makes members ineligible for promotion and automatically cancels projected promotion line numbers

- Once a member reenlists, any misconduct taking place in the earlier enlistment generally cannot be used as a basis for an administrative discharge action

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References

AFI 36-2606, *Reenlistment in the United States Air Force* (9 May 2011), incorporating Change 1, 29 August 2012

AF Form 418, *Selective Reenlistment Program Consideration*

RESERVE REENLISTMENTS

The quality of the Air Force Reserve program depends on the quality of its enlisted members. Reenlistment in the Air Force Reserve is not a right; it is a privilege. Commanders have significant discretion in making reenlistment decisions. In making this determination, commanders should primarily rely upon evaluations of the member's performance during their current enlistment and supervisor recommendations.

Standard for Denial of Reenlistment

- Commanders considering Reservist reenlistment should primarily consider performance and the recommendations of the member's immediate supervisors

- Other factors for a commander to consider include: (1) potential, (2) grade and skill-level, (3) aptitude, (4) education, (5) motivation, (6) self-improvement efforts, (7) training and participation, (8) derogatory information, (9) physical condition, (10) attitude and behavior, and (11) assumption of responsibility

Commander's Role

- Commanders are instructed to appoint a career non-commissioned officer (NCO) of the grade of E-5 or above and at the 7 or 9 skill-level to serve as unit career advisor (UCA) to administer the Airmen Career Retention Program

  -- Unit supervisors give the UCA recommendations on members being considered for reenlistment

  -- Unit commanders consider the UCA's recommendation, the member's duty performance, and career force potential before making a decision

  -- Unit commanders make the final decision on whether a person is eligible for reenlistment or extension

- <u>Common Factors Precluding Reenlistment</u>:

  -- Unsatisfactory participation, performance, attitude, or behavior

  -- Currently undergoing nonjudicial punishment (Article 15)

  -- Conscientious objectors

-- Awaiting HQ AFRC consideration of a waiver of physical disqualification

-- See AFI 36-2612, *United States Air Force Reserve (USAFR) Reenlistment and Retention Program,* Table 6.2 for full list of factors precluding reenlistment

- Even when policy does not prohibit a member from reenlisting, the commander should carefully consider whether the member meets the Air Force's quality standards

Non-Selection for Reenlistment

- Pre-Coordination: Commanders should contact the servicing legal office *prior* to notifying a member of a non-selection decision

- Commander Action: The commander or supervisor completes AF Form 418, *Selective Reenlistment Program Consideration*, when not selecting a member for reenlistment and sends it to the retention program manager

- Member Notification: If the unit commander selects a member for reenlistment but later deems the member ineligible to reenlist, the commander prepares AF Form 418 and processes it as if it were an initial non-selection

- Lengthy Service Exception to Denial of Reenlistment: Except for physical disability or for cause, members may not be denied reenlistment if they have completed at least 18 but less than 20 years satisfactory service for retirement purposes

Appeals of Denial of Reenlistment

- Members who have not been selected for reenlistment have a right to appeal

  -- Member must submit a written appeal to the Military Personnel Flight (MPF) by the next scheduled Unit Training Assemblies (UTA) after the date he/she was notified

  -- Members may appeal non-selection for reenlistment through one of two options:

    --- Senior Rater Appeal: Unit members may appeal to their senior Reserve commander for final selection or non-selection authority

    --- Denial of Reenlistment Board: Upon approval by the member's senior Reserve commander, a member may present their appeal to a three-person appeal board which will review all documentation and make a recommendation to the member's senior Reserve commander for final action

---- Member's Career Enhancements Section appoints all board members

---- All board members must be superior in grade to member

---- At least one board member must be a field grade officer

---- For enlisted appeal boards, board members must be E-7 and above

- Under either appeal option, the ultimate decision of the member's senior Reserve commander is final

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References

UCMJ Art. 15

AFI 36-2612, *United States Air Force Reserve (USAFR) Reenlistment and Retention Program* (25 July 1994)

AF Form 418, *Selective Reenlistment Program Consideration*

OFFICER AND ENLISTED EVALUATION SYSTEMS

The single most important element needed for successful mission accomplishment is performance. The officer evaluation system (OES) and the enlisted evaluation system (EES) are the Air Force's programs for evaluating and documenting performance. Commander involvement in the program is critical to developing and retaining a high-caliber force.

- The Air Force evaluation system is generally comprised of the Airman Comprehensive Assessment (ACA) (i.e., initial and mid-term rater performance feedback), Enlisted Performance Reports (EPR), Officer Performance Reports (OPR), Letters of Evaluation (LOE), and training reports.

- The servicing Military Personnel Section (MPS) provides command support and guidance regarding officer and enlisted evaluations. Air Force Personnel Center (AFPC) provides training and guides on their web site.

- Unit commanders are responsible for ensuring first-time supervisors get mandatory OES/EES training within 60 days of being appointed as a rater. Additionally, the commander should ensure Air Force performance evaluators receive annual recurring OES/EES training.

- Access to Evaluations: Evaluations are For Official Use Only (FOUO), subject to the Privacy Act, and exempt from public disclosure. Only persons who have a proper need to know may read the evaluations.

Airman Comprehensive Assessment

- The first step in the evaluation of any Air Force member is initial and midterm performance feedback provided to the member by their rater

  -- Initial Feedback: Within 30 days of a change in supervision

  -- Midterm Feedback: Halfway through the member's rating period

- ACA sessions must provide realistic feedback to improve the ratee's performance and written comments, not just marks on the form. Any behavior that may result in further administrative or punitive action should be documented in a separate document.

- The rater provides the original ACA worksheet to the ratee. The rater may keep a copy for personal reference, but the ACA worksheet will not be made part of any official personnel record or be included in an individual's PIF, **UNLESS** the ratee introduces it first or alleges he/she did not receive required feedback or claims the sessions were inadequate.

Performance Reports—General Considerations

- OPRs and EPRs are critical in nearly every personnel decision within the Air Force. They form the basis for promotion, training, reenlistment, and other administrative decisions. A poorly managed evaluation system inadequately identifies top performers and undermines confidence in the fairness of the system.

- Performance reports should take into account any adverse administrative or punitive actions taken against the individual during the rating period

- Improperly processed evaluations may limit commanders' options when pursuing adverse administrative actions against poor performers

Performance Reports—Timing

- OPRs: Complete OPRs in accordance with timing requirements set forth in Table 3.3 of AFI 36-2406, *Officer and Enlisted Evaluation System*, attached below

- EPRs: All EPRs are subject to a "static close out date" (SCOD). This is the date that all enlisted evaluations will close out for a specific grade and is the date used to determine the final Time in Grade/Time in Service (TIG/TIS) eligible pool for senior rater stratification/endorsement and forced distribution allocations. EPRs cannot be signed before this date. The local Force Support Squadron (FSS) is the point of contact (POC) for any questions by raters.

Performance Reports—Required and Prohibited Comments

- Some specific comments or entries are required and must be included in OPRs and EPRs. These comments should be drafted as stated in the AFI. Slight deviations are allowed, but entries significantly deviating from the recommended format are unacceptable. These comments and entries include, but are not limited to:

  -- For a referral report or training report (TR), the evaluator must specifically detail the behavior or performance that caused the report to be referred (referral reports are discussed in detail below)

  -- Explaining any significant disagreement with a previous evaluator on a performance report

  -- Comments relating to the ratee's behavior are mandatory on the ratee's next OPR, EPR, TR, and an officer's next promotion recommendation form (PRF), if the ratee has been convicted by court-martial

- -- If performance feedback was not accomplished, comment on that fact is mandatory

- Certain comments are inappropriate to include in performance reports. Some of the common mistakes include, among others:

  - -- Promotion recommendations for officers

  - -- Duty history or performance outside the current reporting period, except as allowed in AFI 36-2406, paras. 1.12.6.5 and 1.12.7.1

  - -- Comments referring to ACA sessions, except in the "Performance Feedback Certification" block

  - -- Events that occur after the close-out date

  - -- Any action against an individual that resulted in an acquittal or failure to implement an intended personnel action. This does not necessarily bar commenting on the underlying misconduct that formed the basis for the action, but consult with the servicing staff judge advocate before doing so.

  - -- Actions taken by a member outside the normal chain of command that represent guaranteed rights of appeal, such as issues raised with the inspector general

  - -- Race, ethnic origin, gender, age, or religion of the ratee

  - -- Temporary or permanent disqualification under AFMAN 13-501, *Nuclear Weapons Personnel Reliability Program* (PRP)

  - -- Participation in drug or alcohol abuse rehabilitation programs

  - -- Performance as a court-martial member

  - -- Punishment received as a result of an administrative or judicial action. Restrict comments to the conduct or behavior that resulted in the action.

SecAF Mandated Report of Ratee Criminal Convictions to Rater

- By order of the SecAF (per AFI 36-2406, para. 1.8), **ALL** Air Force members who are on active duty or in an active status in a Reserve Component, shall report (in writing) to their rater within 72 hours any conviction for a violation of a criminal law of the United States or violations of a criminal law of any other country to the member's rater (first-line military supervisor) or summary courts-martial convening authority

  -- For purposes of this policy, the term "conviction" includes a plea or finding of guilty, a plea of nolo contendere (no contest), and all other actions tantamount to a finding of guilty, including adjudication withheld, deferred prosecution, entry into adult or juvenile pretrial intervention programs, and any similar disposition of charges

  -- For purposes of this policy, a criminal law of the United States includes any military, Federal, State, or equivalent criminal law or ordinance; and any criminal law or ordinance of any county, parish, municipality, or local subdivision of any such authority, other than motor vehicle violations that do not involve a court appearance

- Active duty members shall submit reports under this policy within 15 days of the date the conviction is announced

- Commanders and/or supervisors who have questions regarding whether a particular conviction triggers the mandated comment should consult with their staff judge advocate

Referral Reports

- Certain comments or ratings in a performance report may result in it being "referred" to the ratee for comments. An evaluator whose ratings or comments cause a report to become a referral report must give the ratee a chance to comment on the report.

- <u>Refer a Performance Report When</u>:

  -- An evaluator marks "Does Not Meet Standards" in any performance factor in Section IX of the OPR or places a mark in the far left block of any performance factor in Section III or marks a rating of "1" in Section V of an EPR; or

  -- Any comments or attachments are derogatory; imply/refer to behavior incompatible with standards of personal or professional conduct, character, judgment, or integrity; and/or refer to disciplinary actions

- The procedures involved when referring an OPR or EPR are provided in AFI 36-2406, beginning with para. 1.10 (see AFI 36-2406, fig. 1.1, for referral memorandum)

References

AFMAN 13-501, *Nuclear Weapons Personnel Reliability Program* (PRP) (29 May 2015), including AFMAN13-501_AFGM2016-01, 10 March 2016

AFI 36-2406, *Officer and Enlisted Evaluation Systems* (5 April 2013), incorporating through Change 3, 30 November 2015

AF Form 707, *Officer Performance Report* (Lt through Col)

AF Form 724, *Airman Comprehensive Assessment Worksheet* (2Lt through Col)

AF Form 910, *Enlisted Performance Report* (AB through TSgt)

AF Form 931, *Airman Comprehensive Assessment Worksheet* (AB through TSgt)

AF Form 932, *Airman Comprehensive Assessment Worksheet* (MSgt through CMSgt)

Attachments

AFI 36-2406, Table 3.3, *When to Prepare OPRs for Officer on the EAD and ANG Officers*

AFI 36-2406, Table 3.12, *Static Close-out Date (SCOD) Enlisted Chart for RegAF*

AFI 36-2406, Table 3.3
(see http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2406/afi36-2406.pdf)

When to Prepare OPRs for Officer on the EAD and ANG Officers

RULE	A	B	C	D
	If the ratee is	**And**	**And supervision period was**	**Then write evaluation and enter reason as**
1	A lieutenant thru colonel (see Notes 1, 2, and 3)	Has not had an evaluation, or one year has passed since close-out date of last OPR or TR from school of 20 weeks or more	120 calendar days	Annual (see Note 4)
2		The rater changes, officer departs PCS/PCA to school, or officer is Separating (see Notes 5, 6, 7, 8)	120 calendar days	Change of Rating Official (CRO) (see Note 9)
3		The ratee or rater departs TDY for more than 120 days for other than formal training or normal contingency (deployed) operations (see Notes 5 and 6)	120 calendar days	CRO
4		Determination of appropriateness of action under AFIs 36-2907, 36-3206, 36-3207, or 36-3209 is needed, or ratee's performance or conduct is unsatisfactory or marginal and a special evaluation is appropriate	60 calendar days (see Note 10)	Directed by (Chief NGB; Office of Adjutant General; MAJCOM; wing, group, squadron, etc.) commander
5		The ratee has been declared missing in action (MIA), captured, or detained in captive status	See Note 11	Directed by HQ USAF
6		A special evaluation is directed by HQ USAF (see Note 12), or National Guard Bureau (NGB) for ANG officers not on EAD	As directed	Directed by HQ USAF, Chief NG, etc.
7		A referral Letter of Evaluation (LOE) has been written or an LOE would contain referral comments, if written (see Note 13)	60 calendar days	
8		Is placed into record status 6, deserter status	60 calendar days (see Note 1)	Directed by the Commander
9		An evaluation is prepared to document significant improvement in duty performance	120 calendar days (see Note 15)	
10		Any sentence of confinement as the result of a court-martial	No minimum number of days required	

Notes (referencing AFI 36-2406):

1. If ratee is attending training or education, see ch. 6.
2. Colonels selected for promotion to brigadier general receive evaluations in accordance with ch. 7.
3. If the OPR is already a matter of record and the event or circumstances that brought about the evaluation changes or no longer exists, take no action. The OPR is a valid evaluation and remains in the ratee's records. Exception: The MPS/CSS/HR Specialist updates referral OPRs that are prepared as a result of a PCS and files them in the ratee's records regardless of whether or not the evaluation was a matter of record at the time authorities canceled or delayed an assignment.
4. If a CRO occurs after the original annual date has passed but before the 120-day supervision period ends, the evaluation is closed out the day prior to the rater change, provided at least 60 days of supervision have been obtained. The reason for the evaluation remains "Annual."
5. Do not confuse CRO with change of supervisor. For officers on the EAD and ANG officers, the home station commander may authorize a change of reporting official to the TDY location if ALL the following conditions are met: Note: The senior rater matched to the ratee's home station PAS code must perform senior rater duties.
   a. Someone at the TDY location can perform normal rater duties.
   b. The rater's rater meets the requirements of para. 1.6.3.
   c. The home station and TDY unit commanders have approved the change [The Management Levels (ML) must approve inter-command changes].
   d. The home station commander assigns a new rater when the TDY ends.
6. If the ratee is selected to fill an 365-day extended deployment billet a CRO evaluation must be accomplished provided there has been at least 120 days supervision.
7. An evaluation is prepared on officers discharged from the ANG and reassigned to ARPC unless para. 3.4. applies.
8. If ratee is an ANG officer (not on EAD) serving on an AD tour of at least 120 days, AD supervisor prepares the evaluation.
9. CRO includes separation from EAD. However, no evaluation is required when the criterion in para. 3.4.13. applies.
10. For officers on the EAD and ANG officers, this includes placement on or removal from the control roster.
11. Do not prepare evaluations for periods of MIA, captured, or detained in captive status of less than 15 calendar days. If the ratee remains in one of these categories for 15 calendar days or more, prepare an evaluation under this rule without regard to the number of days of supervision. Close the evaluation on the day the ratee was placed

in MIA, captured, or detained in captive status. These evaluations are as directed by HQ AFPC/DPSIDE.

12. HQ AFPC/DPSIDE, HQ AFPC/DPSOO, and USAF/DPO retain the authority to direct evaluations under this rule. Special evaluations covering outstanding duty performance are not permitted under this rule.
13. If the current rater does not consider the referral comments in an LOE to be serious enough to warrant permanent recording, an OPR will not be prepared.
14. The close-out date of the evaluation is the effective date the ratee is placed in record status 6, deserter.
15. A commander may direct an evaluation for significant duty improvement only if the previous evaluation was referred due to substandard duty performance.

Table 3.12—Static Close-out Date (SCOD) Enlisted Chart for RegAF

RegAF Personnel	
RANK	**SCOD**
SrA and Below	31 Mar
SSgt and SSgt selects	31 Jan
TSgt and TSgt selects	30 Nov
MSgt and MSgts selects	30 Sep
SMSgt and SMSgt selects	31 Jul
CMSgt and CMSgt selects	31 May

OFFICER PROMOTION PROPRIETY ACTIONS

Commanders may determine an officer is not qualified for promotion, should be removed from a promotion list, or have the officer's promotion date delayed. In such cases, the commander presents information to the Secretary of the Air Force (SecAF) or a selection board for a determination. These actions are known as officer promotion propriety actions. Generally, only SecAF (or designee) may end an officer promotion delay action or approve a promotion list removal action.

Preliminary Considerations

- Before taking a promotion propriety action, the commander **MUST** determine if a preponderance of the evidence shows it is more likely than not that the officer is not mentally, physically, morally, or professionally qualified to perform the duties of a higher grade

- If an officer is not qualified to perform the duties of the next grade, the proper authority must take promotion propriety action before the effective date of promotion

- If commanders believe an officer is not qualified to perform the duties of the next grade, they should speak with the servicing staff judge advocate (SJA) to determine whether sufficient evidence exists to support a proprietary action

Not Qualified for Promotion (NQP)

- The officer's immediate commander initiates the recommendation to find the officer NQP and forwards it with appropriate coordination to the major command commander for review

- For officers meeting central selection boards, the NQP recommendation case file must arrive at HQ AFPC/DPPPO before the board convenes. This recommendation is valid for only one selection board.

- Before separating a second lieutenant found NQP, an attempt should be made to retain the officer on active duty for 6 months from the date promotion would have occurred (unless retention is inconsistent with good order and discipline) and give the officer an opportunity to overcome any problem and qualify for promotion

Removal from a Promotion List

- The officer's immediate commander initiates the removal action and forwards it with appropriate coordination to the major command commander for review. The package then goes to SecAF, who must approve any removal action.

- The immediate commander's notification of the officer of the removal action automatically delays the officer's promotion until SecAF makes a decision on the removal action

Delaying a Promotion

- Initiating a Promotion Delay: The officer's immediate commander initiates the delay of promotion before the effective date of promotion and forwards it with appropriate coordination to the major command commander for review

- Effective date of Promotion Delay: The delay is effective when the immediate commander notifies the officer of the delay, either verbally or in writing

- Approval Authority for Promotion Delays: The major command commander approves initial promotion delays up to 6 months. SecAF may grant extensions for up to an additional 12 months.

- Member's Response to Promotion Delay: The officer whose promotion is delayed may make a written response to SecAF

- Authority to Terminate Promotion Delay: Generally, only SecAF (or designee) has authority to end a promotion delay

  -- Notwithstanding the commander's recommendation, SecAF (or designee) may promote an officer on his/her original effective date; promote an officer with a date of rank adjustment; extend the officer's promotion delay; or remove the officer from the promotion list

  -- A reviewing commander may terminate a delay only when the delay was initiated to conduct an investigation or inquiry, and upon completion, there was no finding or conclusion that substantiated or partially substantiated any allegations and no disciplinary action of any kind (administrative, nonjudicial, or judicial) is taken against the officer

Promotion Propriety Action Procedures

- Notification to Officer: The commander must inform the officer, verbally or in writing, of the propriety action before the effective date of promotion

- Notification in Writing is Preferred: If written notification is not possible, confirm the action in writing as soon as possible

- Statement of Reasons: The action itself must contain a clear statement of reasons for the decision and must list the evidence supporting the action. It must also show that the affected officer had an opportunity to review the information.

- Officer's Response: The officer should acknowledge the action and be allowed 5 working days to respond. Include in the package any comment from the officer.

- AFI 36-2501, *Officer Promotions and Selective Continuation*, Table 5.1, contains procedures for processing propriety actions

Reserve and Air National Guard Officers

- Commanders of officers in the Air Force Reserves and Air National Guard initiate a promotion propriety action when there is cause to believe that the officer is not mentally, physically, morally, or professionally qualified to perform duties of a higher grade

- An officer's wing commander or equivalent initiates the promotion proprietary action

- Procedures for actions involving officers in the Air Force Reserves and Air National Guard can be found in AFI 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force*, Table 7.1

References

AFI 36-2501, *Officer Promotions and Selective Continuation* (16 July 2004), incorporating through Change 3, 17 August 2009, including AFI36-2501_AFGM2016-01, 24 June 2016

AFI 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force* (9 January 2003), incorporating through Change 5, 19 October 2007, certified current 22 January 2010

AF Form 4363, *Record of Promotion Propriety Action*

AF Form 4364, *Record of Promotion Delay Resolution*

ENLISTED PROMOTION PROPRIETY ACTIONS

Air Force commanders are authorized to delay enlisted promotions or remove enlisted members from an approved promotion list when the commander deems it necessary in the interests of good order and discipline. Air Force promotion policy is to select individuals (active duty or reserve) for promotion based on potential to serve in the next higher grade. Only the best should be promoted due to the limited vacancies in higher grades. The following tools are available to commanders when managing enlisted promotions.

Non-Recommendation for Promotion

- An enlisted member is considered ineligible for promotion when non-recommended or removed from the promotion list by the promotion authority before the effective date of promotion, commonly referred to as "redlining"

- Standard: Poor or declining performance trends or recent serious misconduct

- A promotion authority can non-recommend E-3s and below in monthly increments up to 6 months. All other ranks are non-recommended for a specific promotion cycle.

- Airmen also become ineligible for promotion under other circumstances as outlined in AFI 36-2502, *Airmen Promotion/Demotion Programs*, Table 1.1, which include, but are not limited to:

  -- Placement on the control roster

  -- Serving a probationary period as part of an involuntary discharge action

  -- Under a suspended reduction in grade imposed through nonjudicial punishment under UCMJ Art. 15

  -- Conviction by court-martial or undergoing punishment or suspended punishment imposed by a court-martial

  -- Conviction by a civilian court (excluding minor traffic violations), undergoing punishment or suspended punishment, probation, or work release program

Withholding of Promotion

- The immediate commander has the authority to withhold a promotion for up to one year after a member's selection for the next higher grade, but before the effective date of promotion

- A higher authority (wing or equivalent level commander) must approve extensions beyond a year

- This action allows the commander to evaluate unique or unusual events so a sound promotion decision can be made. It is not intended to be used when there is sub-standard performance or behavioral problems.

- The reasons for withholding a promotion can be found in AFI 36-2502, Table 1.2, which include, but are not limited to, when the member is:

  -- Awaiting a decision on an application as a conscientious objector

  -- Under court-martial or civilian charges

  -- Placed into the Alcohol and Drug Abuse Prevention and Treatment program (ADAPT)

  -- Under investigation or the subject of an inquiry (formal or informal) that may result in action under the UCMJ or prosecution by civilian authorities

  -- When requested by the member's commander based on other reasons with prior approval from the individual's wing commander

- Effect on Date of Rank: If the commander terminates the withhold action, the member receives his original date of rank, and the effective date is the date the commander terminates the withhold action and recommends promotion

Deferral

- A deferral is a delay in promotion for a specified period of time

- The promotion authority may defer promotion to E-5 or higher for up to 3 months. Members awaiting promotion to the grades of E-1 to E-4 are not subject to promotion deferral.

- Standard: A deferral action is begun to determine if the member meets acceptable behavior and performance standards for the higher grade. If there is clear evidence a non-commissioned officer (NCO) is not suited to take on the increased responsibilities of the higher grade, then non-recommendation is the right course of action, not deferral.

- Effect of Date of Rank: The date of rank and effective date is the first day of the month after the deferral period ends

Procedures

- When non-recommending, deferring, or withholding promotions, the commander informs the member of adverse actions before the promotion effective date. If the notification is verbal, the commander must confirm in writing within 5 workdays.

- The notification must include specific reasons, dates, occurrences, and duration of the action

- The notification and the Airman's acknowledgment is maintained in the Automated Records Management System (ARMS)

Reserve Enlisted Members

- Standard: If the preponderance of the evidence indicates it is more likely than not that a Reserve enlisted member does not have the qualifications to be promoted

- Documentation: Commander disapprove promotions using AF IMT 224, *Recommendation and Authorization for Promotion of Airman as Reserve of the Air Force*

References

UCMJ Art. 15

AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs* (12 December 2014), incorporating Change 1, 27 August 2015

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (8 July 2014)

AF IMT 224, *Recommendation and Authorization for Promotion of Airman as Reserve of the Air Force*

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CHAPTER THREE: NONJUDICIAL PUNISHMENT UNDER ARTICLE 15, UCMJ

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NONJUDICIAL PUNISHMENT OVERVIEW AND PROCEDURES

Nonjudicial punishment (NJP) under Article 15, UCMJ, provides commanders with an essential and prompt means of maintaining good order and discipline outside of the court-martial process. NJP is designed to promote positive behavior changes in service members without the stigma of a court-martial conviction.

Overview

- Generally, any *commander* who is a *commissioned officer* may impose NJP for minor offenses committed by members under his/her command

- NJP procedures provide quick disciplinary action for a commander while maintaining due process for the accused member

Prerequisites

- Nature of the Misconduct—Minor Offenses: Nonjudicial punishment is solely utilized for the disposition of UCMJ offenses. Generally, it should be reserved for "minor offenses" under the UCMJ.

  -- Minor Offenses: An offense is usually **NOT** considered minor if the maximum imposable punishment at a general court-martial for that offense includes a dishonorable discharge or confinement for more than one year

  -- The decision whether an offense is "minor" is a matter of discretion for the commander imposing NJP. Factors to consider for determining a "minor offense" include:

    --- The nature of the offense and the circumstances surrounding its commission

    --- The effect of both the misconduct and the resulting NJP on good order and discipline

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

    --- The effect of NJP on the member and the member's record

- Shared Authority of Parent Unit Commander and Temporary Duty Assignment (TDY) Unit Commander to Issue NJP:

  -- Member is not attached to TDY command: Home-station commander should handle the disposition of NJP

  -- Member is attached to TDY command: TDY commander should confer with the member's parent organization to determine the member's background, past duty performance, and other relevant factors before initiating action

- Withholding of NJP Authority by Superior Commanders: Commanders at any echelon may withhold from any subordinate commander all or part of the authority—including the authority to impose NJP for specific types of offenses—that the subordinate would otherwise have under the UCMJ

  -- Withholding of NJP authority by a superior commander should be in writing

  -- Withholding of authority by a superior commander does not constitute unlawful command influence because it represents the independent exercise of command by the superior commander

- Swift Command Action Required: AFI 51-202, *NonJudicial Punishment*, mandates that 80% of non-judicial punishment actions should be completed within 39 days from the report of the offense:

  -- Date of "discovery" of offense to date of NJP offer: **21 days**. "Date of discovery" means the date when an investigative agency (e.g., Air Force Office of Special Investigations (OSI), Security Forces Office of Investigations (SFOI), Inspector General (IG), legal office, commander, supervisor, or first sergeant) becomes aware of the allegation and has identified a subject.

  -- Date of NJP offer to date of NJP completion: **18 days**. This metric is further subdivided so no more than 9 days pass from offer to imposition of punishment, and no more than 9 days pass from punishment to Staff Judge Advocate (SJA) review of the completed NJP.

- Statute of Limitations: Unless the member is absent without leave (AWOL) or fleeing from justice, NJP may not be imposed for offenses committed more than 2 years before the date of NJP punishment imposition

Procedures

- Forum Choice: For the member accused, NJP is a forum choice—meaning a commander cannot involuntarily impose NJP under Article 15 (unless the member is embarked on a naval vessel), but instead offers to adjudicate the alleged misconduct at proceedings outlined in Article 15 in lieu of doing so at a court-martial

- Staff Judge Advocate (SJA) Consultation Required: Commanders must confer with the SJA, or a designee, prior to both initiation of NJP proceedings and imposition of punishment. The military justice section of the base legal office prepares the AF IMT 3070, *Record of Nonjudicial Punishment Proceedings*.

- Standard of Proof: No specific standard of proof is applicable to NJP proceedings in the Air Force

  -- Commanders should, nonetheless, recognize that a member has the option to turn down the offer of NJP and demand trial by court-martial, where proof beyond a reasonable doubt by competent evidence is required for conviction. Commanders should consider whether such proof is available before initiating action under Article 15 and understand the consequences of offering NJP without sufficient evidence, i.e., an acquittal at court-martial.

  -- If the evidence does not rise to the level of proof beyond a reasonable doubt, NJP is usually neither warranted nor recommended. Instead, commanders should consider lesser forms of disciplinary action, e.g., Letter of Reprimand (LOR), or if warranted, administrative discharge.

- Offering NJP: Commanders initiate NJP action by serving the AF IMT 3070

  -- A member must always be informed of the identity of the commander who will actually make the findings and punishment decision before the member makes an election to accept NJP or demand court-martial

  -- If a new commander assumes responsibility for the case after the member was offered NJP proceedings, but before findings are made, inform the member of the identity of the new commander and provide 3 additional duty days for the member to decide to accept the NJP proceedings or demand trial by court-martial

Member Rights

- Unless embarked on a naval vessel, an accused has the right to refuse an NJP and to demand trial by court-martial

- An accused service member served with an NJP has 3 duty days to in which to decide whether to "accept" NJP as the "forum" for their case

- Forum choice—not an admission of guilt. It is simply a choice by the member not to assert the right to a trial by court-martial and to instead allow the commander to determine his or her guilt, and punishment, if applicable. Once accepting NJP as the forum, the member has the right to either contest or admit guilt, at their discretion.

- An accused service member has the following rights in the NJP process. When responding to the offer of NJP on the AF IMT 3070, the accused member must annotate whether they exercised the following rights by initialing in the appropriate box:

  -- Right to Counsel:

    --- Commanders should encourage members to consult with the area defense counsel (ADC) in all cases. The AF IMT 3070 directs that an appointment with an ADC be established on behalf of a member prior to the commander notifying that member of the commander's intent to impose NJP.

    --- Typically, an ADC appointment will be arranged for the member by the First Sergeant or by legal office personnel prior to notification

  -- Review of Evidence: The accused member has the right to examine all statements and evidence the commander intends to consider in deciding guilt, and then if applicable, punishment. The legal office normally supplies the evidence to the ADC.

  -- Presentation of Evidence: If a member decides to accept NJP, he/she is entitled to present matters in defense, mitigation, and extenuation. Members may present matters in person, in writing, or both.

    --- Written Matters: Must be submitted within 3 duty days, unless the commander grants an extension for good cause shown

    --- Personal Appearance: May be public or private. Must be requested by the member when he/she make her NJP "elections" within 3 duty days of the "offer" of NJP. Except under extraordinary circumstances or when the imposing commander is unavailable, a member is generally entitled to appear

personally before the imposing commander and present matters in defense, mitigation, or extenuation. If the member chooses to make a personal appearance, the member also has the right to:

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

---- Present witnesses who are reasonably available

--- PUBLIC PERSONAL APPEARANCES: A member may request that a personal presentation be open to the public

---- The commander may open the personal appearance to the public, even though the member does not request it or agree that the appearance should be open

---- "Public" NJP should neither be intended as, nor result in, the shame or humiliation of the member. For example, public NJP at a commander's call, unit training assembly, or other public gathering would be inappropriate (unless the member consents). Rather, NJP proceedings may be attended by a limited number of people in a more private setting, i.e., the commander's office.

---- The individuals in attendance at NJP proceedings should normally be limited to those in the member's supervisory chain or people who can assist the commander in making a decision

Commander's Findings

- Commanders must refrain from determining or considering punishment until guilt has been determined based on all the evidence, as well as the matters submitted by the member

- After a full and fair consideration of all matters in defense, mitigation, and extenuation, the commander must first determine whether or not the member committed the offense

  -- If the commander determines the accused to be "not guilty" the NJP process is concluded

  -- If the commander does determine the member to be guilty, the commander must then determine what punishment to impose

Determining a Punishment

- Commanders are required to confer with the SJA (or his/her attorney designee) before imposing punishment except where impracticable due to military exigencies. The legal office will normally input the appropriate punishment language on the AF IMT 3070.

- Commanders should tailor the punishment to the offense and the member

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

  -- For example, commanders should generally impose an unsuspended reduction in grade in combination with forfeitures of pay only when the maximum exercise of NJP authority is warranted (e.g., repeat offender, most serious offenses, past rehabilitative efforts have failed, or recalcitrant offender). This general policy does not preclude such punishment where warranted in the sound exercise of judgment by the commander imposing punishment.

- If a change in commander occurs after imposition of punishment but before the appeal decision has been made, inform the member in writing of the identity the new command and obtain acknowledgment of this change from the member

Punishment Limitations

- General Limitations: Punishment limitations based upon the commander's grade and the member's grade are summarized in AFI 51-202, Tables 3.1 and 3.2, and on page 3 of the AF IMT 3070

- Specific Punishment Limitations: There are limitations on the combination of certain punishments:

  -- Restriction to Limits and Extra Duties: If restriction and extra duties are combined, they must run concurrently (i.e., at the same time) and must not exceed the maximum time imposable for extra duties (45 days when field grade or general officers impose punishment; 14 days when company grade officers impose punishment)

  -- Arrest in Quarters: For officers only, and cannot be combined with restriction

  -- Forfeiture of Pay: Unless the commander otherwise specifies, unsuspended forfeitures of pay take effect on the date the commander imposes punishment

-- Reductions in Grade: Unless the commander otherwise specifies, unsuspended reductions in grade take effect on the date the commander imposes punishment. Suspension of a punishment takes effect on the imposition date.

Appeals

- Members are entitled to appeal nonjudicial punishment to the commander who imposed the original punishment, and then to the next superior authority in the commander's chain of command

  -- Scope of Appeal: The member may appeal the guilty finding, the punishment, or both

    --- A Reserve member is not required to make this appeal election in Title 10 status or in person

  -- Timeline for Appeal: 5 calendar days after member notification of punishment. Commanders may grant extensions for good cause shown (written requests only).

  -- Submission of Matters: Members must submit all evidence supporting an appeal to the commander who imposed the original punishment

- Final Appeal—Superior Commander: After considering any new matters submitted by the member, the imposing commander may deny all relief, grant partial relief, or grant all relief requested by the member. If the imposing commander does not grant all the requested relief, he or she must forward the appeal to the appellate authority through the servicing SJA. If the imposing commander is a section commander of a squadron, the next superior authority is the squadron commander's superior commander.

  -- Final action on Appeal: The appellate authority may deny all relief, grant partial relief, or grant all relief requested by the member. The appellate authority's decision is final.

  -- No Stay on Previously Approved Punishments: Punishments are not stayed during the appeal process, i.e., the punishment will run until overturned on appeal (exception: any unexecuted punishment involving restraint or extra duties will be delayed until after appeal if the member requests such a delay and the appellate authority has not already decided the case within 5 days)

Specific Rules Involving NJP for Reserve Service Members

- Jurisdiction over Offenses by Reservists: A reserve commander **MUST** be in Title 10 status to offer NJP and sign AF IMT 3070 and the Reserve member **MUST** be in Title 10 status when served the AF IMT 3070

- Involuntary Recall of Reservists for Imposition of NJP: A reserve member generally cannot be involuntarily ordered to a duty status solely for purposes of initiating or completing NJP actions. However, Article 2, UCMJ, does permit a MAJCOM commander or equivalent to grant waivers in appropriate cases.

- NJP Authority—Traditional Reservists (CAT A): Air Reserve Component (ARC) unit commanders have UCMJ authority over reserve members assigned or attached to their respective units, even if the Reserve member is deployed

  -- Concurrent Authority Over Traditional Reservists: Active Duty (AD) commanders of Reserve members have concurrent UCMJ authority over all Reserve members attached to their respective units

  -- Commanders of TDY or deployed Traditional Reservist **MUST** coordinate with the Reserve member's parent organization commander prior to NJP imposition

- NJP Authority—Individual Mobilization Augmentees (IMAs) (CAT B): The Readiness Group (RMG) commander has UCMJ authority over all IMA reservists attached or assigned to the RMG

  -- Concurrent Authority over IMAs: Active duty commanders have concurrent UCMJ authority over IMA reservists attached to their unit for reserve duty, for temporary duty, or for deployment

- Withholding of NJP Authority: Authority to issue NJP on Reserve commissioned officers is withheld from all Reserve commanders, except those who are general officers or who exercise general court-martial convening authority and their principal assistants to whom Article 15 power has been delegated

- Prompt Action Required: Commanders must take prompt action to offer NJP to Reserve service members as soon as practicable after an NJP worthy offense is discovered

  -- Traditional Reservists: NJP should generally be offered no later than the next Unit Training Assembly (UTA) after the offense is discovered or the investigation is completed

-- IMA Reservists: NJP should be offered as soon as possible following discovery of the allegation

-- Failure to meet this suggested processing goal **DOES NOT** preclude commanders from initiating NJP proceedings at a later date

- Extended Response Time for Reservists: A reserve member not in Title 10 status for at least 72 hours after being offered NJP should be required to respond at the start of the next military duty day (i.e., UTA), provided at least 72 hours have passed since the NJP was offered. A failure to respond within 30 calendar days is considered a waiver of his/her right to respond, unless an extension is granted.

- Punishment Limitations for Reservists: There are limitations on the punishment that can be imposed on Reserve members

  -- Restrictions on Liberty: Because a reserve member cannot be required to arrive before, or remain after, a UTA to serve NJP, arrest in quarters, restriction to base or extra duties should not be imposed unless the Reserve member is expected to serve on extended active duty (EAD) or perform an annual tour (AT)

  -- No Limitations on UTAs: Barring a Reserve member from participating in UTAs is not an authorized punishment under Article 15, UCMJ

  -- Forfeiture of Pay: Since Reserve members not on EAD typically work only 2 days of military duty per month, the forfeiture provision of the Article 15 does not carry the same disciplinary weight for Reserve members as for active duty members. If the member does not perform any duty during the stated period of the sentence, no forfeiture collection will be made.

- Appeals: Reserve members not in Title 10 status for at least 5 days following receipt of punishment waive their appeal rights by failing to make an election within 30 calendar days of that receipt

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References

UCMJ Art. 15
Manual for Courts-Martial, United States, Part V (2012)
AFI 51-202, *Nonjudicial Punishment* (31 March 2015)
AF IMT 3070, *Record of Nonjudicial Punishment Proceedings*

SUPPLEMENTARY NONJUDICIAL PUNISHMENT ACTIONS

Supplementary nonjudicial punishment (NJP) actions provide commanders with the flexibility to make adjustments based on the response of the NJP recipient. These supplementary actions include: (1) *Suspension*: postponement of the application of all or part of the punishment for a specific probationary period, conditioned upon good behavior; (2) *Mitigation*: lessening of punishment by quality or quantity; (3) *Remission*: cessation of the remainder of any unexecuted period of punishment; (4) *Set Aside*: full reinstatement of prior rights and privileges impacted by NJP; and (5) *Vacation*: reinstatement of previously suspended punishment in the event of misbehavior during the probationary period.

Initiating a Supplemental Action

- Supplementary NJP actions are accomplished on AF IMT 3212, *Record of Supplementary Action under Article 15*, and are filed with the original NJP action

- Initiation by Member: Post-punishment relief may be requested by members (use the sample format in AFI 51-202, attch. 6)

- Initiation by Commander: Either the original commander who imposed the NJP, or a successor commander, may initiate supplemental action

- Staff Judge Advocate (SJA) Consultation Required: Consult with the SJA prior to initiating, or acting upon, any supplemental action

Suspension

- Definition: Suspension postpones all or part of a punishment for a specific probationary period. A suspension can be used as part of both an original or supplemental action. In original actions, the commander can suspend punishment at the time of imposition thereby holding part or all of a punishment in reserve as a motivational tool for the NJP recipient.

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

- Specific Rules for Suspension:

  -- Suspension of punishment may not exceed 6 months from the date of the suspension

  -- Commanders may, at any time, suspend any part or amount of the unexecuted punishment imposed

--- An executed punishment of reduction in grade or forfeiture may be suspended if accomplished within 4 months of the punishment being imposed

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

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

Mitigation

- Definition: Mitigation is a reduction in either the quantity or quality of a punishment. The general nature of the mitigated punishment should remain the same as the original punishment.

- Standard: Mitigation is appropriate when the member's subsequent good conduct merits a reduction in the punishment, or when the commander later determines the punishment imposed was disproportionate to the offense

- Specific Rules for Permissible Mitigated Punishments: With the exception of reduction in grade, only the unexecuted part or amount of the punishments can be mitigated

  -- Reductions in Grade: A reduction in grade may be mitigated even after it has been executed

    --- Reduction in grade may only be mitigated to forfeitures and may only be done up to 4 months after the date of execution

    --- The mitigation date will become the offender's date of rank for both promotion and pay purposes. The member will not be entitled to receive back pay.

  -- Restriction to Limits/Extra Duties: Punishments involving loss of liberty, such as restriction to specified limits or extra duties may only be mitigated to less sever forms of loss of liberty

    --- Loss of liberty punishments cannot be mitigated to forfeitures or reduction in grade

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

Remission

- Definition: Remission is the cancellation of any unexecuted portion of a punishment

- Standard: Remission is appropriate when the member's subsequent good conduct merits a reduction in the punishment, or when the commander later determines the punishment imposed was disproportionate to the offense

  -- Commanders may remit punishments any time before the execution of the punishment is completed (e.g., 30 days have elapsed on 45 days of extra duty and the commander wants to end the punishment now—the commander remits the remaining 15 unexecuted days of extra duty)

  -- An unsuspended reduction in rank is executed at imposition, so it can never be remitted

Set Aside

- Definition: Most sweeping form of supplemental action, permitting removal of punishments, whether executed or unexecuted. A set aside of all punishment voids the entire NJP action.

  -- Any property, privileges, or rights, affected by the portion of the punishment set aside are restored to the member

  -- Unlike suspension, mitigation, and remission, setting aside a punishment is not normally considered rehabilitative in nature and **should not** be used on a routine basis

- Standard: Commanders should exercise this discretionary authority only in the **rare and unusual** case where a question concerning the guilt of the member arises or where the best interests of the Air Force are served by clearing the member's record

  -- Time Limits: Punishments should be set aside within a reasonable time (4 months, except in unusual circumstances) after the punishment is originally imposed

Vacation

- Definition: Imposing punishment that was previously suspended either at the time the original NJP was imposed or as part of supplementary NJP relief

- Standard: Imposed if a member violates either a condition of the suspension specified in writing by the commander in the NJP or any punitive article of the UCMJ

  -- A new serious offense may be the basis for a vacation action AND additional NJP action

  -- The new offense does not have to be serious enough to warrant imposition of NJP, nor does it have to be of the same nature as the original offense

  -- Reserve members need not be subject to the UCMJ during the commission of an offense that serves as the basis for vacating suspended punishment

- SJA Consultation: Commanders must consult the servicing SJA before taking action to vacate suspended punishment

Procedure for Vacation Actions

- The commander must notify and advise the member of the intended vacation action by causing the member to be served with an AF IMT 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*. (The reserve commander initiating the vacation action must be in Title 10 status when signing and serving the vacation action.) AF IMT 366 must contain the following:

  -- A description of the basis for the vacation, such as misconduct (new offense which the commander suspects the member has committed) or what condition of the member's suspension was violated

  -- The fact that the commander is considering vacating the suspended punishment

  -- The member's rights during the vacation proceedings

- The base legal office will input the language describing the offense and other pertinent information concerning the suspended punishment on the AF IMT 366

- The member must receive the AF IMT 366 during the period of the suspension, at which point the suspension period is stayed

Member's Rights During Vacation Proceedings

- Unlike other supplemental actions, vacation action is detrimental to the member and therefore comes with due process protections similar to NJP, namely: (1) 3 duty days to respond; (2) right to consult counsel; (3) right to submit written matters; (4) right to request a personal appearance before the imposing commander

  -- Reserve Members: A reserve member not in Title 10 status for at least 72 hours after being served the vacation action should be required to respond at the start of the next military duty day (i.e., Unit Training Assembly (UTA)), provided at least 72 hours have passed since the vacation was served. A failure to respond within 30 calendar days is considered a waiver of his/her right to respond, unless an extension is granted.

    --- FAILURE TO RESPOND: If the member fails to respond within 3 duty days (30 days for a non-extended active duty (EAD) reserve member), the commander can continue by noting in item 3 of the AF IMT 366 "member failed to respond." However, if the commander believes the failure to respond was out of the member's control, the commander may not proceed with the vacation proceedings without good cause.

  -- Reserve Commanders: The reserve commander and member must both be in Title 10 status at the time the member makes his/her election and during any personal appearance made by the reserve member

Commander's Decision— Vacation Proceedings

- Following the commander's consideration of the evidence, including any matters presented by the member, the commander (who must be in Title 10 status if he/she is a reserve commander) takes one of the following actions on the AF IMT 366:

  -- Terminates the vacation proceedings because vacation of the suspended punishment is not appropriate or because the member did not violate the UCMJ or a condition of the suspension; or

  -- Finds the member did violate the UCMJ or a condition of the suspension

Effects of Vacation Action on Suspended Reductions

- If a suspension of a reduction in grade is "vacated," the member's date of rank, for the purposes of promotion, will be the date the commander imposed the original punishment

  -- For the purposes of pay, however, the date of rank will be the day the suspension is vacated. The member will not be required to return any additional pay received while holding the higher rank.

References

UCMJ Art. 15
Manual for Courts-Martial, United States, Part V (2012)
AFI 51-202, *Nonjudicial Punishment* (31 March 2015)
AF IMT 3212, *Record of Supplementary Action under Article 15*
AF IMT 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*

QUALITY FORCE MANAGEMENT EFFECTS OF NONJUDICIAL PUNISHMENT

Commanders have a great deal of discretion concerning quality force management consequences related to nonjudicial punishment (NJP) actions. Generally speaking, there are three main possible follow-on force management ramifications of NJP action: (1) placement of the NJP in an unfavorable information file; (2) placement of the NJP in a Senior Non-Commissioned Officer (NCO) or Officer Selection Record; (3) follow-on "referral" enlisted or officer performance reports. The following guidance applies primarily to *enlisted* personnel. Please consult with the staff judge advocate (SJA) regarding the quality force management consequences of NJP actions on officers.

Enlisted Unfavorable Information File NJP Entries

- Mandatory Entries: Entry of an NJP into an Unfavorable Information File (UIF) becomes mandatory based upon either the status of the offender or the severity of the punishment imposed

  -- Officers: All officer NJPs are mandatory UIF entries

  -- Enlisted: UIF entry is required if any portion of the executed or suspended punishment will not be completed within 1 month

    --- Post-punishment actions to suspend a previously imposed punishment must be filed in the member's UIF, with the original NJP action, until the suspension period is completed

    --- Actions to vacate a suspended punishment must be entered into the member's UIF

- Discretionary Entries: All other NJPs are "discretionary" UIF entries at the election of the imposing commander

- Notice: Members are entitled to notice that the action will be entered into a UIF. Such notice is included on AF IMT 3070, *Record of Nonjudicial Punishment Proceedings*.

- UIF Retention Period: NJP actions entered into a UIF must remain there until all punishment is completed or remitted, including any periods of suspension

  -- Mandatory UIF: If the commander takes no action to remove a mandatory UIF NJP action, it will remain in the UIF for **2 years**

- -- Discretionary UIF: If the commander takes no action to remove a mandatory UIF NJP action, it will remain in the UIF for **1 year**

- Early Removal of NJP from UIF: The commander may remove the NJP action and related documents from the member's UIF any time **after** the punishment or suspended punishment is completed (if removal is clearly warranted), or if the Article 15 is set aside

Related Administrative Actions

- In addition to NJP, commanders may take other appropriate administrative actions, including but are not limited to:

  - -- Control roster action

  - -- Entry of the member into counseling or rehabilitation programs, such as the Alcohol and Drug Abuse Prevention and Treatment Program (ADAPT)

  - -- Enlisted Performance Report (EPR) comments concerning the member's underlying misconduct

  - -- Administrative discharge

  - -- Removal from the personnel reliability program, withholding a security clearance, or withholding access to sensitive materials; and

  - -- NJP may also adversely affect promotion, reenlistment, and assignment eligibility

Officer Unfavorable Information Files NJP Entries

- Any record of an NJP action for officers is a mandatory UIF entry

- An NJP is permanently retained in the officer's Master Personnel Record Group (Correspondence and Miscellaneous Group) unless set aside in its entirety, or ordered removed by the Air Force Board of Corrections for Military Records (AFBCMR)

- Retention Period: Officer NJP actions are retained in a UIF for 2 years

  - -- Early removal is only permissible after completion of all punishment. Only the wing commander or issuing authority (whomever is higher in rank) is authorized to remove an officer NJP from a UIF

- Referral OPR/PRF Consideration: Commanders should also consider whether comments should be made in the next OPR and/or promotion recommendation form (PRF). Seek the advice of the SJA for assistance in determining when comments may be appropriate.

  -- Sex related offenses punished by NJP require a mandatory notation in the officer's next OPR and/or PRF

Officer and Senior NCO Promotion Selection Records

- Commanders imposing NJP upon officers and senior NCOs must also decide whether to include the Article 15 in the member's promotion selection record

- Selection record decisions are recorded on AF IMT 3070B for Senior NCOs and on AF IMT 3070C for officers

- Reviewing Authority: The imposing commander's decision to file an NJP in a selection record is subject to review by the next senior Air Force commander, unless the General Court-Martial Convening Authority (GCMCA) imposed the punishment

- Senior NCO Selection Record Retention Period: 2 years or until after the member meets one senior NCO evaluation board

  -- Early removal is authorized for senior NCOs only if approved by the current commander

- Officer Selection Record Retention Period: For lieutenant colonels and below, NJPs remain in the officer's selection record until after the officer meets one "in the promotion zone" (IPZ) or "above the promotion zone" (APZ) promotion board and an appeal for removal has been approved

  -- Officers may not request early removal of the NJP from their selection record. Only the imposing authority may request early removal of an NJP from a selection record. Early is only permitted as an **exception to policy**, and should only be approved only **in rare cases**.

References

UCMJ Art. 15

AFI 36-2406, *Officer and Enlisted Evaluation Systems* (2 January 2013), with corrective actions applied 5 April 2013, incorporating through Change 3, 30 November 2015

AFI 36-2608, *Military Personnel Records System* (26 October 2015)

AFI 36-2907, *Unfavorable Information File (UIF) Program* (26 November 2014)

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (8 July 2014)

AFI 51-202, *Nonjudicial Punishment* (31 March 2015)

AF IMT 3070, *Record of Nonjudicial Punishment Proceedings*

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CHAPTER FOUR: ADMINISTRATIVE SEPARATION FROM THE AIR FORCE

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INVOLUNTARY SEPARATION OF ENLISTED MEMBERS: GENERAL CONSIDERATIONS

Commanders and supervisors must identify enlisted members who show a likelihood for early separation and make reasonable efforts to help these members meet Air Force standards. Members who do not show potential for further service should be discharged. Commanders must consult the servicing staff judge advocate and military personnel flight before initiating the involuntary separation of a member.

General Preprocessing Considerations

- Before initiating discharge, a commander must consider all the factors that make the member subject to discharge, including:

  -- The seriousness of circumstances that make the member subject to discharge and how the member's retention might affect military discipline, good order, and morale

  -- Whether the circumstances that are the basis for discharge action will continue or recur

  -- The likelihood that the member will be disruptive or an undesirable influence in present or future duty assignments

  -- The member's ability to perform duties effectively in the present and in the future

  -- The member's potential for advancement and leadership

  -- An evaluation of the member's military record including, but not limited to:

    --- Records of nonjudicial punishment

    --- Records of counseling

    --- Letters of reprimand or admonition

    --- Records of conviction by courts-martial

    --- Records of involvement with civilian authorities

---- Past contributions to the Air Force

---- Duty assignments and EPRs

---- Awards, decorations, and letters of commendation

-- The effectiveness of preprocessing rehabilitation, when required

- A commander should **NOT** use an administrative discharge as a substitute for disciplinary action

- Generally, the acts or conditions on which the discharge is based must have occurred in the current enlistment. **The exceptions are**:

  -- Fraudulent enlistment, erroneous enlistment, or the interest of national security

  -- Cases in which the act or condition occurred in the immediately preceding enlistment, the commander was not aware of the facts warranting discharge until after the member reenlisted, and there was no break in service

  -- Cases in which the member is being separated for failure in the fitness program and at least one instance of unsatisfactory performance is in the current enlistment; then instances of unsatisfactory performance in the immediately preceding enlistment may support the basis for discharge

- Prior to processing a member for discharge for parenthood, conditions that interfere with military service, entry level performance and conduct, unsatisfactory performance, and minor disciplinary infractions or a pattern of misconduct commanders must give the member an opportunity to overcome deficiencies

  -- Efforts to rehabilitate may include, but are not limited to, counselings, reprimands, control roster action, nonjudicial punishment under Article 15 of the UCMJ, change in duty assignment, demotion, additional training, and retraining

  -- It is extremely important to properly document rehabilitative efforts and keep copies of these documents

Special Preprocessing Considerations for Victims and Service Members with Post Traumatic Stress Disorder (PTSD)

- Sexual Assault Victims: Airmen who have made an unrestricted report of sexual assault require special processing procedures

  -- The commander must notify the separation authority that the member has reported being a past victim of sexual assault and include in the recommendation for discharge memorandum sufficient information concerning the alleged assault and the member's status

  -- The member must be advised of the right to request review by the general court-martial convening authority (GCMCA) authority, if the Airman believes the recommendation for involuntary separation was initiated in retaliation for making the unrestricted report of sexual within the last 12 months as of the date of notification of discharge

- PTSD Service Members: All Airmen who are separating must receive a medical examination in accordance with AFI 36-3208, *Administrative Separation of Airmen,* paras. 6.3 and 6.9.3. The medical examination must assess whether the effects of PTSD or traumatic brain injury (TBI) constitute matters in extenuation that relate to the basis for involuntary administrative separation if the Airman:

  -- Is being administratively separated under a characterization other than Honorable; and

  -- Was deployed overseas to a contingency operation during the previous 24 months; and

  -- Is diagnosed by a physician, clinical psychologist, or psychiatrist as experiencing PTSD or TBI, or reasonably alleges the influence of PTSD or TBI based on deployed service to a contingency operation during the previous 24 months; and

  -- Is not being separated under a sentence of court-martial, or other proceeding conducted pursuant to the UCMJ

Characterizations of Service

- The service of a member administratively separated may be characterized as honorable, general (under honorable conditions), or under other than honorable conditions (UOTHC)

  -- Honorable: Appropriate when the quality of the member's service generally has met Air Force standards of acceptable conduct and performance of duty, or a member's service is otherwise so meritorious that any other characterization would be inappropriate

  -- General (under honorable conditions): Appropriate if a member's service has been honest and faithful, but significant negative aspects of the member's conduct or performance outweigh positive aspects of military record

  -- UOTHC: Appropriate if based on a pattern of behavior or one or more acts or omissions constituting a significant departure from the conduct expected of Airmen. This characterization can be given only if the member is offered an administrative discharge board or if a discharge is unconditionally requested in lieu of trial by court-martial.

- A dishonorable discharge and a bad conduct discharge are punitive discharges and are authorized only as a result of a court-martial sentence

- If the sole basis for discharging an Airman with a UOTHC service characterization is a serious offense that resulted in conviction by a court-martial that did not adjudge a punitive discharge, then the Secretary of the Air Force (SecAF) must approve the service characterization (this includes a conviction at a summary court-martial)

- Separation without Service Characterization: Members in entry level status (the first 180 days of active military service) will ordinarily receive an "entry level separation" without service characterization

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References

AFI 36-2905, *Fitness Program* (21 October 2013), incorporating Change 1, 27 August 2015
AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

INVOLUNTARY SEPARATION OF ENLISTED MEMBERS: REASONS FOR DISCHARGE

Specific reasons for involuntarily separating enlisted members are in Chapter 5 of AFI 36-3208, *Administrative Separation of Airmen*. Commanders must consult with the servicing staff judge advocate and military personnel flight prior to initiating the involuntary separation of a member. With a few exceptions, a commander is generally not required to initiate involuntary separation of a member just because a reason for discharge set out in AFI 36-3208 exists. The facts and circumstances are different in each case and must be considered on a case-by-case basis. An overview of the nine broad reasons for discharge follows below.

Mandatory Discharges

- A commander **MUST** initiate discharge processing or seek a waiver of the discharge if the reason for discharge is one of the following:
    - -- Fraudulent or erroneous enlistment
    - -- Civilian court conviction for an offense for which a punitive discharge and confinement for one year or more would be authorized under the UCMJ
    - -- Drug abuse
    - -- Sexual assault or sexual assault of a child
    - -- Failure in the fitness program: a commander must make a discharge or retention recommendation when a member remains in a poor fitness category for a continuous 12-month period or receives four poor fitness assessments in a 24-month period

Convenience of the Government Discharges

- Discharge is appropriate when separation would serve the best interest of the Air Force and discharge for cause is not warranted. Such separations may be based on:
    - -- Parenthood, if the member fails to meet military obligations because of parental responsibilities
    - -- Insufficient retainability for required training, if the cost of retraining for a brief period of service may not warrant retention

-- Medical/Psychological conditions (not rising to the level of "disabilities" severe enough to warrant medical discharge via a Medical Evaluation Board (MEB)) that interfere with military service, which include:

--- Enuresis, sleepwalking, dyslexia, severe nightmares, Attention Deficit Hyperactivity Disorder (ADHD), stammering/stuttering, incapacitating fear of flying, air sickness, and claustrophobia. The condition must have an adverse effect on assignment or duty performance.

--- Mental Disorders:

---- Must be supported in writing by a report of evaluation by a psychiatrist or PhD-level clinical psychologist that confirms a diagnosis of a disorder contained in the current edition of the Diagnostic and Statistical Manual of Medical Disorders;

---- Must be documented in a report as so severe that the member's ability to function in the military environment is significantly impaired; and

---- Must have an adverse effect on assignment or duty performance

--- Special processing is required for Airmen who are currently serving or who have served in an imminent danger pay area and have been diagnosed with a personality disorder that is the basis of the discharge

---- The diagnosis of a personality disorder must specifically address PTSD or other mental illness co-morbidity

---- Separation **WILL NOT** be initiated if there is a diagnosis of service-related PTSD, unless the Airman is subsequently found fit for duty under the disability evaluation system in accordance with AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*

---- The Air Force Surgeon General must review the diagnosis with supporting documentation prior to initiation of the separation

- Discharge for conditions that interfere with military service is not appropriate if the member's record supports discharge for another reason, such as misconduct or unsatisfactory performance

- Service is characterized as entry level separation or honorable

- Before recommending discharge, commanders must be sure:

  -- Preprocessing rehabilitation requirements in AFI 36-3208, para. 5.2, have been met;

  -- They have complied with all requirements of the specific AFI paragraph authorizing discharge; and

  -- Circumstances do not warrant discharge for another reason

Defective Enlistments

- Enlistment of Minors: a person under 17 years of age is barred by law from enlisting

- Void Enlistments: the enlistment was not a voluntary act by a sane, sober person of age; or enlistee was a deserter from another service

- Erroneous Enlistment: the Air Force should not have accepted the enlistee, but the case does not involve fraud

- Fraudulent Entry: involved deliberate deception on the part of the enlistee

- A commander must initiate discharge or seek a waiver of discharge for erroneous enlistment or fraudulent entry

  -- Erroneous enlistments and fraudulent entries for reasons of alienage cannot be waived

  -- If the commander has knowledge of an erroneous enlistment or fraudulent entry and fails to act within a reasonable time, that failure to act may result in a constructive waiver of the commander's ability to discharge the member

- Authorized characterizations of service and the approval authorities are listed in AFI 36-3208, Table 5.4

- Members approved for discharge are not eligible for probation and rehabilitation (P&R)

Entry Level Performance or Conduct

- Enlisted members in entry level status should be discharged when unsatisfactory performance or conduct shows the member is not a productive member of the Air Force

- Discharge processing must start during the first 180 days of continuous active duty

- Eligibility for discharge based on entry level performance or conduct does not preclude separation for another reason

- Before processing a member for discharge for unsatisfactory entry level performance or conduct, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented

- Discharge is not formally characterized, but is described as entry level separation (ELS)

- Members approved for discharge for entry level performance or conduct are not eligible for P&R

Unsatisfactory Performance

- Members should be discharged when unsatisfactory performance or conduct shows they are not qualified for service in the Air Force

- Performance includes assigned duties, military training, bearing and behavior, as well as maintaining the high standards of personal behavior and conduct required of all military members at all times

- Unsatisfactory performance may be evidenced by any of the following:

  -- Unsatisfactory duty performance, which may include:

    --- Failure to properly perform assigned duties

    --- A progressively downward trend in performance ratings

    --- Failure to demonstrate the qualities of leadership required by the member's grade

  - Failure to maintain standards of dress and personal appearance, other than fitness standards, or military deportment

  - Failure to progress in military training required to be qualified for service with the Air Force or for the performance of primary duties

  - Irresponsibility in the management of personal finances

  - Unsanitary habits

  - Failure to meet fitness standards

- Before processing a member for discharge for unsatisfactory performance, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented

- Service is characterized as honorable or general

- Members approved for discharge should be considered for P&R

Failure in Drug or Alcohol Abuse Treatment

- Members are subject to discharge for failure in drug or alcohol abuse treatment if they:

  - Are in a program of rehabilitation for abuse of drugs or alcohol and fail to complete the program due to inability, refusal to participate, or unwillingness to cooperate; and

  - Lack the potential for continued military service or need long-term treatment and are transferred to a civilian medical facility for treatment

- Service is characterized as honorable, general, or entry level

- Members approved for discharge are eligible for P&R

Misconduct Discharges

- Unacceptable conduct adversely affects military duty and may be a proper basis for discharge

- Types of misconduct include:

  -- Minor Disciplinary Infractions (AFI 36-3208, para. 5.49): Consists solely of infractions during the current enlistment resulting in letters of counseling, letters of admonition, letters of reprimand, and nonjudicial punishment actions

    --- Before processing a member for discharge for misconduct consisting of minor disciplinary infractions, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented

    --- Members approved for discharge are eligible for P&R

  -- Pattern of Misconduct (AFI 36-3208, para. 5.50): Includes misconduct more serious than that consisting of minor disciplinary infractions and involving (1) discreditable involvement with military or civilian authorities, (2) conduct prejudicial to good order and discipline, (3) failure to support dependents, or (4) dishonorable failure to pay just debts

    --- Before processing a member for discharge for misconduct consisting of a pattern of misconduct, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented

    --- Members approved for discharge are eligible for P&R

  -- Civilian Conviction (AFI 36-3208, para. 5.51): When the member is convicted, or there is a finding that amounts to a conviction, of an offense which would authorize a punitive discharge under the UCMJ or when the sentence by civilian authorities actually includes confinement for 6 months or more

    --- A commander must initiate discharge or seek a waiver of the discharge when the civilian conviction involves an offense for which a punitive discharge and confinement for one year or more would be authorized under the UCMJ

    --- It is general policy to withhold execution of discharge until the outcome of the appeal is known or the time for appeal has passed. If the appeal results in the conviction being set aside, the Airman may not be discharged due to civilian conviction.

    --- An Airman whose home of record is in the continental United States (CONUS) may be discharged in absentia if he or she is in civil confinement in the

CONUS or has been release from confinement in the CONUS and is absent without authority

--- An Airman in a foreign penal institution may not be discharged until released from confinement and returned CONUS or higher authority (HQ AFMPC/DPMARAS2) authorizes an exception

--- If the commander has knowledge of such a civilian conviction and fails to act within a reasonable time, that failure to act may result in a constructive waiver of the commander's ability to discharge the member

--- Members approved for discharge are eligible for P&R

-- Commission of a Serious Offense (AFI 36-3208, para. 5.52): Includes offenses for which a punitive discharge would be authorized under the UCMJ

--- Airmen are subject to discharge for misconduct based on acts of aberrant sexual behavior or acts of sexual misconduct, which include offenses such as: indecent viewing, visual recording, or broadcasting; forcible pandering; indecent exposure

--- Airmen may be discharged for misconduct based on unauthorized absence continuing for 1 year or more

--- Airmen are subject to discharge for misconduct based on acts that constitute unprofessional relationships between recruiters and potential recruits during the recruiting process or between students and faculty or staff in training schools or professional military education setting

--- Members approved for discharge are eligible for P&R **EXCEPT FOR** cases of non-compliance with "safe sex" order

-- Drug Abuse (AFI 36-3208, para. 5.53): The illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug

--- Commanders must act promptly when information indicates drug abuse and initiate discharge or seek a waiver of discharge processing

--- A member found to have abused drugs will be discharged unless the member meets all seven of the retention criteria in AFI 36-3208, para. 5.55.2.1. The member has the burden of proving he or she meets all seven retention criteria.

--- Members approved for discharge are not eligible for P&R

-- Sexual Assault (AFI 36-3208, para. 5.54): Includes rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy, or attempts to commit these offenses. Sexual assault of a child includes rape of a child, sexual assault of a child, and sexual abuse of a child.

--- Commanders must act promptly when they have information indicating a member is subject to discharge for sexual assault or sexual assault of a child. They evaluate the specific circumstances of the offense, the member's record and potential for future service, and take prompt action to initiate discharge or seek waiver of discharge processing.

--- A member found to have committed sexual assault or sexual assault of a child will be discharged unless the member meets all six the retention criteria in AFI 36-3208, para. 5.55.3.2. The member has the burden of proving he or she meets all six retention criteria.

--- Members approved for discharge are not eligible for P&R

- Characterization of Misconduct Discharge: Usually, the characterization for misconduct cases under AFI 36-3208, paras. 5.50, 5.51, 5.52, and 5.54 should be under other than honorable conditions (UOTHC), but characterization may be honorable, general, or entry level separation in appropriate cases

-- The general court-martial convening authority (GCMCA), usually the numbered air force (NAF) commander, will approve separation for misconduct with a service characterization of honorable or UOTHC

Discharge in the Interest of National Security

- A member whose retention is clearly inconsistent with the interest of national security may be discharged

- Discharge may only be initiated after criteria in AFI 36-3208, paras. 5.57.1 and 5.57.2 have been met

- Discharge may be characterized as entry level, honorable, general, or UOTHC

- Members approved for discharge are not eligible for P&R

Failure in the Fitness Program

- A member who does not meet fitness standards as set out in AFI 36-2905, *Fitness Program,* may be discharged when the failure is the result of a cause in the member's control

- The required medical examination prior to discharge must document that there is not a medical condition that would preclude the member from meeting fitness program standards

- Characterization of service is restricted to honorable if failure in the program is the sole reason for discharge

- Members approved for discharge should be considered for P&R

Joint Processing

- In some cases, it may be preferable to cite two or more reasons as the basis for the discharge recommendation if the member's record justifies more than one basis for discharge

  -- If one of the reasons cited in the letter of notification as the basis for discharge entitled the member to a board hearing, then a hearing must be conducted

  -- For determining service characterization, apply the guidance for the basis for discharge that allows the most latitude

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References

AFI 36-2905, *Fitness Program* (21 October 2013), incorporating Change 1, 27 August 2015

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (2 February 2006), incorporating through Change 2, 27 November 2009

DUAL ACTION PROCESSING OF ADMINISTRATIVE AND MEDICAL DISCHARGES

"Dual action processing" refers to the simultaneous processing of an administrative and a medical discharge package. Commanders should not abandon pursuing an administrative discharge (particularly misconduct based administrative discharges) solely because a member is also undergoing processing for a medical discharge. Instead, commanders should press on with the administrative discharge while the medical discharge process is ongoing. Ultimately, if both discharges are warranted (administrative and medical), AFPC will decide which one to approve.

- Dual action processing involves referral of separation action to AFPC and is required when an airman subject to discharge is also eligible to apply for retirement (20 years or more active service) or is eligible for disability separation or disability retirement

  -- Service Retirement Eligibility: Airmen who are qualified for retirement may be permitted to retire in lieu of involuntary separation

    --- Airmen who are retirement eligible must be notified at the time discharge starts of the chance to apply for retirement

  -- Disability Separation or Retirement: When the required medical examination shows that the airman is not qualified for worldwide duty, refer to Tables 6.13 and 6.14 of AFI 36-3208, *Administrative Separation of Airmen,* for processing guidelines

    --- When an Airman is determined to not be worldwide qualified during a medical examination, a significant delay in the processing of the discharge is likely to occur

    --- Additional medical evaluations and a determination as to whether the Airman qualified for disability separation or disability retirement must be made prior to the Airman being involuntarily separated

    --- The involuntary separation may continue to process, but the discharge may not be executed until all medical evaluation boards are completed and the member is determined to be fit for duty

References

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (2 February 2006), incorporating through Change 2, 27 November 2009

PROCEDURE TO INVOLUNTARILY SEPARATE ENLISTED MEMBERS

Enlisted members may be involuntarily separated through two different processes: (1) notification procedures (applicable to Airmen E-4 and below with less than 6 years of service), and (2) board hearing procedures (applicable to Airmen E-5 and above or in any case when the commander is pursuing an Under Other Than Honorable Conditions (UOTHC) service characterization). Most cases are processed using notification procedures. Before initiating involuntary separation of a member, commanders must consult with the servicing staff judge advocate (SJA) and military personnel flight.

Preprocessing Procedures

- The type of discharge processing a member is entitled to depends upon: (1) the rank of the member; (2) years of service of the member; and (3) the characterization of service pursued by the commander concerned

- Medical Examination: Before the member may be discharged, a medical examination must document:

  -- Any medical aspects pertaining to the reason for discharge; and

  -- That the member is or is not medically qualified for worldwide service and separation

    --- A member determined to not be qualified for worldwide service and separation may also be dual processed for separation under AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*

- Victims of Sexual Assault: If the member is a victim of sexual assault who made an unrestricted report, commanders must:

  -- Notify the separation authority that the discharge proceeding involves a victim of sexual assault

  -- Provide sufficient information concerning the alleged assault and respondent's status to ensure a full and fair consideration of the victim's military service and particular situation

  -- Advise the Airman of the right to request review by the general court-martial convening authority (GCMCA) if the Airman believes the recommendation for involuntary separation was initiated in retaliation for having made the unrestricted report within the last 12 months

- Completion of Enlisted Performance Report (EPR)/Letter of Evaluation (LOE): An EPR or LOE must be generated for discharges based on parenthood, conditions that interfere with military service, unsatisfactory performance, or failure in the fitness program

  -- The EPR must be completed if the airman has not had an EPR closing in the 90 days before the day discharge action starts

Notification Procedures

- If there is sufficient documentation/evidence supporting a basis for discharge, the commander serves a notification memorandum on the member (AFI 36-3208, *Administrative Separation of Airmen,* Fig. 6.1 or 6.2)

- After receiving the notification memorandum, the member has 3 duty days to prepare a response (AFI 36-3208, Fig. 6.4)

- The commander considers the member's response, if any, and if the commander still recommends discharge, the commander signs a recommendation for discharge to the special court-martial convening authority (SPCMCA), who is usually the wing commander (AFI 36-3208, Fig. 6.5)

- The servicing SJA prepares a legal review of the package assessing the four issues at stake in enlisted administrative discharges: (1) is there a basis for discharge (AFI 36-3208, Ch. 5); (2) should the member be discharged; (3) if so, what should the characterization of service be; and (4) is probation and rehabilitation available and appropriate?

- SPCMCA reviews the package and the SJA's legal review

  -- If the SPCMCA is also the separation authority, the SPCMCA determines:

    --- (1) If there is a basis for discharge;

    --- (2) If the member should be discharged;

    --- (3) If the member should be discharged, how to characterize the member's service; and

    --- (4) Whether to offer Probation & Rehabilitation (P&R) (if available) if the member should be discharged

- If the SPCMCA is not the separation authority, the SPCMCA will forward the package to the GCMCA, who is usually the numbered air force (NAF) commander, with a recommendation concerning the above four questions

Board Entitlement

- A member recommended for discharge must be offered a hearing by an administrative discharge board if one of the following applies:
  - The member is a non-commissioned officer at the time discharge processing starts
  - The member has 6 years or more total active and inactive service, including delayed enlistment time, at the time discharge processing starts
  - The commander recommends a UOTHC characterization
  - Discharge in the interest of national security is recommended (ensure appropriate clearance to proceed)

Board Hearing Procedures

- After receiving the notification memorandum, the member has 7 duty days to:
  - Request a board hearing or unconditionally waive his/her right to a board hearing (AFI 36-3208, Fig. 6.8); or
  - Waive the board hearing contingent upon receiving a specific type of discharge, which is called a conditional waiver (AFI 36-3208, Fig. 6.9)
- The commander considers the member's response, if any, and if the commander still recommends discharge, he or she signs a recommendation for discharge to the SPCMCA (AFI 36-3208, Fig. 6.5)
- In cases where the member requests a board hearing, the SPCMCA reviews the recommendation for discharge and either sends the file back to the unit for further action (normally to withdraw the action or reinitiate the action using different grounds or evidence) or convenes a discharge board

- The administrative board convenes, considers all the evidence, and makes:

  -- A separate finding of fact on each allegation set out in the notification memorandum. The board's finding of fact will determine whether a basis for discharge exists.

  -- A recommendation to discharge or retain

  -- A recommended characterization of service if the board recommends discharge

  -- A recommendation concerning P&R (if member is eligible) if the board recommends discharge

- The servicing SJA prepares a legal review of the package and forwards the package to the SPCMCA

- The SPCMCA takes final action if referral to the GCMCA is not required or forwards the package to the GCMCA if referral to the GCMCA is required

- Lengthy Service Consideration: Members with more than 16 but less than 20 years of service are entitled to special probation consideration upon request and may not be separated before forwarding to HQ AFMPC/DPMARS2 for review

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References

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (2 February 2006), incorporating through Change 2, 28 November 2009

AFI 90-6001, *Sexual Assault Prevention and Response (SAPR) Program* (21 May 2015)

AFPAM 36-3210, *Procedural Guide for Enlisted Administrative Discharge Boards* (1 November 1995), incorporating through Change 3, 20 October 2011

PROBATION AND REHABILITATION FOR ENLISTED MEMBERS

The Air Force program of probation and rehabilitation (P&R) allows the Air Force to retain a trained resource while allowing enlisted members another opportunity to complete their service honorably. P&R is a conditional suspension of an approved administrative discharge for cause. In deserving cases, it lets a member prove he or she is able to meet Air Force standards.

P&R Considerations

- Only the discharge authority can suspend the execution of a discharge for P&R

- Members who have completed at least 16 but less than 20 years of active service are entitled to special consideration upon their request and their cases are forwarded to HQ AFMPC/ DPMARS2 for review concerning probation

- P&R is appropriate for members:

  -- Who demonstrate a potential to serve satisfactorily

  -- Who have the capacity to be rehabilitated for continued military service or completion of the current enlistment

  -- Whose retention on a probationary status is consistent with the maintenance of good order and discipline

Who is Eligible

- Members are **NOT** eligible for P&R if the reason for discharge is one of the following:

  -- Failure to comply with preventive medicine counseling (safe sex order) by a member with human immunodeficiency virus (HIV)

  -- Fraudulent entry into the service

  -- Entry level performance or conduct

  -- In the interest of national security

  -- Drug abuse

- -- In lieu of trial by court-martial

- -- Sexual assault or sexual assault of a child

- Members must be considered for P&R if the reason for discharge is unsatisfactory performance or misconduct (except failure to comply with preventive medicine counseling by a member with HIV and drug abuse):

  - -- The case file must show the initiating commander, board members if a hearing is involved, and separation authority considered P&R;

  - -- If the initiating commander does not recommend P&R, he or she must give the reason for not recommending P&R; and

  - -- If the initiating commander recommended P&R and the separation authority disapproved that recommendation, the separation authority must state the reason for his/ her decision

P&R Procedures

- Suspending the execution of an approved discharge is contingent on successful completion of rehabilitation

  - -- The separation authority sets a specific period of rehabilitation, which is not less than 6 months or not more than 12 months

  - -- The probationary period is usually served in the current unit of assignment, but reassignment to another local unit or within the MAJCOM may be authorized if warranted by the circumstances of the case

- If the decision is made to offer a member P&R, the commander must:

  - -- Give the member information about the P&R program (AFI 36-3208, *Administrative Separation of Airmen,* Fig. 7.2)

  - -- Counsel the member, emphasizing points listed in AFI 36-3208, para. 7.7.2

  - -- Find out whether the member has enough retainability to complete P&R, and if not, try to get a voluntary request for extension of enlistment for the minimum time required

  - -- Require members who accept P&R to sign statements of understanding and acceptance of the terms of probation

- -- Ensure the terms of probation are set out in a letter from the separation authority and countersign the letter (AFI 36-3208, Fig. 7.1)

- -- Require members who refuse P&R or fail to satisfy the retention requirements to sign a statement:

  - --- Acknowledging understanding of the rehabilitation privilege;

  - --- Giving the date the commander counseled the member; and

  - --- Acknowledging understanding of the effects of refusal to accept P&R

What Happens During P&R

- The commander is the primary judge of the member's performance

  - -- Commanders are not required to set up a special rehabilitation program because the member is expected to perform duties appropriate to his/her grade, skill level, and experience

  - -- An enlisted performance report (EPR) is prepared every 90 days

  - -- Promotion consideration is according to AFI 36-2502, *Airman Promotion/Demotion Programs*

  - -- Members are not selected for formal training while in P&R

  - -- A commander usually should not place a member in P&R on the control roster, and the commander should consider removing the member from the control roster if the member is on it when placed in P&R

  - -- Reenlistment consideration is according to AFI 36-2606, *Reenlistment in the United States Air Force*

Completing P&R

- If a member successfully completes P&R:

  - -- The approved discharge is automatically and permanently canceled on the date the suspension expires

  - -- Separation at expiration of term of service (ETS) will result in an honorable service characterization

- -- Future failure to maintain standards may be the basis for new discharge proceedings

- -- Eligibility for reenlistment will be according to AFI 36-2606 and none of the reasons for recommending discharge that existed before P&R began may be used as a basis for denial of reenlistment

Other Command Options

- Commanders have other options during P&R, including:

  - -- Canceling the probation in whole or in part where member's good conduct clearly shows goals of P&R have been met

  - -- Extending the probationary period where member has made progress but the commander is not sure rehabilitation is complete. The original probationary period and the extension together must not exceed 1 year, and the Airman must consent to the extension.

Terminating P&R

- If a decision is made to initiate vacation (termination) of the P&R, the commander notifies the member by a letter, which gives:

  - -- The reason for the action

  - -- The name, address, and phone number of military legal counsel (often the area defense counsel (ADC))

  - -- Instruction that the member may secure civilian counsel at his own expense

  - -- Instruction to reply within 7 workdays (rebuttal or waiver of right to rebut)

References

AFI 36-2502, *Airman Promotion/Demotion Programs* (12 December 2014), incorporating Change 1, 27 August 2015

AFI 36-2606, *Reenlistment in the United States Air Force* (9 May 2011), incorporating Change 1, 29 August 2012

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

OFFICER SEPARATIONS

Officer separations operate similarly to enlisted separations. However, certain key differences exist. Most of the differences revolve around definitions, terminology, and authorities for officer separations. Unlike enlisted separations, the Secretary of the Air Force (SecAF) is the approval authority for all "for cause" commissioned officer administrative discharges.

Definitions

- Non-probationary Officer:
  - -- Regular officer with 5 or more years of active commissioned service as determined by the officer's total active federal commissioned service date; or
  - -- Reserve officer with 5 or more years of commissioned service (inactive or active) as determined by the officer's total federal commissioned service date
- Probationary Officer:
  - -- Regular officer who has completed less than five years of active commissioned service as determined by the officer's total active federal commissioned service date; or
  - -- Reserve officer who has completed less than five years of commissioned service (inactive or active) as determined by the officer's total federal commissioned service date

Voluntary Separation

- Officers may apply for voluntary separation prior to expiration of term of service under AFI 36-3207, *Separating Commissioned Officers,* Ch. 2, for a variety of reasons, which include:
  - -- Completion of active duty service commitment (ADSC)
  - -- Hardship
  - -- Pregnancy
  - -- Conscientious objector status

  - Medal of Honor recipient
  - Other miscellaneous reasons

- Voluntary separations are subject to approval by the SecAF. The SecAF or designee may disapprove an application if, among other reasons, the officer:
  - Has had charges preferred or is under investigation
  - Remains absent without leave or absent in the hands of civil authorities
  - Defaulted with respect to public property or funds
  - Has been sentenced by a court-martial to dismissal
  - Is being considered for involuntary administrative discharge proceedings
  - Submits an application during war, when war is imminent, or during an emergency declared by the President or Congress
  - Has an ADSC for advanced educational assistance, government-funded education or training programs, special pay, or bonus pay (restriction applies even when the reason for separation is pregnancy)

Involuntary Separations not "For Cause"

- Officers may be separated involuntarily under AFI 36-3207, Ch. 3, sec. 3B, for various reasons that are not for cause

- Many involuntary separations are required by law, e.g., reserve officers who reach age limit, those non-selected for promotion, and officers who have reached maximum years of commissioned service or service in grade

- Other involuntary separations include loss of ecclesiastical endorsement; failure to complete or pass medical training, nursing examinations, or nursing intern programs; and officers in health care fields who do not have required licenses

- Only an honorable characterization is authorized for involuntary separations that are not for cause

Involuntary Separations "For Cause"

- Grounds for discharge for cause are found in AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers,* Ch. 2 (substandard performance of duty) and Ch. 3 (misconduct, moral or professional dereliction, or in the interest of national security)

- Substandard Performance of Duty:

  -- Only an honorable or general (under honorable conditions) characterization. Includes broad categories subjecting an officer to separation:

    --- Failure to show acceptable qualities of leadership or proficiency

    --- Failure to achieve acceptable standards of proficiency required of an officer in his/her grade

    --- Failure to discharge duties equal to his/her grade and experience

    --- Substandard performance of duty resulting in an unacceptable record of effectiveness

    --- A record of marginal service over an extended time as shown by performance reports covering two or more jobs and prepared by at least two different supervisors

    --- Mental disorders that interfere with the officer's performance of duty and do not fall within the purview of the medical discharge process

    --- Apathy or defective attitude

    --- Failure in the fitness program as specified in AFI 36-2905, *Fitness Program*

    --- Failure to conform to prescribed standards of dress, physical fitness, or personal appearance. For cause separation under AFI 36-3206, Ch. 3, is appropriate if failure is deliberate.

    --- Inability to perform duties because of family care responsibilities

    --- Failure to maintain satisfactory progress while in an active status student officer program

-- Before discharging an officer under this chapter, there should be a documented history of problems and documented efforts to correct the officer's conduct

-- If an officer is being separated for reasons under this chapter and received education assistance, special pay, or bonus money, the officer is subject to recoupment

- Misconduct, Moral or Professional Dereliction, or in the Interest of National Security:

  -- When officers engage in some form of misconduct, discharge under this chapter is often the most appropriate basis

  -- Although not necessarily considered misconduct, discharges for fear of flying for rated officers fall under this chapter

  -- Some other specific grounds for discharge, besides fear of flying for rated officers, include:

    --- Having human immunodeficiency virus (HIV) and not complying with lawfully ordered preventive medicine procedures (i.e., safe sex order)

    --- Failure to meet financial obligations

    --- Intentional or discreditable mismanagement of personal affairs

    --- Drug abuse, which is defined as the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug

    --- Serious or recurring misconduct punishable by civilian or military authorities

    --- Intentional neglect or intentional failure to either perform assigned duties or complete required training

    --- Misconduct resulting in the loss of professional status necessary to perform duties

    --- Intentionally misrepresenting or omitting facts concerning official matters

    --- Sexual assault or sexual assault of a child

    --- Sexual perversion, including aberrant sexual behavior, acts of sexual misconduct, or any indecent viewing, visual recording or broadcasting, forcible pandering, indecent exposure

--- Sexual deviation, including transvestitism, exhibitionism, voyeurism, and others as defined in the Diagnostic and Statistical Manual of Mental Disorders

--- Retention is not clearly consistent with interests of national security

--- Sentence by a court-martial to a period of confinement for more than 6 months and not sentenced to a dismissal

-- The service of officers separated under this chapter may be characterized as under other than honorable conditions (UOTHC). The exceptions to this are drug use revealed as a result of self-identification or commander-directed urinalysis.

-- If an officer is being separated for reasons under this chapter and received education assistance, special pay, or bonus money, the officer is subject to recoupment

Discharge Procedures under AFI 36-3206

- Unit commander must evaluate the information and consult with the servicing staff judge advocate

- If appropriate, the unit commander recommends discharge to the show cause authority (SCA), who is usually the wing commander if he or she is a general officer, or the general court-martial convening authority, usually the numbered air force (NAF) commander, for wings not commanded by a general officer

- If appropriate, the SCA initiates discharge action by signing a letter to the officer notifying him or her of the discharge action

- Within 10 calendar days of receipt of the letter of notification, the officer submits evidence in response, applies for voluntary retirement (if eligible), tenders a resignation, or requests a delay to respond

- If the SCA determines no action is warranted, the action is terminated

- If the SCA determines discharge action is warranted, the type of processing that occurs depends on the officer's status and the characterization recommended

  -- Not Board Entitled: If the officer is probationary, and the case does not involve a recommendation for a UOTHC service characterization, the SCA notifies the officer that the case will be reviewed by the Air Force Personnel Board (AFPB). The officer is not entitled to appear in front of or present witness testimony to the AFPB.

- -- Board Entitled: If the officer is non-probationary, or the officer is probationary and a UOTHC discharge is recommended, then the SCA notifies the officer that the officer will be required to show cause for retention before a board of inquiry (BOI). The officer is entitled to appear in front of and present witness testimony to the BOI.

- Final approval authority for separations initiated under AFI 36-3206 is the SecAF

Resignations in Lieu of Further Administrative Discharge Proceedings (AFI 36-3207, Ch. 2, sec. 2B)

- When the SCA notifies an officer to show cause for retention, an officer may:

  - -- Submit a resignation; or

  - -- Submit a resignation to enlist and retire if eligible to apply for retirement in enlisted status

- These options should not be confused with resignations for the good of the service, which an officer may submit when facing a court-martial for alleged criminal conduct (AFI 36-3207, Ch. 2, sec. 2C)

- Officer may be entitled to separation pay

- SecAF is the approval authority

References

AFI 36-2905, *Fitness Program* (21 October 2013), incorporating Change 1, 27 August 2015

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), incorporating through Change 7, 2 July 2013, including AFI36-3206_AFGM2016-01, 24 June 2016

AFI 36-3207, *Separating Commissioned Officers* (9 July 2004), incorporating through Change 6, 18 October 2011

ADMINISTRATIVE SEPARATION OF RESERVISTS

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, applies to both officer and enlisted members of the reserve components not serving on extended active duty (EAD) with the Regular Air Force. See Tables 2.1 and 3.1 for lists of permissible reasons for officer and enlisted separations.

General Considerations

- Processing of reservist discharge actions varies depending on whether the member is a Category A (CAT A) or Category B (CAT B) reservist

- Remember that letters of counseling, letters of admonition, and letters of reprimand for reservists are not procedurally correct unless they allow the member 30 days to respond, as opposed to the 3 duty days for active duty members

- For those respondents meeting an administrative discharge board, there must be at least three voting members

  -- For officer respondents, each voting member must be at least a colonel (O-6) and senior in grade to the respondent, and at least one voting member must be a member of the Reserve Component

  -- For enlisted respondents, if they wish to have non-commissioned officers (NCOs) serve as voting members on the board, the respondent must make this request in writing to the convening authority. Enlisted board members must be in the grade of master sergeant (E-7) or above, be senior to the respondent, and at least one voting member must be in the grade of major (O-4) or higher, and a majority shall be commissioned officers.

- <u>CAT A (Reserve Unit)</u>:

  -- The member's unit commander initiates the discharge action by presenting the evidence to the Military Personnel Squadron (MPS). The MPS then prepares the letter of notification (LON). The LON must include all attachments (Privacy Act statement, statement of reasons, acknowledgement of receipt, selection of rights, return envelopes, and supporting documents). It must also contain the following additional information, if applicable:

    --- Request for administrative discharge board hearing, waiver of administrative discharge board hearing, and administrative discharge board action information

--- Application for transfer to the Retired Reserve

--- Recoupment of educational assistance, special pay, or incentives

--- Voluntary extension of enlistment election

-- The member is generally entitled to an administrative discharge board if the member is a non-probationary reserve officer; an NCO or above or has been an NCO or above; has 6 or more years of satisfactory service for retirement; or if the commander is recommending an Under Other Than Honorable Conditions (UOTHC) characterization

-- If the commander does not want the member to continue participating on active duty, a separate No Pay/No Points letter should be provided to the member or contained in the LON

-- The MPS presents the LON and attachments to the servicing staff judge advocate (SJA) for a legal sufficiency review

-- Once the LON is approved for legal sufficiency, the unit commander serves, in person if possible, the LON on the member. The member signs the acknowledgement receipt. The commander gives the member a copy of the entire package, but retains the original documents. If the member is not board entitled, the member has 15 days to present any rebuttal evidence.

--- If the member is not served in person, the LON should be sent via registered or certified mail, return receipt requested. The last option is to send the LON by first class mail if other attempts are unsuccessful.

--- If notification attempts are not successful, determine whether there is another address available. If the member's address has changed, it must be updated in the Military Personnel Data System (MilPDS).

-- If board entitled, the member's request for a board hearing must be received by the unit commander (or servicing MPS, if this is how the unit has set up the return of document if the unit commander is a Traditional Reservist) within 15 calendar days (30 days if in confinement), or the right to a board hearing is waived

-- For enlisted members who are not board entitled; do not have lengthy service consideration; are not retirement eligible; or those who waived their board (affirmatively or because they failed to return the Request for Board Hearing); the unit commander reviews any documentation submitted to confirm his/her determination that the discharge should proceed

--- This is then sent to the servicing SJA for another legal review

--- Finally, it is submitted to the wing commander or equivalent for determination of whether the member should be discharged

-- For all officer or enlisted members who are entitled to and do not waive a board; have lengthy service consideration; or are retirement eligible; the unit commander reviews any documentation submitted to confirm his/her determination that the discharge should proceed

--- This is then sent to the servicing SJA for another legal review and forwarded to the wing commander, or equivalent, for forwarding to HQ AFRC for further processing

--- HQ AFRC will convene the board and then process it to the discharge authority

- <u>CAT B Individual Mobilization Augmentees (IMAs)</u>:

-- IMA discharges are processed through the Readiness Management Group (RMG). The RMG is the Air Force Reserve Command's agency responsible for shared administrative control (ADCON) of IMAs.

-- Program Managers (PM) are a part of the RMG staff and are located at each MAJCOM, Joint Command, or Defense Agency. The PM with administrative oversight responsibility for the IMA initiates the discharge process by forwarding the discharge recommendation to the RMG/CC for action.

-- The RMG/CC forwards the file to HQ AFRC/DPML for processing to AFRC/CC or AFRC/CV, the discharge authorities for CAT B reservists

-- HQ AFRC/DPML notifies the member of the discharge recommendation by certified mail and gives the member 15 days to respond

-- HQ AFRC/JA reviews the case file and determines if it is sufficiently documented to support the basis for discharge

-- If the case file lacks such documentation, HQ AFRC will ask the unit to get the supporting documentation

- Board Entitlements: The following reservists are entitled to present their cases before an administrative discharge board:

  -- Enlisted: if the recommended characterization of service is UOTHC, if the member is a non-commissioned officer, or if the member has 6 or more years of satisfactory service for retirement

  -- Officers: a non-probationary officer who has completed 5 or more years of service as a commissioned officer in any of the armed forces (as determined from the total federal commissioned service date); or a probationary officer who has completed fewer than 5 years of service as a commissioned officer in any of the armed forces (as determined from the total federal commissioned service date) when the recommended characterization of service contained in the letter of notification is UOTHC

References

DoDI 1332.30, *Separation of Regular and Reserve Commissioned Officers* (25 November 2013)

AFI 36-2115, *Assignments within the Reserve Components* (8 April 2005), certified current, 2 May 2008

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), incorporating through Change 7, 2 July 2013, including AFI36-3206_AFGM2016-01, 24 June 2016

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

LOSS OF VETERANS' BENEFITS

The U.S. Department of Veterans Affairs (VA) provides several benefits to veterans including the GI Bill, home loan benefits, disability compensation, and other benefits. More information on the availability of veteran's benefits can be found at www.benefits.va.gov. To become eligible for veteran's benefits, the active duty member must have been discharged or released under conditions other than dishonorable. The term "dishonorable" is broader in the context of determining VA benefit eligibility than the term as defined in Rule for Courts-Martial 1003(b)(8)(B), which relates to the punitive dishonorable discharge one can receive at a court-martial.

- Discharge or release because of any of the following offenses is considered to have been issued under dishonorable conditions:
    - -- Acceptance of an under other than honorable conditions (UOTHC) discharge to avoid trial by general court-martial
    - -- Mutiny or spying
    - -- An offense involving moral turpitude, including (generally) a conviction of a felony
    - -- Willful and persistent misconduct, including a UOTHC discharge if it is determined that the discharge was issued for willful and persistent misconduct, but not including a discharge because of a minor offense if service was otherwise honest, faithful, and meritorious
- Benefits are also not payable where the member was discharged or released under one of the following conditions:
    - -- As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities
    - -- By reason of the sentence of a general court-martial
    - -- Resignation by an officer for the good of the service
    - -- As a deserter
    - -- As an alien during a period of hostilities where it is shown the member requested his/her release

  - By reason of a UOTHC discharge as a result of an absence without leave for a continuous period of at least 180 days

- A punitive discharge or UOTHC characterization does not necessarily deprive a member of benefits administered by the VA

- Normally, benefits earned during an earlier enlistment period of honorable service are not voided by a punitive discharge or a UOTHC discharge earned during a later enlistment.

- Any person may be denied VA benefits, regardless of an earlier period of honorable service, if shown by evidence satisfactory to the Secretary of Veteran's Affairs to be guilty of:

  - Filing a fraudulent claim for benefits;

  - Treason; or

  - Subversive activities

References

38 U.S.C. § 5303
38 U.S.C. §§ 6103-6105
United States v. McElroy, 40 M.J. 368 (C.M.A. 1994)
38 C.F.R. § 3.12

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CHAPTER FIVE: CRIMINAL AND MILITARY JUSTICE

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INSTALLATION JURISDICTION

Installation jurisdiction refers to the type of legal authority exercised by the Air Force over an installation. There are four main types of jurisdiction (arranged from greatest Air Force authority to least): (1) exclusive federal jurisdiction; (2) concurrent federal jurisdiction; (3) partial federal jurisdiction; and (4) proprietary jurisdiction. Depending on your installation, more than one type of jurisdiction may apply. Always check with your staff judge advocate to verify the type of jurisdiction existing on your installation.

Title

- Title in relation to a military installation is virtually the same as in a private real estate transaction. Title simply means legal ownership—the legal right to the use and possession of a designated piece of property.

- In most cases, the Air Force has title to the property on which its installations are located. However, some installations sit on leased property or have portions of the base sitting on leased property.

- The installation civil engineer maintains the deed or lease to the installation. Questions concerning title to the installation's real property should be referred to the servicing staff judge advocate.

Jurisdiction

- The concept of jurisdiction is separate and distinct from that of title

- Jurisdiction includes the right to legislate (i.e., implement laws, rules, and regulations) and to enforce those laws. Having title does not necessarily include legislative jurisdiction.

Sources of Legislative Jurisdiction

- Article I, Section 8, Clause 17, of the United States Constitution confers upon Congress the power to exercise legislative jurisdiction over federal property. The government can acquire the right to exercise legislative jurisdiction in three ways.

  -- Purchase and Consent: The federal government purchases the property, and the state legislature consents to giving the federal government jurisdiction

  -- Cession: After the federal government acquires title to property, the state may cede jurisdiction, in whole or in part, to the federal government. The federal government can later retrocede jurisdiction back to the state. 10 U.S.C. § 2683.

Prior to 1940, it was presumed that jurisdiction was ceded at the time the government acquired the property. Since 1940, however, there must be an affirmative acceptance of jurisdiction before the federal government will have legislative jurisdiction. 40 U.S.C. § 3112. Check the deed to determine when the federal government acquired the property.

-- Reservation: At the time the federal government ceded property to establish a state, particularly in the western United States, it reserved some of the land as federal property. In these cases, the federal government retained legislative jurisdiction over the property it reserved. Again, check the deed.

Types of Legislative Jurisdiction

- The inquiry does not stop with determining if the federal government has legislative jurisdiction. It is also necessary to determine what type of jurisdiction it has. There are four types of legislative jurisdiction.

  -- Exclusive Jurisdiction: As the term implies, this type of jurisdiction gives the federal government sole authority to legislate. Unless exclusive jurisdiction was reserved at the time land was granted to the state, it is necessary to go back to the state for exclusive jurisdiction. The state may have elected to reserve some authority, e.g., authority to serve civil and criminal process on the property. If the state failed to reserve such authority, it is waived. For some years now, it has been federal policy not to acquire exclusive jurisdiction. While at first blush this may seem odd, there are legitimate reasons for the policy. For instance, state and local authorities may be better able to deal with particular situations than the federal government, e.g., child welfare services, domestic relations matters, etc.

  -- Concurrent Jurisdiction: Both the state and federal governments retain all their legislative authority. In the event of conflict, the federal government prevails under the Supremacy Clause of the Constitution. U.S. Const. Art. VI, cl. 2.

  -- Partial Jurisdiction: Both the state and federal government have some legislative authority, but neither one has absolute power. For instance, the state may have reserved the authority to impose and collect taxes, or it may have ceded only criminal jurisdiction over the property. Again, federal supremacy applies in the event of a conflict.

-- Proprietary Jurisdiction: In this case, the United States is like any other party who has only a possessory interest in the property it occupies. The United States is simply a tenant with virtually no legislative authority. The federal government maintains immunity and supremacy for inherently governmental functions. The only federal laws that apply are those that do not rely upon federal jurisdiction, e.g., espionage, bank robbery, tax fraud, counterfeiting, etc. However, the installation commander can still exclude civilians from the area pursuant to the commander's inherent authority.

References

U.S. Const. Art. I, § 8, cl. 17
U.S. Const. Art. VI, cl. 2
10 U.S.C. § 2683
40 U.S.C. § 3112
Greer v. Spock, 424 U.S. 828 (1976)
AFI 32-9001, *Acquisition of Real Property* (27 July 1994)

FEDERAL MAGISTRATE PROGRAM

The federal magistrate program provides a means of enforcing discipline on base with respect to civilian criminal misconduct. The availability of the program depends on the location and jurisdiction of the base, the type and locale of the offense, and the status of the offender.

How Magistrate Court Works

- Federal magistrate court is an alternative to prosecution in federal district court. Magistrate court generally provides a more expeditious and cost-effective forum than district court for minor civilian criminal misconduct.

- Military members on Title 10 orders should **NOT** be prosecuted for criminal offenses in U.S. magistrate court

- Prosecution in magistrate court requires the consent of the defendant

- United States magistrate judges normally try misdemeanor offenses (offenses for which the authorized penalty does not exceed 1 year of imprisonment)

- Air Force judge advocates, when designated by the United States Attorney for the area of the base to act as Special Assistant United States Attorneys (SAUSAs), may prosecute cases in magistrate court

  -- Prosecution by Air Force judge advocates in U.S. District Court is permissible with MAJCOM Staff Judge Advocate approval

- Where an installation magistrate court program is established, the installation commander should execute a memorandum of understanding (MOU) with the U.S. Attorney covering responsibilities and procedures for trials in U.S. magistrate court

Federal Magistrate Program Jurisdiction

- Criminal actions committed by civilians on a military installation may be handled in federal court, contingent upon the jurisdictional status of the installation and whether the crime in question violated state or federal law

  -- <u>Federal Statutes Without Territorial Jurisdiction Requirements</u>**:** Prosecuted in federal court regardless of the installations jurisdictional status, e.g., counterfeiting, espionage, sabotage, bribery of federal officers

-- Federal Statutes With Territorial Jurisdiction Requirements: May be prosecuted in federal court if the installation where the crime occurs has appropriate jurisdiction, e.g., exclusive or, in most cases, concurrent jurisdiction

--- If the federal government has only proprietary jurisdiction, federal statutes that rely on territorial jurisdiction may not be enforced in federal court. Such offenses may be prosecuted only in state court.

--- If the federal government has exclusive jurisdiction, the state may not prosecute offenses committed on the installation. Federal courts provide the only remedy.

-- State Statutes: Generally, state law crimes will be prosecuted in state court, however, most state law violations can be handled in federal court under the Assimilative Crimes Act, 18 U.S.C. § 13

--- Makes violating a state statute on an installation with exclusive jurisdiction a federal offense and allows prosecution of state-only crimes

--- This is available where the conduct does not otherwise violate a federal statute

- State vehicular and pedestrian traffic laws are expressly adopted and made applicable on military installations having concurrent or exclusive federal jurisdiction under the provisions of 18 U.S.C. § 13. In those states where violations of traffic laws are not considered criminal offenses and cannot be assimilated, DoDD 5525.4 adopts the vehicular and traffic laws of such states and makes these laws applicable to military installations having concurrent or exclusive federal jurisdiction.

References

18 U.S.C. § 13
32 C.F.R. § 634.25
DoDD 5525.4, *Enforcement of the State Traffic Laws on DoD Installations* (2 November 1981), incorporating Change 1, 31 October 1986
AFI 36-703, *Civilian Conduct and Responsibility* (18 February 2014)
AFI 51-905, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians* (30 September 2014)

COURT-MARTIAL JURISDICTION UNDER THE UCMJ

The UCMJ applies at all times and at all places to active duty military members, as well as to reservists in activated status and national guardsmen in "Title 10" federal status. Court-martial jurisdiction rests upon two primary considerations: (1) commission of an offense under the UCMJ; and (2) military status of the person who committed the offense at the time the offense was committed.

Types of Jurisdiction

- Military Offenses RCM 201(d)(1)**:** Courts-martial have exclusive power to hear and decide "purely military offenses"

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

  -- Double Jeopardy for court-martial and federal court prosecution of same misconduct

    --- A military member may **NOT** be tried for the same misconduct by both a court-martial and another federal court because that would constitute "double jeopardy" because the same sovereign (i.e., the federal government) would be prosecuting the accused twice for the same misconduct

  -- No Double Jeopardy for court-martial and state/foreign court prosecution of same misconduct

    --- A military member **MAY** be tried for the same misconduct by both a court-martial and state court. However, if a military member was tried by a state court and jeopardy attached, regardless of the outcome, as a matter of policy, SecAF approval is required before proceeding with a court-martial. AFI 51-201, *Administration of Military Justice,* para. 2.6.3. If the case was dismissed before jeopardy attached, SecAF approval is not necessary.

  -- Host nation treaties and status of forces agreements (SOFAs) govern exercise of jurisdiction over military members overseas

Jurisdiction Over the Offense (RCM 203)

- Courts-martial may try any offense under the UCMJ, and in general courts-martial, the law of war

- Jurisdiction in a court-martial is based **solely** on the accused's status as a person subject to the UCMJ, and not the "service-connection" of the charged offense

Jurisdiction Over the Person (RCM 202)

- General Rule**:** UCMJ, Article 3(a) authorizes court-martial jurisdiction in all cases in which the service member was subject to the UCMJ at the time of the offense and is subject to the UCMJ at the time of trial. Article 2 of the UCMJ lists classes of persons who are subject to the UCMJ.

- Fraudulent Enlistment**:** UCMJ, Article 2(c) provides that, notwithstanding any other provision of law, a person serving with the armed forces is subject to the UCMJ until such person's active duty service has been terminated in accordance with law or regulations promulgated by the SecAF if the person:

  -- Submitted voluntarily to military authority;

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

  -- Received military pay or allowances; and

  -- Performed military duties

Air Force Reserve

- Articles 2(a)(1) and 2(a)(3), UCMJ, extend court-martial jurisdiction over reservists whenever they are in Title 10 status (meaning that they are on inactive duty training (IDT), active duty (AD), or annual tour (AT)). See also RCM 202 and 204(b)(1) and AFI 51-201, para. 2.9, *Jurisdiction over Air Force Reserve and Air National Guard Members*.

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

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

--- An Air Force Reserve member may be ordered to active duty by an active component general court-martial convening authority. AFI 51-201, para. 2.9.4.

--- An Air Force Reserve member recalled to active duty for court-martial may not be sentenced to confinement, or be required to serve a punishment consisting of any restrictions on liberty during the recall period of service, without approval of SecAF. The staff judge advocate (SJA) will coordinate approval, as needed, to recall an Air Force Reserve member for court-martial when the sentence may include confinement. AFI 51-201, para. 2.9.5.

--- Do not involuntarily recall Air Force Reserve members to active duty solely for nonjudicial punishment or summary court-martial, although major command commanders or equivalents may grant waivers to this restriction in appropriate cases. AFI 51-201, para. 2.9.3.

-- When determining whether the commander has UCMJ jurisdiction over the member, the commander must determine two facts: (1) military status at time of the offense and (2) military status as of the time of court-martial

--- Military Status at Time of Offense: Was the member in military status at the time he or she committed the alleged misconduct? If not, then no UCMJ jurisdiction exists.

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

---- Generally, a member performing IDT or a unit training assembly (UTA) is subject to the UCMJ from the beginning to the end of the duty day, e.g., 0730 – 1630

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

--- Military Status at the Time of Court-Martial/NJP: Will the member be in military status at the time the commander will impose punishment?

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

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

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

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

Air National Guard (ANG)

- A member of the ANG is subject to court-martial jurisdiction only when in federal service. UCMJ Art. 2(a)(3), 10 U.S.C. §§ 12301, 12401.

  -- ANG members serve in one of two federally funded duty capacities:

    --- State Duty Status: Referred to as "Title 32" status

    --- Federal Duty Status: Referred to as "Title 10" status

  -- When ANG members are performing state duty (state active duty or Title 32) they are subject to their state codes of military justice

  -- It is very important to coordinate with your local SJA when addressing ANG military justice matters to ensure jurisdiction over that person

Retirees

- Court-martial jurisdiction continues over retired Regular Air Force personnel entitled to military pay. UCMJ Art. 2(a)(4), (5).

- Retired members should not be court-martialed unless their conduct clearly links them with the military or is adverse to a significant military interest of the United States

- Commanders should not prefer charges without SecAF approval unless the statute of limitations (UCMJ Art. 43) is about to run out. The SJA will coordinate approval, as needed, to recall a retired member for court-martial.

Termination of Jurisdiction

- General Rule: A valid discharge terminates jurisdiction. There must be:
  - -- Delivery of a valid discharge certificate;
  - -- A final accounting of pay; and
  - -- Completion of the clearing process required by appropriate service instructions
- Exceptions: UCMJ Art. 3
  - -- The member was subject to the UCMJ at the time of the offense and is subject to the UCMJ at the time of trial
  - -- A fraudulently obtained discharge does not terminate military jurisdiction
  - -- An Air Force Reserve member is not, by virtue of the termination of a period of active duty or inactive-duty training, "shielded" from jurisdiction for an offense committed during such period of active duty or inactive-duty training

Statute of Limitations (UCMJ Art. 43)

- General Rule – Nonjudicial Punishment: Imposition of NJP within 2 years of offense
- General Rule – Court-Martial: Preferral of charges within 5 years of offense
- Exception: There is no statute of limitation for a person charged with murder, rape, sexual assault, rape or sexual assault of a child, and any other offense punishable by death

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References

U.S. Const. amend. V
UCMJ Arts. 2, 3, and 43
10 U.S.C. § 12301, 12401
Solorio v. United States, 483 U.S. 435 (1987)
Rules for Courts-Martial 201-204 (2015)
AFI 36-3209, *Separation Procedures for Air Force National Guard and Air Force Reserve Members* (14 April 2005), incorporating through change 3 (20 September 2011)
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

A COMMANDER'S GUIDE TO THE AFOSI

The Air Force Office of Special Investigations (AFOSI) provides specialized investigations and services to protect Air Force and DoD personnel, operations, and interests. AFOSI is the designated Military Criminal Investigation Organization (MCIO) for the Air Force. Select AFOSI agents are also members of the Special Victim Investigation and Prosecution (SVIP) capability, in accordance with DoD policy.

Organization

- Removed from command channels as an independent, centralized organization to ensure unbiased investigations

- Accountable to the Secretary of the Air Force (SecAF) and organized under the oversight of SAF/IG, but has independent statutory and regulatory authority to conduct criminal investigations and counterintelligence activities

- Missions include investigating allegations of criminal activity and fraud, as well as counterintelligence and specialized investigative activities, counter-drug activities, protective service operations, and integrated force protection

Requesting AFOSI Investigative Service

- Any Air Force commander responsible for security, discipline, or law enforcement may request investigative support

  -- Investigations initiated on authority of AFOSI/CC, as delegated to subordinate AFOSI commanders and special agents in charge

- Only SecAF may direct AFOSI to delay, suspend or terminate an investigation, unless the investigation is conducted at the request of DoD/IG

- AFOSI briefs Air Force commanders on the progress of investigations affecting their command as necessary

- Coordination with AFOSI and the staff judge advocate (SJA) is required prior to commanders reassigning a person subject to an AFOSI investigation or ordering/permitting a commander directed inquiry/investigation when there is ongoing AFOSI investigation

- AFOSI investigative responsibilities

  -- Generally, AFOSI will only investigate major offenses

  -- Initiates investigation into **ALL** allegations of sexual assault that occur within its jurisdiction, regardless of the severity of the allegation

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

  -- Coordination between AFOSI and SFOI is required to make best use of investigative resources, taking into consideration technical expertise, investigative capability, and available manpower

Mutual Support Agreements

- Command Role:

  -- AFOSI requests, and the appropriate commander or magistrate issues, search and seizure authorizations based on probable cause requirements. Include the SJA in every case involving a probable cause determination.

  -- Operations Security (OPSEC) of AFOSI investigations is critical

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

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

    --- Restrict information to base/staff officials on a strict "need-to-know" basis

  -- Crime scene protection support

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

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

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

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

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

-- Protection of agent's grade

--- Mission success is enhanced by concealing the rank of AFOSI special agents

--- Commanders are required to ensure special procedures exist to protect agents' personnel, medical, and other administrative records

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

--- AFOSI personnel may wear civilian clothes while performing their duties

-- Complaints against AFOSI personnel should be referred to the person's immediate commander for thorough and expeditious investigation by AFOSI, which has its own internal affairs section

- AFOSI Support to Command:

-- AFOSI developmental files

--- Preliminary inquiry initiated by AFOSI/CC or Region/CC and used to examine situation to determine if there is criminal activity warranting an investigation

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

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

-- Child abuse/neglect

--- Assist command in family advocacy program

--- All allegations of serious child abuse or neglect must be reported to AFOSI, regardless of origin of complaint (personnel of family support and child care centers, equal opportunity, medical, etc.)

---- AFOSI has greater access to certain records

---- AFOSI can provide fact-finding role to assist command and staff to make decisions

Special Victim Investigation and Prosecution (SVIP) Capability

- DoD policy requires each military service to maintain a SVIP capability comprised of specially trained MCIO investigators, judge advocates, paralegals, and victim/witness assistance personnel in support of victims of rape, sexual assault, child sex assault, and other crimes of serious violence

  -- SVIP Process: MCIO investigators collaborate with assigned specially trained judge advocates, DoD Sexual Assault Response Coordinators (SARCs), Sexual Assault Prevention and Response Victim Advocates (SAPR VAs), Family Advocacy Program (FAP) managers, and domestic abuse victim advocates (DAVAs), as appropriate, during all stages of the investigative and military justice process for "covered offenses"

  -- "Covered Offenses":

  --- Unrestricted reports of adult sexual assault

  --- Unrestricted reports of domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm

  --- Child abuse involving child sexual assault and/or aggravated assault with grievous bodily harm

- AFOSI is the MCIO for the Air Force SVIP

AFOSI's Specialized Functions

- Sole manager of USAF polygraph program

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

- Provide law enforcement and counterintelligence support for USAF nuclear envoys

- Regionally located investigators serve as specialists in the investigation of cybercrime, e.g., computer network intrusions and computer media search and seizure

- Forensic Science Consultants:

  -- Regionally located experts with forensic sciences masters degrees

  -- May provide consultation, training, or specialized investigative techniques

- Technical Services:

  -- Process and support requests to intercept wire, oral, or electronic communications for law enforcement or counterintelligence purposes

  -- Technical surveillance countermeasures

    --- Detection and neutralization of technical surveillance devices deployed against Air Force facilities

    --- Conducts security vulnerability surveys

- Protective Services:

  -- Provides threat assessments; protects designated Air Force officials; protects foreign official guests of DoD in the continental United States (CONUS)

  -- Provides assessments and estimates on terrorist and foreign intelligence threats to Air Force deployments, exercises, weapons facilities, and other base facilities upon request. HQ AFOSI/JA, not the base legal office, provides legal advice for counterintelligence operations

- Security Violations:

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

  -- Does not investigate routine security violations

AFOSI Policy Information

- Apprehension/Arrest:

  -- Civilian special agents are authorized to arrest civilians under many circumstances. However, not all detachments have civilian agents. In addition, this authority will be used judiciously and only when necessary.

    --- Civilian agents' authority is derived from 10 U.S.C. § 9027

  -- Military agents' authority is derived from the Manual for Courts-Martial

    --- Limited to individuals subject to UCMJ, not family members or nonmilitary U.S. citizens

    --- Only if required by operation or emergency (security forces routinely do so at AFOSI's request)

    --- Military law enforcement personnel may temporarily detain civilians suspected of on-base offenses until civilian authorities arrive

- Arming:

  -- AFPD 71-1 authorizes agents to carry Government issued or approved privately owned firearms (including concealed) for duties

  -- AFOSI offices required to maintain at least one handgun and ammunition for each agent assigned

  -- Weapons stored within AFOSI facilities or in security forces armory if the local detachment is inadequate for security purposes

- Sources and Undercover Agents:

  -- Human sources of information may be overt (official) or covert (confidential)

  -- AFOSI undercover agents are specially trained to perform duties

-- OPSEC and safety concerns dictate identity protections

--- Investigative reports may conceal identities of sources; release of identities requires either concurrence of AFOSI detachment commander/special agent in charge or an order from a military judge

--- Threatened Airman Program is a personnel program; AFOSI provides threat validation and assessment as prelude to reassignment action

Types of AFOSI Reports

- Routinely Provided:

  -- Information routinely provided to commanders and their representatives (e.g., SJA)

- Interim Case Reporting:

  -- AFOSI may up-channel internal reporting of special interest cases where publicity or Congressional interest is expected

  -- Informs HQ AFOSI, Air Staff, commanders, and other agencies of significant matters affecting Air Force and DoD

  -- Separate and distinct from major command up-channel reporting

- Report of Investigation (ROI):

  -- Provided to command officials when investigation is complete

  -- Information obtained through investigation and witness interviews

  -- No recommendations or suggestions on appropriate command action

- Special Reports:

  -- Provided by HQ AFOSI highlighting a particular kind of investigative activity and pinpointing problems so commanders can better handle them

  -- Provides description of weaknesses or susceptible areas under command to alert functional managers for possible correctional or remedial actions, e.g., fraud information reports, narcotics information reports, and narcotics briefs

-- Reports requested by the Air Staff or other senior Air Force or DoD officials containing in-depth analysis of some area of concern Air Force-wide, e.g., damage to AF aircraft

- Command Reporting of Actions Taken:

  -- Commanders must provide AFOSI with a report of action taken

  -- Allows AFOSI to ensure command action is included in appropriate national level databases

Release of Information

- AFOSI records are "For Official Use Only" and should be treated as sensitive records covered by Privacy Act

- Safeguarding, handling, and releasing information from AFOSI reports:

  -- May be released in whole or in part, only to persons who require access for official duties

    --- Refer all requests for release to non-Air Force officials to the servicing AFOSI detachment

    --- In the absence of a governing agreement, only HQ AFOSI may authorize release outside the Air Force; or release or deny information under Freedom of Information Act (FOIA) or Privacy Act (law enforcement records exemption)

    --- SJAs must appropriately redact Report of Investigation (ROI) prior to release to defense attorneys for discovery

- Press or news inquiries for information require close coordination between public affairs, SJA, and AFOSI in all cases

References

10 U.S.C. § 9027

Military Rules of Evidence 507 (2015)

DoDI 5505.19, *Establishment of Special Victim Investigation and Prosecution (SVIP) Capability within the Military Criminal Investigative Organizations (MCIOs)* (3 February 2015), incorporating Change 1, 4 September 2015

AFI 71-101 V1, *Criminal Investigations Program* (8 October 2015), certified current 17 December 2015

AFI 71-101 V2, *Protective Service Matters* (23 Jan 2015), certified current 17 December 2015

AFI 71-101 V3, The *Air Force Technical Surveillance Countermeasures Program* (13 May 2015), certified current 17 December 2015

AFI 71-101 V4, *Counterintelligence* (26 January 2015), certified current 17 December 2015

AFMD 39, *Air Force Office of Special Investigations* (7 May 2015)

AFPD 71-1, *Criminal Investigations and Counterintelligence* (13 November 2015)

FUNCTIONS OF THE AREA DEFENSE COUNSEL

The area defense counsel (ADC) program provides Air Force members with free, confidential, and independent legal representation. Airmen suspected of a criminal offense or facing an adverse administrative action receive legal advice from an experienced, certified judge advocate.

- The ADC represents Air Force members in the following areas:
  - -- Courts-martial
  - -- Administrative discharge actions
  - -- Article 32 investigations
  - -- Article 15 actions
  - -- Criminal investigations or interrogations (when a service member requests a defense counsel pursuant to the service member's right not to self-incriminate under Article 31, UCMJ)
  - -- Any other adverse administrative action for which legal counsel is required or authorized, including but not limited to Letters of Counseling, Admonition, or Reprimand, Unfavorable Information Files, Control Rosters, Referral Performance Reports, administrative demotions, and Flying Evaluation Boards
- All ADCs are assigned outside the local chain of command and maintain an office physically separate from the base legal office to avoid conflicts of interest or command influence
  - -- The ADC's responsibility is to zealously and ethically represent the client, which may include meeting with or advocating directly to commanders and unit leadership
  - -- Acting as legal representative for the client alone, the ADC is ethically prohibited from sharing any details of the representation of the client or any confidential client communications with third parties, unless specifically authorized to do so

- Air Force members facing any type of investigation or adverse administrative action should be promptly referred to the ADC

  -- Civilians are not entitled to ADC representation

  -- Resources permitting, the ADC at Air Force Reserve Command, Robins Air Force Base, Georgia will represent reservists facing administrative discharge action; reservists facing military criminal investigation or any other adverse administrative action will generally be represented by the ADC responsible for servicing that member's reserve unit

- The ADC program requires strong command and staff judge advocate (SJA) support to maintain the integrity and fairness of the military justice system

- The ADC is available, subject to workload and client confidences, to help educate the base population on the military justice system and the ADC's function

Reference

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

MILITARY MAGISTRATE PROGRAM

Military magistrates may be appointed by an installation commander who is either a special or general court-martial convening authority, or the installation commander at Air Force Reserve Command bases and stations. A military magistrate's primary duty is to determine whether probable cause exists to issue search, seizure, and/or apprehension authorizations in criminal investigations and, if so, to issue such authorizations.

- The installation commander may appoint a maximum of four officers, of "judicial temperament," to serve as military magistrates for the installation

  -- Absent general court-martial convening authority (GCMCA) approval, a magistrate must be in the grade of lieutenant colonel or above

  -- A magistrate may not be a chaplain, security forces member, staff judge advocate personnel, Air Force Office of Special Investigation (AFOSI) agent, or convening authority

  -- Appointment must be in writing, specifying the name (not position) of the magistrate and the installation over which the magistrate has authority

  -- If more than one magistrate is appointed for a single installation, each exercises concurrent authority with the other and with the installation commander

- Once appointed, magistrates are authorized to issue probable cause search, seizure, and/or apprehension authorizations based upon written or oral statements or any other evidence or information made known to the magistrate

  -- Magistrates may exercise this authority concurrent with installation commander, but the availability of the installation commander is not required for the magistrate to act

  -- Magistrates must be neutral and detached and remain impartial when granting search and seizure or apprehension authorization in a particular case

  -- Magistrates may grant search and seizure or apprehension authority either orally or in writing, usually via AF Form 1176, *Authority to Search and Seize,* and AF IMT 3226, *Authority to Apprehend in Private Dwelling*. If conditions permit, verbal authorizations should generally be memorialized in writing as soon as practicable.

- Each installation's staff judge advocate will brief and train the magistrate on his or her duties when appointed and thereafter when appropriate, as well as provide detailed legal advice regarding each individual probable cause determination

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References

Military Rules of Evidence 315 (2015)
Military Rules of Evidence 316 (2015)
Rule for Courts-Martial 302 (2015)
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016
AF Form 1176, *Authority to Search and Seize* (2 March 2016)

NATIONAL SECURITY CASES

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

Obtaining Permission to Proceed in Courts Martial, Administrative Discharges, and Civilian Removal Actions

- Commanders send a written request to the appropriate special access program(s) functional office for permission to proceed with further processing, including the information required by AFI 31-501, para. 8.9.1. Involve the unit security manager and the special access program manager in the collection and processing of this type of information.

- Expeditious processing of such requests must be pursued to comply with speedy trial rules in criminal cases and restrictive time requirements in civilian removal cases. Normally, no more than 15 days should elapse between the date of initiation request and the approval/denial by the Office of Primary Responsibility (OPR).

- Voluntary separation requests by officers (AFI 36-3207, *Separating Commissioned Officers*) and enlisted members (AFI 36-3208, *Administrative Separation of Airmen*) will not be handled under these procedures unless they are in lieu of adverse action

- Periodic reporting by the unit commanders should advise the parent MAJCOM and decision authority of any changes to the proposed action every 90 days until the action has been completed

Actions Permitted Pending Decision to Proceed

- Courts-martial: In general or special courts-martial, command may process the case through preferral of charges and an Article 32 preliminary hearing, if applicable, but may not refer charges without permission to proceed. These restrictions do not apply to summary courts-martial.

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

- Enlisted Discharges: In "notification" cases, the commander may process the action through giving the member notice of the proposed discharge, obtaining the member's response, scheduling necessary appointments, and conducting those appointments. However, the separation authority may not approve the discharge until permission to proceed is granted. In "board hearing" cases, the commander may similarly process the action through giving the member notice of the proposed discharge, obtaining the member's response, scheduling necessary appointments, and conducting those appointments. The convening authority may not convene the board until authority to proceed is obtained.

- Civilian Removals: Commanders must coordinate with the servicing civilian personnel flight to compose the message to forward to the appropriate Air Force OPR, seeking authority to proceed. Under no circumstances may a "notice of proposed removal" be issued until authority to proceed is obtained.

Judge Advocate Notifications in Certain National Security Cases

- Any case with potential to be a national security case must be reported immediately to AFLOA/JAJM, by the local staff judge advocate (SJA). Such cases include:

  -- Aiding the Enemy (UCMJ Art. 104)

  -- Spying (UCMJ Art. 106)

  -- Espionage (UCMJ Art. 106a

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

  -- Subversion (UCMJ Art. 94)

  -- Violations of punitive instructions, regulations, or criminal statutes concerning classified information, or U.S. foreign relations (UCMJ Art. 92)

- DoDI 5525.07 requires coordination between DoD and Department of Justice (DOJ) of the investigation and disposition of significant cases. Early reporting to AFLOA/JAJM is essential because national security cases often involve issues such as searches, seizures, immunity grants, polygraphs, etc., as well as the decision whether to prosecute and, if so, which department will prosecute. Under no circumstances should a unit commander or an SJA take action initiating the court-martial process in a case potentially involving national security issues until AFLOA/JAJM has coordinated the case with DOJ through appropriate DoD channels.

References

Manual for Courts-Martial, United States (2012)

DoDI 5525.07, *Implementation of the Memorandum of Understanding (MOU) Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes* (18 June 2007)

AFI 31-501, *Personnel Security Program Management*, Chapter 8 (27 January 2005), incorporating through Change 2, 29 November 2012, including AFGM2015-1, 20 November 2015

AFI 36-3207, *Separating Commissioned Officers* (9 July 2004), incorporating through Change 6, 18 October 2011

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

SEXUAL ASSAULT PREVENTION AND RESPONSE

Sexual assault is criminal conduct. It falls well short of the standards America expects of its men and women in uniform and civilian members. It violates Air Force Core Values. Inherent in our Core Values of Integrity First, Service Before Self, and Excellence in All We Do is respect: self-respect, mutual respect, and respect for our Air Force as an institution. Our core values and respect are the foundation of our Wingman culture; a culture in which we look out for each other and take care of each other. Incidents of sexual assault corrode the very fabric of our Wingman culture; therefore we must strive for an environment where this behavior is not tolerated and where all Airmen are respected.

- Air Force Sexual Assault Prevention and Response policy and responsibilities apply to all levels of command and all Air Force organizations and personnel, including active duty, Air Force government civilian employees, Air Force Academy, Air National Guard, and Air Force Reserve components while in federal service

- Installation commanders will implement local sexual assault prevention and response programs. The installation vice commander or equivalent may be designated as the responsible official to act for the installation commander and supervises the Installation Sexual Assault Response Coordinator.

Definition of Sexual Assault

- Sexual assault is the intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority or when the victim does not or cannot consent. It includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive or wrongful (to include unwanted and inappropriate sexual contacts), or attempts to commit these acts.

- This definition is for training and educational purposes only and does not affect in any way the definition of any offenses under the UCMJ. Commanders are encouraged to consult with their staff judge advocate for complete understanding of this definition in relation to the UCMJ.

Installation Sexual Assault Prevention and Response Office

- Sexual Assault Response Coordinator (SARC)

  -- The SARC serves as the single point of contact for integrating and coordinating sexual assault victim care from an initial report of sexual assault, through disposition and resolution of issues related to the victim's health and well-being

-- Reporting directly to the installation vice wing commander, the SARC implements and manages the installation level sexual assault prevention and response programs

-- The SARC is responsible for assisting commanders in meeting annual sexual assault prevention and response training requirements

-- The SARC is responsible for ensuring a victim support system that provides a 24 hours a day/7 days a week sexual assault response capability for all victims that fall under the SAPR program within his/her designated area of responsibility

-- The SARC will provide updates to the victim and commanders as appropriate and in accordance with Air Force policy

-- The SARC will supervise the Sexual Assault Prevention and Response Victim Advocate (VA) and Volunteer Victim Advocates (VVA)

- Sexual Assault Prevention and Response VA and VVAs

-- Responsibilities of SAPR VAs and VVAs include providing crisis intervention, referral, and ongoing non-clinical support, including information on available options and resources to assist the victim in making informed decisions about the case. VA services will continue until the victim states support is no longer needed.

-- SAPR VAs and VVAs must possess the maturity and experience to assist in a very sensitive situation

--- SAPR VAs are GS-11 civilian employees who work full-time in the SAPR office

--- VVAs are volunteers

---- Only active duty military personnel and DoD civilian employees selected by the SARC may serve as VVAs. They cannot be assigned to the legal office, Area Defense Counsel, Investigator General (IG), Air Force Office of Special Investigations (AFOSI), Security Forces Squadron (SFS), Equal Opportunity (EO) office, or wing chaplain's office.

---- Individuals on G-series orders, first sergeants, and chief master sergeants cannot serve in this capacity

---- Medics can serve as VVAs if they do not participate in "direct patient care"

  - SAPR VAs and VVAs do not provide counseling or other professional services to a victim. Appropriate agencies will provide clinical, legal, and other professional services.

  - SAPR VAs and VVAs may accompany the victim, at the victim's request, during investigative interviews and medical examinations

- SARCs', SAPR VAs', and VVAs' communications with victims (of a sexual or violent offense) are privileged under Military Rule of Evidence 514 when the communication is intended to be confidential and the perpetrator is a military member. Consult the local legal office for additional exceptions to this general rule.

Commander's Response to Allegations of Sexual Assault

- Commanders notified of a sexual assault must take immediate steps to ensure the victim's physical safety, emotional security, and medical treatment needs are met, and that the AFOSI or other appropriate criminal investigative agency is notified

  - Commanders and anyone in the victim's chain of command are mandatory reporters that must report a sexual assault to AFOSI

  - Commanders and others in the victim's chain of command cannot keep a report of sexual assault restricted

  - Commanders should also refer to the section of this chapter titled "Command Response to Sexual Assault" for further details regarding their responsibility

- The appropriate commanders should determine whether temporary reassignment or relocation of the victim or subject is appropriate

- Commanders should consider whether no contact orders or Military Protective Orders (DD Form 2873) are required

- Personnel Reliability Program (PRP): A sexual assault victim certified under the PRP is eligible for both the restricted and unrestricted reporting options

  - If electing restricted reporting, the victim is required to advise a medical clinic provider of any factors that could have an adverse impact on the victim's performance, reliability, or safety while performing PRP duties. If necessary, the medical clinic will inform the commander that the person in question should be temporarily suspended from PRP status, without revealing that the person is a sexual assault victim, thus preserving the restricted report.

- Required Reports:

  -- 24-Hour Notification: The SARC will complete and submit the 24-hour Notification for all restricted or unrestricted reports to the Installation Commander as a standalone report via an encrypted, unclassified e-mail. The Installation Commander will forward a copy to the MAJCOM SARC who will forward to the MAJCOM/CV and AF/CVS.

  -- Sexual Assault Incident Response Oversight (SAIRO) Report: The commander is responsible for completing an eight-day incident report for all unrestricted and independent reports in which the victim or subject is a service member.

    --- Normally, it will be the victim's immediate commander that will complete the SAIRO. However, when the victim is a civilian the subject's commander will complete the SAIRO.

    --- The purpose of the SAIRO is to detail the actions taken or in progress to provide the necessary care and support to the victim of the assault, to ensure that allegations of sexual assault are referred to the appropriate investigatory agencies, and to provide initial notification of the serious incident to appropriate commanders. AFI 90-6001, *Sexual Assault Prevention and Response (SAPR) Program*, Fig. 3.1 and Attachment 3 provide detailed guidance and a template for the SAIRO.

    --- SAIROs are not completed for sexual assault cases handled by the Family Advocacy Program

  -- Commanders Critical Information Requirement (CCIR): The CCIR provides timely information to Air Force leadership when an allegation of sexual assault meets specific criteria

    --- Criteria include: Involvement of an O-6 commander (or equivalent), potential for media attention, Congressional involvement, an overturned conviction, other factors warranting higher level command awareness

    --- This is a separate report from the 24-hour notification and SAIRO Report listed above but may be accomplished at the same time

    --- A CCIR is provided to the installation Command Post for submission as an OPREP-3 in accordance with AFI 10-206, *Operational Reporting*, and the current CSAF OPREP-3 Reporting Matrix, Rule 3D

    --- A CCIR is not completed for restricted reports

SARP Response to Allegations of Sexual Assault

- Upon notification if the Victim desires SAPR services

  -- The SAPR office will determine program eligibility using the definition listed above for education and training purposes

    --- SAPR services are available to active duty service members, dependents 18 years of age and older, reservists and guardsmen and Air Force civilian employees. DoD Civilian employees (Army, Navy and Marine), their dependents 18 years of age and older, outside the continental United States (OCONUS) and contractor employees are eligible in contingency areas if they are eligible for treatment in the military treatment facility

    --- SAPR services are not available for victims who are assaulted by their spouse and child victims. Due to the heightened risk of violence, those cases are handled by the Family Advocacy Program (FAP) and must be referred to FAP.

    --- Victims can be referred to FAP through command or by the SARC once it is determined FAP services are the most appropriate care

      ---- In cases where the subject and victim are unmarried intimate partners, the case will be referred to FAP

      ---- However, if the victim chooses not to engage in FAP services, victim may choose SAPR services

  -- The SARC, SAPR VA, or on-call VVA will meet with the victim and discuss the restricted and unrestricted reporting options

    --- <u>Unrestricted Reports</u>: An unrestricted report of sexual assault will result in a formal investigation and must be reported to AFOSI

      ---- Any report of a sexual assault made through the victim's chain of command, law enforcement, and the AFOSI, or other criminal investigative service is an unrestricted report

      ---- The victim can also elect to make an unrestricted report

--- Restricted Reports: Restricted reports will not be referred to AFOSI for investigation. A restricted report can only be made to a SARC, SAPR VA, VVA, or healthcare provider.

---- Restricted reporting is intended to give a victim additional time and increased control over the release and management of the victim's personal information, and to empower the victim to seek relevant information and support to make an informed decision about participating in the criminal process

---- Only military personnel and Air Force civilian employees may make restricted reports. Dependents and Reservists not on Title 10 orders cannot make restricted reports.

---- Restricted reports may be disclosed only under very limited circumstances, e.g., a serious or imminent threat to life.

--- Independent Investigations (also referred to as third party reports): Should information about a sexual assault be disclosed to command or law enforcement from sources independent of the victim (such as a friend or witness), and an investigation into an allegation of sexual assault is initiated, that report is considered an independent investigation. An official investigation may be initiated based on that independently acquired information.

---- When the SARC or SAPR VA learns that a law enforcement official has initiated an official investigation that is based upon independently-acquired information and after consulting with the law enforcement official responsible for the investigation, the SARC or SAPR VA will notify the victim, as appropriate

---- If the victim has already made a restricted report, covered communications from the restricted report will not be released for the investigation unless the victim authorizes the disclosure in writing or another exception applies

-- Assignment of a Victim Advocate (full-time or volunteer)

--- A VA may be assigned to the victim. To the extent practicable, the assigned VA will not be from the same unit as the victim.

--- The VA will provide support throughout the process. The VA will provide referral and ongoing non-clinical support to the victim.

--- Services will continue until the victim indicates services are no longer required, or the SARC makes this determination based on the victim's response to offers of assistance

Other SAPR Related Issues

- Expedited Transfers (ET)

-- An ET provides victims who file an unrestricted report of sexual assault the option of a permanent change of station (PCS) or a temporary or permanent change of assignment (PCA) to a location that will assist with the immediate and future welfare of the victim, while also allowing them to move to locations that can offer additional support to assist with healing, recovery, and rehabilitation

-- An ET is only available for active duty victims

-- Victims will only be eligible to receive one facilitated ET for an unrestricted report of sexual assault. Multiple reassignment requests for the same reported incident are only considered in exceptional circumstances.

-- Process:

--- The victim, with the assistance of the SARC, makes the request for an expedited transfer

--- The victim's commander (or equivalent) makes a recommendation to the host wing/installation commander for approval or disapproval. The victim's commander should base his or her recommendation upon all available information, especially that provided by AFOSI, and after consultation with the staff judge advocate (SJA). The victim's commander should recommend approval if he or she finds a credible report of sexual assault exists.

--- The host wing/installation commander makes a decision which, if approved, is forwarded by the victim through the virtual MPF to AFPC for transfer orders

--- The process from request through host wing/installation commander's decision must take no more than 72 hours

--- If disapproved by the wing/installation commander, the victim may appeal to the first/next general officer in the chain of command. If disapproved at this level the victim may make a final appeal to the MAJCOM/CV.

- Victims in FAP cases may also request an expedited transfer. The process is the same. The SARC will facilitate the process which can be found in AFI 40-301, Family Advocacy Program.

- Subjects may be transferred in the best interest of the Air Force. This is a separate process that is initiated by a commander through the local Military Personnel Flight (MPF). Additional guidance may be found in AFI 36-2110, *Assignments*, Attachment 26.

- <u>Case Management Group (CMG) Meetings</u>

  -- SARCs and commanders, along with AFOSI, medical, SJA, and others, meet monthly to discuss reports of sexual assault on the installation. The CMG is convened to address cohesive emotional, physical, and spiritual care of a victim in a collaborative environment. The CMG will not discuss FAP, spouse or intimate partner cases. This CMG is chaired by the host wing or vice wing commander.

  -- The CMG will also discuss instances of retaliation

  -- The victim's commander is a mandatory member of the CMG and he/she may not delegate the responsibility to attend the CMG. Within 72 hours after the CMG the commander will provide the victim with an update regarding the investigation, medical, legal, status of an expedited transfer request, any other request made by the victim, command proceedings regarding the sexual assault from the date the investigation was initiated until there is a final disposition of the case.

- <u>Retaliation</u>

  -- Air Force personnel who file an unrestricted or restricted report of sexual assault will be protected from reprisal, coercion, ostracism, maltreatment, retaliation, or threat of reprisal, coercion, ostracism, maltreatment or retaliation, for filing a report

  -- If a commander becomes aware of retaliation they may refer the victim to the SARC, IG, or EO to assist with resolution. If referred to the SARC he or she will inform, with victim consent, the IG and the SJA.

-- In addition to protections for those who make a report to the SARC, no military member can retaliate against any alleged victim or other military member who reports a criminal offense (of any kind)

--- This provision in AFI 36-2909, *Professional and Unprofessional Relationships*, also prohibits members from maltreating or ostracizing any person who reports a criminal offense

--- A violation of this provision is considered a violation of a lawful general order or regulation, which means a violation of the AFI can be punished under UCMJ, Art. 92

-- At every CMG meeting, the CMG Chair will ask the CMG members if the victim, witnesses, bystanders (who intervened), SARCs and SAPR VAs, responders, or other parties to the incident have experienced any incidents of coercion, retaliation, ostracism, maltreatment, or reprisals. If any incidents are reported, the installation commander will develop a plan to immediately address the issue. The coercion, retaliation, ostracism, maltreatment, or reprisal incident will remain on the CMG agenda for status updates, until the victim's case is closed.

- Addressing Victim Misconduct:

-- An investigation into the facts and circumstances surrounding an alleged sexual assault may develop evidence that the victim engaged in misconduct like underage drinking or other related alcohol offenses, adultery, drug abuse, fraternization or other violations of instructions, regulations, or orders

-- In accordance with the UCMJ, the Manual for Courts-Martial (MCM), and AFIs, commanders are responsible for ensuring victim misconduct is addressed in a manner that is consistent and appropriate to the circumstances

-- The disposition authority, the commander that makes the determination as to whether action should be taken and the appropriate level of action, for victim misconduct is the first O-6 Special Court-Martial Convening Authority in the chain of command

-- Commanders have the authority to determine the appropriate disposition of alleged victim misconduct, to include deferring disciplinary action until after disposition of the sexual assault case. When considering what corrective actions may be appropriate, commanders must balance the objectives of holding members accountable for their own misconduct with the intent to avoid unnecessary additional trauma to sexual assault victims and to encourage reporting of sexual

assaults, the gravity of any collateral misconduct by the victim and its impact on good order and discipline should be carefully considered in deciding what, if any, corrective action is appropriate.

-- Special Victims' Counsel and/or Area Defense Counsel may be representing victims on matters of victim misconduct

-- Commanders are expected to consult with their servicing staff judge advocate and use appropriate personnel actions to resolve any allegations

-- Administrative separation actions involving victims of sexual assaults will be processed as required by the applicable AFI

--- When a commander proposing administrative or medical separation action was previously aware, or is made aware by the respondent or others, that the member has filed a past complaint, allegation, or charge that they were a victim of sexual assault, the proposing commander shall ensure the separation authority is aware that the discharge proceeding involves a victim of sexual assault

--- The separation authority must be provided sufficient information concerning the alleged assault and the victim's status to ensure a full and fair consideration of the victim's military service and particular situation

--- An Airman who is being recommended for an involuntary separation has the right to request the General Court-Martial Convening Authority review his or her discharge if they believe their separation was initiated in retaliation for making an unrestricted report of sexual assault with the 12 months prior to the notification of the discharge

References

DoD 6025.18-R, *DoD Health Information Privacy Regulation* (24 January 2003)

DoDI 6495.02, *Sexual Assault Prevention and Response Program Procedures* (28 May 2013), incorporating Change 2, 7 July 2015

DoDD 6495.01, *Sexual Assault Prevention and Response (SAPR) Program* (23 January 2015), incorporating Change 2, 20 January 2015

Memorandum, Under Secretary of Defense for Personnel and Readiness, *Increased Victim Support and a Better Accounting of Sexual Assault Cases* (JTF-SAPR-002) (22 November 2004)

AFI 10-206, *Operational Reporting* (11 June 2014), certified current, 18 March 2015, including AFI10-206_AFGM2016-01, 21 July 2016

AFI 36-2110, *Assignments* (22 September 2009), incorporating through Change 2, 8 June 2012, including AFI36-2110 _AFGM2016-01, 23 June 2016

AFI 36-2909, *Professional and Unprofessional Relationships* (1 May 1999), including AFI36-2909_AFGM2016-01, 15 June 2016

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2014), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 40-301, *Family Advocacy Program* (16 November 2015)

AFPD 90-60, *Sexual Assault Prevention and Response (SAPR) Program*, 2 October 2014

AFI 90-6001, *Sexual Assault Prevention and Response (SAPR) Program* (21 May 2015), incorporating Change 1, 18 March 2016

Memorandum, *Department of the Air Force Policies and Procedures for the Prevention of and Response to Sexual Assault* (8 June 2005)

SPECIAL VICTIMS' COUNSEL PROGRAM

The Special Victims' Counsel (SVC) program was created in 2013. The SVC program was authorized in order to empower victims of sex offenses through the military legal system by allowing for a confidential, attorney-client relationship between an SVC and a qualifying victim. This relationship gives victims a voice and a choice in the legal process, and provides victims with an attorney who will advocate on the victim's behalf to protect the victim's rights throughout the legal process.

Objectives

- The objectives of the Air Force Special Victims' Counsel Program are:
  - -- Provide victims of assault, stalking, and other sexual misconduct with independent, attorney-client privileged representation throughout the investigation/prosecution processes
  - -- Empower victims by providing professional and knowledgeable counsel to enable them to express their choices
  - -- Provide advocacy to protect the rights afforded to victims in the military justice system

Overview

- On 28 January 2013, the Air Force implemented a Special Victims' Counsel (SVC) Program by providing qualified Judge Advocates (JAGs) to represent sexual assault victims
- The FY14 National Defense Authorization Act (NDAA) mandated the Military Services to provide Special Victims' Counsel and amended 10 U.S.C. § 1044 (adding subparagraph (e))

Eligibility for Representation

- Certain categories of victims of sexual assault, stalking, and other sexual misconduct are eligible for SVC representation
  - -- Air Force members (active duty and reserve/guard in Title 10 status at the time of the offense)

-- Dependents of Air Force members if the perpetrator is a military member subject to the UCMJ

-- DoD Civilians

-- Other service members and their dependents if the perpetrator is a military member subject to the UCMJ (individuals will be referred to their respective Service SVC or Victims' Legal Counsel Programs)

-- Basic Military Training and Technical Training students who are involved in an unprofessional relationship that involves physical contact of a sexual nature with faculty or staff if the incident occurs within the first 6 months of their service

- The Chief, Special Victims' Counsel Division, AFLOA/CLSV, or designee, has the final authority on determination of eligibility and may grant exceptions to policy on a case-by-case basis consistent with 10 U.S.C. §§ 1044, 1044e and 1565b

Notifying Victims of Availability of Special Services

- The first individual to make contact with the victim, such as the Sexual Assault Response Coordinator (SARC), Victim Advocate (VA), Family Advocacy representative, investigator, Victim Witness Assistance Program (VWAP) Liaison or trial counsel, is required to inform the victim of the availability of SVC services

  -- SVCs are not permitted to solicit clients. Victims must request an SVC in order for services to be rendered.

Scope of Representation

- An SVC's sole role is to represent victims in a confidential, attorney-client relationship, throughout the investigation and prosecution processes

  -- Military Justice Advocacy: SVCs enable victims to assert their rights under Article 6b, UCMJ

    --- SVCs advocate for a victim's interests to commanders, convening authorities, staff judge advocates, prosecutors, defense counsel, and military judges; attend interviews with investigators, trial and defense counsel; attend Article 32 hearings and courts-martial, including in-court representation (such as motions to assert Article 6b, UCMJ rights, Military Rules of Evidence (MRE) 412/513/514 and other evidentiary/legal rights); assist with post-trial submissions to the convening authority; assist with transitional compensation;

advise on VWAP, and the responsibilities and support provided by the SARC and VA

-- Advocacy to Air Force and DoD Agencies: SVCs assist with expedited transfer; address safety concerns (Military Protective Orders/Temporary Restraining Orders/altering working conditions); assist with access to medical/mental health care; address work-place concerns (such as retaliation or peer ostracism); and advise on military benefits

-- Collateral Misconduct: SVCs may represent in conjunction with a military defense counsel or solo. Collateral misconduct is defined as victim misconduct that might be in time, place, or circumstance associate with the victims' sexual assault incident. It is often one of the most significant barriers to reporting an assault due to fear of punishment.

-- Advocacy to Civilian Prosecutors and Agencies: SVCs may advise on United States civilian criminal jurisdiction and may advocate a victim's interest to civilian prosecutors or agencies. SVCs may not represent victims in civilian court.

-- Legal Consultation: SVCs may consult on potential for civil litigation against parties other than DoD

-- Traditional Legal Assistance: SVCs may provide traditional legal assistance or may refer victim to a local legal office to provide traditional legal assistance

Special Victims' Counsel (SVC)

- The SVC is a certified judge advocate designated by The Judge Advocate General to represent the interests of victims of sexual assault

- No SVC is assigned to the local chain of command. The SVC chain of command flows through regional SVC circuits to the Chief, Special Victims' Counsel Division, Air Force Legal Operations Agency, Joint Base Andrews.

  -- The SVC's responsibility is to zealously advocate for their client, assist victims by helping them understand the investigatory and military justice process, and to advocate for the victim to command or a court-martial when necessary

  -- The SVC is an advocate for the client, not an advisor for the command or the legal office. The SVC office is typically co-located with the SARC.

  -- SVCs are not located at every base, rather they are assigned to represent victims within a particular region of military bases

- If an active duty military member who is the victim of a sexual assault requests an SVC, refer them to the legal office or the SARC who will coordinate representation
    - -- Civilians, with no affiliation to the military, are not entitled to SVC representation
        - --- Exceptions are civilian dependents, Reservists, or National Guard members who were serving on active duty at the time of the offense, and DoD civilians
    - -- SVCs generally do not represent victims in any disciplinary action. SVCs refer those clients to the ADC. However, SVCs may work with the ADC regarding collateral misconduct related to the sexual assault.

References

UCMJ Art. 6b

10 U.S.C. § 1044e

AFI, 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (27 October 2003), incorporating through Change 3, 24 May 2012

COMMAND RESPONSE TO SEXUAL ASSAULT

The Air Force's response to sexual assault is both proactive and reactive. On both fronts the Air Force utilizes a multidisciplinary approach. On the proactive front, the Sexual Assault Prevention and Response (SAPR) office is the lead agency for prevention. Prevention addresses a number of areas such as education and establishing an appropriate Air Force climate. The SAPR office has the lead in the area of sexual assault prevention, but every Airman and every agency must play a role for prevention to work. The Air Force responds to sexual assault as an institution, but a number of specific agencies respond to individual cases depending on the facts of the case. A broad range of agencies respond to individual cases. The SAPR office or Family Advocacy is typically one of those agencies. Others agencies include the Air Force Office of Special Investigations (AFOSI), the legal office, numerous medical and mental health providers, the chaplain's office, a member's chain of command and many others. Ultimately the member's commander will also be involved. Commanders are responsible for the good order and discipline within their unit and therefore have unique responsibilities regarding their response to an allegation of sexual assault.

Command Action Unique to Sex Assault Cases

- The legal landscape in the area of sexual assault is changing very rapidly. There have been a host of legal changes in consecutive National Defense Authorizations Acts (NDAA) beginning in 2012. These NDAA changes resulted in sweeping legal changes to Federal Law (primarily in Chapter 10 of the United States Code), the UCMJ, Rules for Courts-Martial (RCM), Military Rules of Evidence (MRE) and numerous Air Force Instructions.

- With so many legal changes and more likely to come, it is imperative commanders consult with their respective Staff Judge Advocate early on in any sexually related offense. Below are several important areas all commanders must be aware of and consider when dealing with any sexual offense.

  -- Authority to Investigate: AFOSI is the lead agency to investigate sexual assault allegations regardless of the severity of the offense. A commander should not make a determination about investigating a sexual offense without first consulting both AFOSI and their respective staff judge advocate (SJA).

  -- Disposition Authority: RCM 306 states: "Each commander has discretion to dispose of offenses by members of that command." It also states: "A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally." The Secretary of Defense did just that with regard

to certain sexual offenses. This mandate known as "Initial Disposition Authority" is reiterated in AFI 51-201, *Administration of Military Justice*. The Secretary of Defense's (SecDef) order and AFI 51-201 both state the O-6 Special Court-Martial Convening Authority is the initial disposition authority for certain sexual assault cases and all offenses arising from or relating to the same incident(s). Initial reports of a criminal offenses are often unclear. Early collaboration between the command, AFOSI, and the judge advocate (JAG) is critical to ensure this Initial Disposition Authority Policy is complied with.

-- Mandatory Discharge for Perpetrator of Sexual Assault: Sexual assault and sexual assault of a child are incompatible with military service. In accordance with AFI 36-3208, *Administrative Separation of Airmen*, a member found to have committed a sexual assault or sexual assault of a child will be discharged unless the member meets all of the specified retention criterial listed in the AFI. Sexual assault for the purposes of the instruction is defined very broadly. Again, JAG consultation is essential to ensure compliance with the AFI.

-- Discharging a Victim of a Sexual Assault: There are special discharge processing requirements for airmen who have made unrestricted reports of sexual assault. AFI 36-3208 provides victims the opportunity to request the General Court-Marital Convening Authority to review a discharge case if the victim made an unrestricted report of sexual assault within the 12 months prior to being notified of an involuntary discharge if that victim believed the discharge was initiated in retaliation for making the unrestricted report.

-- Mandatory General Court-Martial (GCM) and Statute of Limitations: Specified sexual assault offenses referred to a court-martial are now required to be referred to a GCM. This change in the UCMJ impacts a number of sexual assault offenses. In addition, UCMJ, Art. 56 makes a punitive discharge mandatory for a conviction of the same specified offenses under Article 18. Finally, UCMJ, Art. 43 was amended and the statute of limitation was removed for certain sexual assault cases.

-- Victim Consultation: Victims have a number of rights under UCMJ, Art. 6b (addressed in the section on the Victim Witness Assistance Program). In an effort to ensure victims are accorded their rights; commanders and legal offices are required to consult with victims (of all crimes) prior to taking a number of military justice related actions. The list of actions is provided in AFI 51-201, para. 7.12.12.

Addressing Victim Misconduct

- An investigation into the facts and circumstances surrounding an alleged sexual assault may develop evidence that the victim engaged in misconduct like underage drinking or other related alcohol offenses, adultery, drug abuse, fraternization, or other violations of instructions, regulations, or orders

  -- In accordance with the UCMJ, the MCM, and Air Force Instructions, commanders are responsible for ensuring victim misconduct is addressed in a manner that is consistent and appropriate to the circumstances.

    --- A commander's authority might be limited, based on the type of offense involved

    --- Commanders are expected to consult with their servicing SJA and use appropriate personnel actions to resolve any allegations of victim misconduct

  -- If not withheld by a superior authority, commanders have the authority to determine the appropriate disposition of alleged victim misconduct, to include deferring disciplinary action until after disposition of the sexual assault case

  -- When considering what corrective actions may be appropriate, commanders must balance the objectives of holding members accountable for their own misconduct with the intent to avoid unnecessary additional trauma to sexual assault victims and to encourage reporting of sexual assaults

  -- The gravity of any collateral misconduct by the victim and its impact on good order and discipline should be carefully considered in deciding what, if any, corrective action is appropriate

Commander Response to Allegations of Sexual Assault

- Commanders notified of a sexual assault through unrestricted reporting must take immediate steps to ensure the victim's physical safety, emotional security, and medical treatment needs are met, and that the AFOSI or appropriate criminal investigative agency is notified

- Attachment 4 to the Air Force Sexual Assault Policy is a checklist for assisting commanders in responding to allegations of sexual assault. Its primary objective is to assist commanders in safeguarding the rights of the victim and the subject, as well as addressing appropriate unit standards and interests. In all cases, commanders should seek the advice of the SJA in using the checklist before taking action.

- The appropriate commander should determine whether temporary reassignment or relocation of the victim or subject is appropriate, or possibly a permanent change of station, including humanitarian reassignment

- Commanders should consider whether no contact orders or Military Protective Orders (DD Form 2873) are required

- Sex Offender Registration: It is the policy of the DoD that any service member convicted in a general or special court-martial of any specified sexual offense must register with the appropriate authorities in the jurisdiction the service member will reside, work, or attend school upon leaving confinement (or upon conviction if not confined)

  -- The specific offenses requiring a convicted member to register are listed in AFI 51-201, sec. 13L.

References

UCMJ Arts. 6b, 18, 43, 56, 120, 120a, 120b, and 120c

National Defense Authorization Act for Fiscal Year 2014

10 U.S.C. § 113 (2014)

Rule for Courts-Martial 306 (2015)

Memorandum, Secretary of Defense, *Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases* (20 April 2012)

Memorandum, Under Secretary of Defense for Personnel and Readiness, *Collateral Misconduct in Sexual Assault Cases* (JTF-SAPR-001) (12 November 2004)

DoDI 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority* (11 March 2013)

AFPD 51-5, Military Legal Affairs (27 September 1993)

AFI 31-105, *Air Force Corrections System* (15 June 2015)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

AFI 71-101, Vol 1, *Criminal Investigations Program*, (8 October 2015), certified current 17 December 2015

AFI 90-6001, *Sexual Assault Prevention and Response (SAPR) Program* (21 May 2015), incorporating Change 1, 18 March 2016

AIR FORCE VICTIM WITNESS ASSISTANCE PROGRAM

The Air Force Victim and Witness Assistance Program (VWAP) provides guidance for the protection and assistance of victims and witnesses, enhances their roles in the military criminal justice process, and preserves the constitutional rights of an accused. VWAP is a multidisciplinary program established at the installation level. It has three primary objectives. Those objective are first, to mitigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by U.S. Air Force authorities; second, to foster cooperation between victims, witnesses, and the military justice system; and third, to ensure best efforts are extended to protect the rights of victims and witnesses.

Overview

- The Air Force Responsible Official (the person responsible for coordinating, implementing and managing) for the Air Force VWAP is The Judge Advocate General (TJAG) of the Air Force. The Local Responsible Official (LRO) at an Air Force base is the installation commander or the Special Court-Martial Convening Authority. The LRO often delegates LRO duties to the Installation Staff Judge Advocate (SJA).

- The SJA appoints a VWAP Coordinator to implement and manage the VWAP. The VWAP Coordinator is also responsible for annual training and can serve as a Victim Liaison.

- Victim Liaison is an individual appointed by the LRO or delegate to assist a victim during the military justice process. Communications between a victim and victim liaison are **NOT** considered confidential for the purposes of Military Rule of Evidence 514.

- Each agency (Office of the Staff Judge Advocate (JA), Security Forces, Air Force Office of Special Investigations (AFOSI), Chaplin (HC) and Medical Group (MDG)) is responsible for training personnel on their responsibilities. The SJA trains commanders and first sergeants.

- Each installation should prepare an information packet modeled after figure 7.3 of AFI 51-201, *Administration of Military Justice*, and provide the packet to each victim/witness. See also DD Form 2701, *Initial Information for Victims and Witnesses of Crime*; DD Form 2702, *Court-Martial Information for Victims and Witnesses of Crime*; and DD Form 2703, *Post-Trial Information for Victims and Witnesses of Crime*.

Victim Rights

- Article 6b of the UCMJ established eight rights for crime victims. These rights can be enforced by the Court of Criminal Appeals through a Writ of Mandamus. For the purposes of Article 6b and VWAP a victim is defined as a person who suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ. There is no burden of proof for these rights to apply. A victim has the right:
    - To be reasonably protected from the accused
    - To reasonable, accurate, and timely notice of specified hearings
    - Not to be excluded from any public hearing or proceeding
    - To be reasonably heard at specified hearings
    - To confer with government counsel for proceeding
    - To receive restitution as provided by law
    - To proceedings free from unreasonable delay
    - To be treated with fairness and with respect for his/her dignity and privacy

LRO Responsibilities to Crime Victims

- In addition to the proceeding victims' rights, the LRO also has specific responsibilities toward crime victims under VWAP
    - Inform eligible victims of the ability to consult with special victims' counsel and or a legal assistance attorney
    - Inform victims about sources of medical and social services
    - Inform victims of restitution or other relief to which they may be entitled
    - Assist victims in obtaining financial, legal, and other social services
    - Inform victims concerning protection against threats or harassment

-- Provide victims notice of the status of investigation or court-martial, preferral of charges, acceptance of a guilty plea or announcement of findings, and the sentence imposed

-- If administrative action is taken

--- LRO may reveal "appropriate administrative action was taken"

--- LRO **MAY NOT** reveal the specific action taken, e.g., Article 15 punishment, because it is not public knowledge and is protected by the Privacy Act

-- Safeguard the victim's property if taken as evidence and return it as soon as possible

--- Evidence in a sexual assault case will be returned to the victim as soon as all legal, adverse action, or administrative proceedings are complete

-- Consult with victims and consider their views on preferral of court-martial charges, pretrial restraint, dismissal of charges, pretrial agreements, discharge in lieu of court-martial, and scheduling of judicial proceedings. Although victims' views should be considered, nothing in the VWAP limits the responsibility and authority of officials involved in the military justice process from taking any action deemed necessary in the interest of good order and discipline and/or preventing service discrediting conduct.

-- Designate a victim liaison when necessary

LRO Responsibilities to All Witnesses

- Notify authorities of threats and assist in obtaining restraining orders

- Provide a waiting area removed from and out of the sight and hearing of the accused and defense witnesses

- Assist in obtaining necessary services such as transportation, parking, child care, lodging, and court-martial translators/interpreters

- If the victim/witness requests, take reasonable steps to inform his/her employer of the reasons for the absence from work, as well as notify creditors of any serious financial strain incurred as a direct result of the offense

- Provide victims and witnesses necessary assistance in obtaining timely payment of witness fees and related costs

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

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References

UCMJ Art. 6b
Military Rules of Evidence 514 (2015)
DoDD 1030.01, *Victim and Witness Assistance* (13 April 2004), certified current 23 April 2007
DoDI 1030.2, *Victim and Witness Assistance Procedures* (4 June 2004)
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

TRANSITIONAL COMPENSATION FOR VICTIMS OF ABUSE

Federal legislation provides for transitional assistance to abused dependents of military members. The assistance provided can be an extension of benefits and/or a monetary pay for a set period of time. It is DoD policy to provide monthly transitional compensation payments and other benefits for dependents of members who are separated for dependent abuse. Applicants initiate requests for transitional compensation through the member's unit commander or Military Personnel Flight (MPF).

Eligibility for Transitional Compensation

- Dependents of members of the armed forces who have been on active duty for more than 30 days and who, after 29 November 1993, are:

  -- Separated from active duty under a court-martial sentence resulting from a dependent- abuse offense

  -- Administratively separated from active duty if the basis for separation includes a dependent-abuse offense

  -- Sentenced to forfeiture of all pay and allowances by a court-martial which has convicted the member of dependent-abuse offense

- Dependents are ineligible to receive any transitional compensation if they remarry, cohabitate with the member, or are found to have been an active participant in the dependent abuse

- Dependent abuse includes crimes such as sexual assault, rape, sodomy, battery, murder, and manslaughter

Types of Transitional Compensation

- Monthly monetary compensation (10 U.S.C. § 1059)

- Commissary and exchange benefits (10 U.S.C. § 1059)

- Medical and dental care (10 U.S.C. § 1076)

Application Procedures

- Eligible dependents request transitional compensation by completing DD Form 2698, *Application for Transitional Compensation*

- Requests are made through the member's unit commander or through the MPF at any Air Force installation when the applicant is no longer at the installation in which the member was assigned

- Unit representative will assist the dependent with the completion of DD Form 2698

- MPF commander will coordinate the package and obtain a written legal review from the SJA. The installation commander is the approval authority.

- If approved, transitional compensation can last between 12 and 36 months, depending on the circumstances

  -- For cases approved 22 September 2014 and after, the compensation period will be 36 months

  -- For cases approved prior to 2 September 2014, the compensation period is between 12 and 36 months

- The monthly amount for transitional compensation is set by Congress

  -- In 2009, the compensation was set at $1154 per month, plus $286 for each dependent child

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References

10 U.S.C. § 1059
10 U.S.C. § 1076
38 U.S.C. § 1311
DoDI 1342.24, *Transitional Compensation for Abused Dependents* (23 May 1995), incorporating Change 1, 16 January 1997
AFI 36-3024, *Transitional Compensation for Abused Dependents* (15 September 2003), incorporating Change 1, 4 December 2007, certified current 10 November 2009, including AFI36-3024_AFGM2015-01, 19 November 2015
DD Form 2698, *Application for Transitional Compensation* (January 1995)

MEDIA RELATIONS IN MILITARY JUSTICE MATTERS

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

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

Providing Information

- AFI 51-201, *Administration of Military Justice*, sec. 13D, covers the rules for releasing information pertaining to criminal proceedings. It prohibits release of information that could reasonably be expected to interfere with law enforcement proceedings or deprive a person of a right to a fair trial or an impartial adjudication in a criminal proceeding.

- The release of extrajudicial statements is a command responsibility. The convening authority (CA) responsible for the criminal proceeding makes the ultimate decision about release of extrajudicial statements relating to that criminal proceeding. Major command (or equivalent) commanders may withhold release authority from subordinate commanders.

- If a proposed extrajudicial statement is based on information contained in agency records, the office of primary responsibility for the record should also coordinate prior to release

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

Extrajudicial Statements Generally

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

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

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

Prohibited Extrajudicial Statements

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

  -- The existence or contents of any confession, admission, or statement by the accused, or the accused's refusal or failure to make a statement

  -- Observations about the accused's character and reputation

  -- Opinions regarding the accused's guilt or innocence

  -- Opinions regarding the merits of the case or the merits of the evidence

  -- References to the performance of any examinations, tests or investigative procedures (e.g., fingerprints, polygraph examinations, and ballistics or laboratory tests), the accused's failure to submit to an examination or test, or the identity or nature of physical evidence

  -- Statements concerning the identity, expected testimony, disciplinary or criminal records, or credibility of prospective witnesses

  -- The possibility of a guilty plea or other disposition of the case other than procedural information concerning such processes

  -- Information government counsel knows or has reason to know would be inadmissible as evidence in a trial

  -- Before sentencing, facts regarding the accused's disciplinary or criminal record, including nonjudicial punishment, prior court-martial convictions, and other arrests, indictments, convictions, or charges. Do not release information about nonjudicial punishment or administrative actions even after sentencing, unless admitted into evidence. However, a statement that the accused has no prior criminal or disciplinary record is permitted.

Permissible Extrajudicial Statements

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

  -- General information to educate or inform the public concerning military law and the military justice system

  -- If the accused is a fugitive, information necessary to aid in apprehending the accused or to warn the public of possible dangers

  -- Requests for assistance in obtaining evidence and information necessary to obtain evidence

  -- Facts and circumstances of an accused's apprehension, including time and place

  -- The identities of investigating and apprehending agencies and the length of the investigation, only if release of this information will not impede an ongoing or future investigation and the release is coordinated with the affected agencies

  -- Information contained in a public record, without further comment

  -- Information that protects the military justice system from matters that have a substantial likelihood of materially prejudicing the proceedings

    --- Such information will be limited to that which is necessary to correct misinformation or to mitigate the substantial undue prejudicial effect of information or publicity already available to the public. This can include, but is not limited to, information that would have been available to a spectator at an open Article 32 investigation or an open session of a court-martial.

- The following extrajudicial statements may normally only be made after a CA has disposed of preferred charges by directing an Article 32 preliminary hearing or has referred the charges to court-martial, subject to the limitations stated above (substantial likelihood of prejudice and prohibitions under FOIA, PA, and/or VWAP):

  -- The accused's name, unit, and assignment

  -- The substance or text of charges and specifications, provided there is a statement included explaining that the charges are merely accusations and that the accused

is presumed innocent until and unless proven guilty. As necessary, redact all VWAP and PA protected data from the charges and specifications.

  - The scheduling or result of any stage in the judicial process

  - Date and place of trial and other proceedings, or anticipated dates, if known

  - Identity and qualifications of appointed counsel

  - Identities of convening and reviewing authorities

  - A statement, without comment, that the accused has no prior criminal or disciplinary record or that the accused denies the charges

  - The identity of the victim where the release of that information is not otherwise prohibited by law. Generally, however, do not release information identifying victims, especially the names of children or victims of sexual offenses.

- Do not volunteer the identities of the court members or the military judge in material prepared for publication. Prerequisites for release are:

  - Release authorized after the court members or military judge have been identified in the court-martial proceeding; and

  - The CA's SJA determines that release would not prejudice the accused's rights or violate the members' or military judge's privacy interests

Article 32 Hearings

- Article 32 hearings should ordinarily be open to the public

  - Access by spectators to all or part of the proceeding may be restricted or foreclosed by the CA who directed the hearing or by the preliminary hearing officer (PHO) when, in that officer's opinion, the interests of justice outweigh the public's interest in access (e.g., protecting the safety or privacy of a witness, preventing psychological harm to a child witness, or protecting classified information)

  - CAs or PHOs must conclude that no lesser methods short of closing the preliminary hearing will protect the overriding interest in the case

  - If a CA or PHO orders a hearing closed, he/she must make specific findings of fact, in writing, for the closure, which must be attached to the PHO's report

Release of Information from Records of Trial or Related Records

- Once a completed record is forwarded, AFLOA/JAJM is the disclosure authority for all records and associated documents

Reducing Tension with the Media

- Command should take positive steps to reduce tension with the media
  - -- Have the SJA and public affairs officer (PAO) work together to develop a coordinated press release that explains how the military justice system works and how it compares and contrasts with the civilian system
  - -- Advise the media up-front of the prohibition against courtroom photography, television, and audio and visual recording, and provide an alternate location, room or office for media interviews, broadcasts, etc.
  - -- Provide reserved seating in the courtroom for at least one pool reporter and a sketch artist
  - -- Air Force representatives must not encourage or assist news media in photographing or televising an accused being held or transported in custody

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References

The Freedom of Information Act, 5 U.S.C. § 552
The Privacy Act of 1974, 5 U.S.C. § 552a
Rule for Courts-Martial 405 (2015)
AFI 33-332, *Air Force Privacy and Civil Liberties Program* (12 January 2015)
AFI 35-101, *Public Affairs Responsibilities and Management* (12 January 2016)
AFI 35-104, *Media Operations* (13 July 2015)
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

ARREST BY CIVIL AUTHORITIES

When a commander receives notice from any source (e.g., a unit member, security forces (SF), or the Air Force Office of Special Investigations (AFOSI)) that a member of his/her command is being held by civilian authorities or is charged with a criminal offense, he/she should take prompt action.

Initial Actions Following Report of Service Member Arrest by Civilian Authorities

- The commander or a representative of the unit should contact the civilian authorities, inform them the person is a military member, and gather the following information:
  - The charge against the member
  - The facts and circumstances surrounding the charged offense; and
  - The maximum punishment the member faces
- If possible, make arrangements for the member's return to military control
  - **DO NOT** state or imply the Air Force will guarantee the member's presence at subsequent hearings
  - **DO NOT** post bond for the member or personally guarantee any action by the member (unless you are willing to accept personal responsibility and liability)

Release of Criminal Jurisdiction by Civilian Authorities to Military Authorities

- When a military member commits an offense off base in violation of both civilian (state law) and military law (which is federal law) (e.g., rape, robbery, murder) the member is subject not only to prosecution by the state, but also the military
- While prosecution by both the state and federal governments for the same offense is constitutionally permissible (separate sovereigns), Air Force policy is that if the state is prosecuting a member for an offense, the Air Force will not take UCMJ action against the member without approval of the Secretary of the Air Force (SecAF)
  - Air Force policy is to request criminal jurisdiction from applicable civilian authorities for any qualifying offenses (offenses also under military law) by service members

- -- The determination of which sovereign (state or federal) shall exercise jurisdiction should be made through consultation or prior agreement between appropriate Air Force and civilian authorities

- -- Off-base offenses committed by a military member on active duty may be tried by court-martial or civilian courts. The question of personal military jurisdiction turns on the military status of the offender at the time of the offense, not where the offense occurred.

- -- The court-martial convening authority will often request that the civilian authorities waive jurisdiction and permit the Air Force to prosecute the offender

- -- The staff judge advocate (SJA) will assist in coordinating with the local authorities

- As a general rule, military status will not be used to avoid orders of civilian courts

Delivering Military Members Stationed in the United States to Civilian Authorities:

- Requests from federal authorities for members stationed in the United States will normally be granted when a warrant has been issued

- Requests by state authorities for members located in that state will normally be granted when the state produces documents preferring charges

  - -- The Air Force will not transfer a member from one state to another for purposes of making them amenable to prosecution by civilian authorities. The state seeking the member must proceed through normal civilian extradition channels.

  - -- Commanders will respond promptly to requests from civil authorities within the United States for assistance. A commander exercising general court-martial convening authority (GCMCA) jurisdiction, or an installation commander when authorized by the officer exercising GCMCA jurisdiction, may authorize delivery of a member of his or her command to federal or state civil authorities.

Delivering Military Members Stationed Overseas to Civilian Authorities

- A GCMCA, or an installation or equivalent commander designated by the GCMCA, shall order the return of a member from an overseas assignment, at government expense, if the member is convicted or charged with a felony or other serious offense (punishable by confinement for more than 1 year), or if the offense involves taking a child out of the jurisdiction of a court or from the lawful custody of another person

-- In any lesser case, the GCMCA, or an installation equivalent commander designated by the GCMCA, may order the return of the member when deemed appropriate under the facts and circumstances of each particular case, following consultation with the SJA

--- Only the Under Secretary of Defense for Personnel and Readiness (USD P&R) may deny a request for delivery of a military member to federal, state, or local civilian authorities for a felony or for taking a child out of the jurisdiction of a court or from the lawful custody of another person. The Judge Advocate General may deny requests in all other cases, or grant a delay of not more than 90 days.

-- Consult with the SJA to route civilian requests for the return of a member from overseas through the Air Force Legal Operations Agency, Military Justice Division (AFLOA/JAJM), The Judge Advocate General (TJAG), and, if necessary, the USD P&R

-- A GCMCA, or his or her designee, may request denial of the civilian request based on one or more of the following reasons:

--- Loss of the member from the unit would have an adverse impact on operational readiness or mission accomplishment

--- An international agreement or other overriding legal requirement precludes the member's delivery

--- Member is the subject of foreign judicial proceedings, a court-martial, or a U.S. military investigation such that the member cannot be immediately made available to civilian authorities

--- Member has demonstrated that non-compliance with the court order that is the subject of the request for delivery is legally justified, or sanctioned by supplemental court orders, equally valid court orders of other jurisdictions, good faith legal efforts to resist the original orders, or other legal reasons

Physical Restraint or Confinement Pending Delivery

- An Air Force member may be placed under physical restraint or confinement by his or her commander pending delivery to civilian authorities, provided there is a reasonable belief that the member committed the offense and a reasonable belief that restraint or confinement is necessary

Civilians Associated with the Air Force

- Commanders ordinarily do not have authority to compel civilian compliance with court orders, but will strongly encourage civilians associated with their organizations to comply with valid orders of federal and state courts, to include the use of adverse administrative actions against civilian employees and withholding of official command sponsorship for military dependents, where appropriate

Military Members in Civilian Custody or Post-Conviction

- An AF IMT 2098, *Duty Status Change*, reflecting a duty status change must be prepared and forwarded to the military personnel flight when a member is in civilian custody

- If the member is convicted of an offense which would, if tried by court-martial, subject the member to a punitive discharge, the member is subject to involuntary administrative separation from the Air Force with a less than honorable service characterization (general or under other than honorable conditions discharge)

- If the member is convicted of an offense (or one closely related to an offense under the UCMJ) that would, if tried by court-martial, subject the member to a punitive discharge and confinement for one year or more, the commander must either recommend involuntary separation or submit a request for waiver of discharge. The decision should be made promptly, as an extended period of inaction may result in a waiver of the right to process the member for separation.

  -- The member's absence due to confinement in a civilian facility does not bar processing the member for separation, but an approved discharge may not be executed until the member is released and returned to the United States

  -- The commander must obtain information from the civilian authorities concerning the final disposition of the case. The SJA, with the SF, or AFOSI, will assist.

  -- If a member is charged with or convicted of an offense that does qualify for or warrant separation, various disciplinary actions, such as unfavorable information file (UIF), control rosters, or administrative reprimands, may still be appropriate. Consult with the SJA.

References

UCMJ Art. 14

DoDI 5525.09, *Compliance of DoD Members, Employees, and Family Members Outside the United States with Court Orders* (10 February 2006)

DoDI 5525.11, *Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members* (3 March 2005)

AFPD 51-10, *Making Military Personnel, Employees, and Dependents Available to Civilian Authorities* (19 October 2006), certified current 2 December 2012

AFI 36-3207, *Separating Commissioned Officers* (9 July 2004), incorporating through Change 6, 18 October 2011

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 51-1001, *Delivery of Personnel to United States Civilian Authorities for Trial,* (28 August 2014)

AF IMT 2098, *Duty Status Change* (30 June 2003)

ADVISING SUSPECTS OF RIGHTS

At times, a commander, or any other person subject to the UCMJ, may need to question a member suspected of committing some other offense. When this arises, it is essential to follow the legal requirement of Article 31 of the UCMJ.

Overview

- It is essential that a commander understands when and how to advise a member of their Article 31 rights

  -- When a commander, law enforcement, or any other person subject to the UCMJ, interrogates or requests any statement from an Airman suspected of an offense, that individual must first warn the Airman of their Article 31 rights

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

  -- Admissions or confessions made in response to a defective Article 31 rights advisement, or in the absence of a necessary Article 31 rights advisement, cannot normally be admitted as evidence at trial. Additionally, other evidence, both physical and testimonial, that may have been discovered or obtained as a result of the unadvised statements is usually inadmissible at trial.

- Advisement of rights for both military personnel and civilians is set out in the attached Advisement for Military Suspects and Advisement for Civilian Suspects located at the end of this chapter

When Article 31 Rights are Required

- When a person subject to the UCMJ, suspects someone (also subject to the UCMJ) of an offense, then starts interrogating or requests any statement from that individual, and those statements regard the offense of which the person is questioned or suspected

- When active duty members question members of the Individual Ready Reserve (IRR)

- An interrogation or request for a statement does not have to involve actual questions. Sometimes actions, if they are intended to elicit responses, are deemed to be interrogation. For example, a commander declares, "I don't know what you were thinking,

but I'm assuming the worst," while shrugging his shoulders and shaking his head. Even though the commander has not asked a question, his statement and actions could be deemed an interrogation because they were likely to elicit a response.

Who Must Provide Article 31 Rights Advisements?

- When the questioner is subject to the UCMJ and is acting in an official, law enforcement or disciplinary investigation or inquiry, or could reasonably be perceived to be acting in such capacity

- Military supervisors and commanders are presumed to be acting in a disciplinary capacity when questioning a subordinate. Supervisors and commanders are held to a high standard. When in doubt, give the rights advisement and consult with your staff judge advocate (SJA).

What Information Must the Article 31 Rights Advisement Include?

- Allegation must be specific enough so the suspect understands what offense you are questioning him/her about.

  -- Legal specifications are not necessary; lay terms are sufficient

  -- General nature of the offense is sufficient but should be more than just reading the Article number of which the person is suspected of violating

- Right to remain silent

- Consequences of making a statement

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

- Article 31 does not include a right to counsel, although one is provided in the Constitution. The right is listed on the rights advisement card, however, and should be included when reading Article 31 rights.

Rights Advisement Must be Understood and Acknowledged by the Suspect

- Suspect Must:
  - (1) Affirmatively acknowledge understanding of the rights;
  - (2) Affirmatively waive their rights; and
  - (3) Consent to make a statement without counsel present
- Consent to make a statement cannot be obtained by coercion, threats, or any other tactics utilized for the purpose of eliciting a false confession
- Be cautious when advising an intoxicated person of his rights. If significantly under the influence of drugs or an intoxicant, the individual may be legally incapable of knowingly and voluntarily waiving his rights.
- If a suspect wavers over whether or not to assert his/her rights, best practice is to clarify whether or not the suspect will waive his/her rights and not ask any further questions until all doubt is resolved

When to Stop Questioning

- If the individual indicates a desire to remain silent, stop questioning
  - This does not mean, however, that you cannot give the individual orders or directions on other matters
- If the suspect requests counsel, stop questioning
  - Inform the SJA and get advice before re-initiating any questioning
  - No more questions can be asked until counsel is present, or there has been a sufficient break in custody to permit the accused a meaningful opportunity to consult with counsel

Re-initiation of Questioning Following an Earlier Article 31 Rights Invocation

- There are three circumstances under which questioning may be re-initiated with a suspect following an earlier Article 31 rights invocation:
  - The suspect re-initiates the questioning

-- You are questioning the suspect about a different offense

-- There has been a sufficient "break in custody" to permit the accused a meaningful opportunity to seek/consult with counsel

--- Rule of Thumb: 14-day break in custody is sufficient. Prior to the preferral of charges, if there is a 14-day break in custody between the initial rights invocation and the re-initiation of questioning, you are permitted to re-initiate questioning.

--- Shorter "breaks in custody" may also be permissible, so long as the accused has had a meaningful opportunity to seek/consult with counsel, in the interim

- Nonetheless, if a suspect has asserted their rights, do not speak to that individual again regarding the offense in question unless you have consulted with the SJA

Suspect Acknowledgement and Waiver of Article 31 Rights

- When possible, obtain the waiver in writing using AF IMT 1168, *Statement of Suspect*

- Have a witness present

- Try to get the statement in writing. A clearly handwritten statement by a suspect is preferred, but also consider having the suspect fill out the AF IMT 1168 electronically, if reasonable under the circumstances.

- If after electing to talk, a suspect changes their mind and decides to stop talking, **stop all questioning!**

- Prepare a memorandum for record after the session ends, including:

-- Where the session was held

-- What and when you advised the suspect

-- What the suspect said

-- What activities took place (suspect sat, stood, smoked, drank, etc.)

-- What the suspect's attitude was (angry, contrite, cooperative, combative, etc.)

-- Duration of the session with inclusive hours

References

UCMJ Art. 31
Maryland v. Shatzer, 559 U.S. 98 (2010)
United States v. Vaughters, 44 M.J. 377 (C.A.A.F. 1996)
United States v. Cohen, 63 M.J. 45 (C.A.A.F. 2006)
United States v. Jones, 73 M.J. 357 (C.A.A.F. 2014)
United States v. Gilbreath, 74 M.J. 1 (C.A.A.F. 2014)
Military Rules of Evidence 304 and 305 (2015)
AF Visual Aid 31-231, *Advisement of Rights* (2 May 2014)
AF IMT 1168, *Statement of Suspect/Witness/Complainant* (1 April 1998)

Attachments

Advisement for Military Suspects
Advisement for Civilian Suspects

Advisement for Military Suspects

I am _____ (grade, if any, and name), member of the (Air Force Security Police/AFOSI). I am investigating the alleged offense(s) of _____ of which you are suspected. I advise you that under the provisions of Article 31 UCMJ, you have the right to remain silent, that is, to say nothing at all. Any statement you do make, either oral or written, may be used against you in a trial by court-martial or in other judicial, nonjudicial or administrative proceedings. You have the right to consult with a lawyer prior to any questioning and to have a lawyer present during this interview. You have the right to military counsel free of charge. In addition to military counsel, you are entitled to civilian counsel of your own choosing at your own expense. You may request a lawyer at any time during this interview. If you decide to answer questions, you may stop the questioning at any time. Do you understand your rights? Do you want a lawyer? (If the answer is yes, cease all questions at this point). Are you willing to answer questions?

Advisement for Civilian Suspects

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

INSPECTIONS AND SEARCHES

This discussion is only a general overview of the rules governing searches, seizures, and inspections. Because there are many legal considerations and technical aspects involved in this area, which are very fact dependent, it is necessary to seek legal advice from the legal office when questions arise.

Military law authorizes a commander to direct inspections of persons and property under his or her command and to authorize probable cause searches and seizures of persons and property under his or her command. However, a commander who authorizes a search or seizure must be neutral and detached from the case and facts. Therefore, the command functions of gathering facts and maintaining overall military discipline must remain separate from the legal decision to grant search authorization.

Most bases have centralized the search authorization role in the installation commander, who is also often the special court-martial convening authority. The installation commander has discretion to appoint, in writing, up to four military magistrates who may also authorize search and seizure (including apprehension) requests. Each magistrate must receive training provided by the staff judge advocate on search and seizure issues.

A commander should also know the difference between inspections/inventories and searches/ seizures. Understanding this distinction will help ensure crucial evidence can be introduced at trial.

Key Terms

- Searches: Examinations of a person, property, or premises, for the purpose of finding evidence for use in trial by court-martial or in other disciplinary proceedings

- Seizures: The meaningful interference with an individual's possessory interest in property

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

- Inventories: Administrative actions that account for property entrusted to military control

- Apprehension: The taking of a person into custody

Searches

- A search may be authorized upon:
  - -- Persons subject to military law and under the commander's command
  - -- Persons or property situated in a place under the commander's command and control
  - -- Military property or property of a nonappropriated fund instrumentality (NAFI)
  - -- Property situated in a foreign country which is owned, used, occupied by or held in the possession of a member of your command
- A search may be authorized for the following types of evidence:
  - -- Contraband, e.g., drugs, unauthorized government property
  - -- Fruits of a crime, e.g., stolen property, money
  - -- Evidence of a crime, e.g., bloody stained clothing, weapon, fingerprints, bodily fluids

Probable Cause Searches

- As a general rule, probable cause must be present before a commander can legally authorize a search
  - -- Probable cause exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched
  - -- Probable cause may arise from your personal knowledge, hearsay, or written evidence, or both
  - -- The search authority will make a decision based on the "totality of the circumstances," i.e., believability of information and specific known facts
  - -- An anonymous telephone call, by itself, does not justify a probable cause search
  - -- When relying on military working dogs to establish probable cause, the search authority should be aware of the dog's successful training exercises as well as the dog's actual record of success in similar search situations

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

- The search may be an oral authorization to search, based upon probable cause, when exigent circumstances exist and there is a reasonable belief that a delay in obtaining authorization would result in the removal, destruction, or concealment of the property or evidence sought

Mechanics of a Search Request

- Refer the source of information to security forces who will investigate or refer to Air Force Office of Special Investigations (AFOSI)

- Do not personally investigate

- If the commander becomes knowledgeable of information which may justify a search

  -- "Freeze" the situation (i.e., control access to the area to be searched, if within the commander's control, so that the scene and potential evidence remain undisturbed)

  -- Immediately notify Security Forces Office of Investigations or AFOSI

  -- Note any incriminating evidence or statements

  -- Coordinate facts that can be presented to the search authority to support a finding of probable cause with the legal office

Exceptions to Probable Cause Searches

- A search authorization is not required for the following searches:

  -- <u>Consent Searches</u>:

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

    --- Consent must be voluntary

---- Consent cannot result from threats, coercion, or pressure, e.g., do not tell the suspect that if they do not consent you will obtain authorization anyway. Best practice is to have a third person present.

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

--- Consent may be orally given or in writing. Written consent is preferred. When possible, use AF IMT 1364, *Consent for Search and Seizure*.

--- You may request an individual to consent to a search regardless of whether there was a previously exercised the right to remain silent under UCMJ, Art. 31 or an exercised right to counsel

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

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

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

---- If a suspect occupant is present and does not consent, but a co-occupant who is also present consents, then consent is not valid as to the suspect occupancy

-- <u>Border Searches</u>:

--- Searches upon entry to, or exit from, U.S. installations, enclaves, aircraft, or vessels that are outside the United States

--- Searches of government property not issued for personal use. Property issued for personal use include: dorm rooms, lockers, and housing.

--- Searches within jails, confinement facilities, or other similar facilities

--- Searches incident to a lawful stop or apprehension

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

Special Search Issues

- Computer Searches:

  -- Computer users have a reasonable expectation of privacy in computer files stored on personal computers, personal cell phones, and in personal mass data storage devices

  -- To search personal computer files or storage devices, one must obtain either authorization based on probable cause or consent

  -- A person may have a reasonable expectation of privacy in some aspects of government computers, networks, storage devices, and e-mails. The law in this area is complex— consult your legal office in every instance.

  -- Network administrators who discover evidence of misconduct on a users' account while performing network maintenance may disclose that information to law enforcement or the commander

- Searches of Privatized/Leased Housing:

  -- On-Base Housing: The installation commander and the military magistrate probably have power to authorize searches of privatized housing located on the installation

  -- On-Base Privatized Housing: Under the Military Housing Privatization Initiative (MHPI), the military leases land to private developers who are responsible for housing construction and upkeep. The issue centers on whether the installation commander retains sufficient control over family housing when housing is leased to a private entity—especially on bases with concurrent jurisdiction. Due to sensitive nature of the privacy rights involved, it is essential to consult with your legal office in every instance.

  -- Off Base Housing: Normally commanders do not have sufficient control over leased housing outside the installation to allow them to authorize searches. Commanders should review the lease agreement and consult with their legal office.

Inspections

- Generally: An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle (see Military Rule of Evidence 313)

  -- Inspections are not searches. An impermissible inspection is one that is made for the primary purpose of obtaining evidence for use in trial by court-martial or in other disciplinary proceedings.

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

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

- Methods of Conducting Lawful Inspections: (1) primary purpose is something other than to gain evidence for disciplinary purposes; and (2) inspection is conducted using reasonable means

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

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

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

    --- For example, if the purpose of an inspection is to look for fire hazards near office electrical outlets, inspecting the contents of the desk drawers would probably be unreasonable since items located in the desk drawers would not risk an electrical fire. The inspection will have gone beyond the scope of the purpose of the inspection.

- Inspections for Weapons and Contraband: Inspections for weapons or contraband are specifically permitted while conducting a previously scheduled lawful inspection as long as the examination was not targeted toward specific individuals or employ substantially different intrusion methods and not directed immediately following a report of a specific offense within the unit, organization, or installation

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

  -- An inspection that turns up contraband should continue as planned. Commanders who abandon inspections upon the discovery of contraband risk creating the appearance that the inspection was a search in disguise.

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

- Examples of Lawful Inspections:

  -- Air Force random urinalysis inspection program

  -- Unit/Base wide "dorm sweeps" (ordered by installation/unit commander)

  -- "Unit urinalysis sweep" (urinalysis testing of all or part of a unit on a predesignated day)

  -- "Operation Nighthawk" (selection of random individuals for UA entering the installation in the late evening/early morning hours of a pre-designated day)

  -- Consult with your local staff judge advocate for implementation instructions for an inspection for contraband

Inventories

- Inventories may be conducted for valid administrative purposes including:

  -- Furniture inventories of dormitories or dormitory rooms

  -- Inventories of an absent without leave (AWOL) member's, or a deserter's, property left in a government dormitory room. Commanders should consult their servicing legal office in these cases.

  - Inventories of the contents of an impounded or abandoned vehicle

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

Unfit to Perform Duties & Blood Alcohol Tests

- A blood alcohol test (BAT) is not required under UCMJ, Art. 134 to prove a member to be incapacitated for the performance of their duties by prior wrongful indulgence in alcohol or drug use

- Voluntary BATs:

  - You may, after consultation with your local legal office, ask a member of your command who is suspected of being under influence of alcohol or drugs to voluntarily take a BAT

  - Follow procedures of local hospital/clinic laboratory

- Involuntary BATs:

  - Although commanders have authority over subordinate members within their units, BAT tests are normally directed by a military magistrate (appointed by the installation commander) through a search authorization based on probable cause

- Implied Consent for Alcohol Tests:

  - Drivers give implied consent to tests of their blood, breath, and/or urine for alcohol or drugs when driving on base

  - Invoked by security forces regulations governing driving under the influence (DUI) offenses

  - Often results in automatic adverse action for refusal to cooperate and/or loss of on base driving privileges

- Physician Authorized:

  - For medical reasons directed by an examining physician

  - Results may be used criminally

Use of Military Working Dogs in Searches and Inspections

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

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

- Military working dogs may be used during inspections anywhere within the scope of the inspection, e.g., dormitory rooms, whether the occupant is present or not

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

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

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

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

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

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

  -- After the search of that particular area has been completed pursuant to a search authorization, continue the inspection

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References

UCMJ Art. 31
The Military Housing Privatization Initiative, 10 U.S.C. §§ 2871-85
Military Rules of Evidence 311-317 (2015)
AFMAN 31-116, *Air Force Motor Vehicle Traffic Supervision* (18 December 2015)
AFI 31-121, *Military Working Dog Program* (17 October 2012), incorporating Change 1, 31 March 2015
AFI 31-218(I), *Motor Vehicle Traffic Supervision* (22 May 2006), certified current, 15 July 2011
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016
AF Form 1364, *Consent for Search and Seizure* (18 April 2016)

PRELIMINARY INQUIRY INTO REPORTED OFFENSES

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

Exceptions

- For crimes involving rape, sexual assault, or child sex crimes the initial disposition authority is removed from the immediate commander and placed with the Special Court-Martial Convening Authority (SPCMCA)

- A commander who is a court-martial convening authority or who grants search authority must remain neutral and detached from the cases in which they act in this capacity. Thus, they will typically not act in an investigative capacity.

Initial Investigation of Suspected Offense

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

- Major Offenses: In more serious cases, law enforcement agents such as the Security Forces Office of Investigations (SFOI) or the Air Force Office of Special Investigations (AFOSI) will conduct the investigation and report the results to the commander for disposition of the case. When the commander receives a report of investigation (ROI) from law enforcement, the preliminary inquiry requirement is fulfilled by reviewing the ROI.

Options Available to the Commander

- Ordinarily the immediate commander of a person accused or suspected of committing an offense determines the appropriate initial disposition and should do so in a timely manner

- In any case involving a disciplinary action or a criminal offense, the commander should consult with the local legal office

- Options available to the commander include:

  -- No action

-- Administrative action, e.g., letter of reprimand, removal from supervisory duties, involuntary discharge, denial or reenlistment, etc.

-- Nonjudicial punishment under Article 15

-- Preferral of court-martial charges

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

--- At the time of preferral of charges, the accuser is required to take an oath that he or she is familiar with facts underlying the charges. The accuser is traditionally the commander.

-- Make sure you consult with the legal office on all allegations of a sexual nature. Initial Disposition Authority in those cases has been withheld effective 28 June 2012 by the Secretary of Defense.

-- All allegations of a sexual nature or drug distribution must be referred to AFOSI for investigation

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References

Rules for Courts-Martial 303 and 306 (2015)

SecDef Memorandum, *Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases* (20 Apr 2012)

MILITARY JUSTICE ACTIONS AND THE INSPECTOR GENERAL

The Inspector General (IG) has authority to investigate complaints related to "discipline." This authority is restricted particularly as it relates to actions under the UCMJ. If court-martial charges have already been preferred in a case, the IG should generally not have any direct involvement.

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

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

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

- IG personnel and investigating officers must have expeditious and unrestricted access to all Air Force records, reports, investigations, audits, reviews, documents, papers, recommendations, and other materials relevant to the investigation concerned; IGs are authorized access to all documents and all other evidentiary materials needed to discharge their duties to the extent allowed by law

Role of the IG in UCMJ Matters Should Be Guided by the Following Information

- Prior to a commander's initiation of an action under the UCMJ, the IG may conduct an investigation authorized by applicable regulations

- If misconduct is involved, refer to the provisions in AFI 90-301, para. 6.3.3 and table 3.6; and consult with the local staff judge advocate (SJA)

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

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

- If action is initiated under Article 15, UCMJ, the IG should refer to the provision of AFI 90-301, table 3.6, rule 22

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

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

  -- Assessing the sufficiency of the evidence

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

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

- Additionally, the IG is responsible for investigating allegations of reprisal. Any non-judicial punishment or adverse administrative action taken against the individual who filed the reprisal complaint may be reviewed in the course of that investigation.

References

10 USC, §§ 8014, 8020
Manual for Courts-Martial, United States, Part V (2012)
AFI 36-2603, *Air Force Board for Correction of Military Records* (5 March 2012)
AFI 51-202, *Nonjudicial Punishment* (31 March 2015)
AFI 90-301, *Inspector General Complaints Resolution* (27 August 2015)

PREPARATION, PREFERRAL, AND PROCESSING OF CHARGES

The preparation of court-martial charges involves drafting the charges and specifications. Preferral of charges in the military is the act of formally accusing a military member of a violation of the UCMJ. Processing of the charge involves forwarding the charges and specifications to a convening authority.

Preparation of Charges

- The charge states which article of the UCMJ has allegedly been violated
  - The specification is a concise statement of exactly how the article was allegedly violated
  - Since precise legal language is required, the legal office drafts charges and specifications
  - Charges are documented in Section 10, block II of the DD Form 458, *Charge Sheet*

Preferral of the Charge

- The first formal step in initiating a court-martial
- Anyone subject to the UCMJ may prefer charges against another person subject to the UCMJ
- The immediate commander of an accused is the individual who ordinarily prefers the charge
- Preferral is documented in block III of the charge sheet
- Preferral requires the "accuser," the one preferring the charge, to take an oath that he/she is a person subject to the Code, that he/she either has personal knowledge of or has investigated the charge and specification, and that they are true to the best of his/her knowledge and belief
  - This oath is normally given by a judge advocate
  - An accuser is not required to believe a charge and specification can be proven beyond a reasonable doubt

Processing of the Charge

- Preferral does not require the presence of the accused. However, after preferral, the commander must inform the accused of the charge. Since the commander is normally the accuser, notice to the accused typically occurs at the same time as preferral by the commander reading the charge to the accused.

- The commander then forwards the charge with a transmittal indorsement to the summary court-martial convening authority (SCMCA)

- To convene a court-martial, the charge must be forwarded to a convening authority, usually the special court-martial convening authority (SPCMCA). In the Air Force, the SCMCA is usually also the SPCMCA, so this extra step of forwarding the charge from the SCMCA to the SPCMCA is not required. A judge advocate may be authorized by the SPCMCA to receipt for charges on the SPCMCA's behalf.

- The SPCMCA can dismiss the charges or return the charges to the commander for alternate disposition. If the SPCMCA determines the charges warrant a court-martial, the following actions may be taken:

  -- Refer the charge to a special court-martial or summary court-martial; or

  -- Appoint a preliminary hearing officer (PHO) to conduct an Article 32 preliminary hearing

    --- The PHO completes and forwards the preliminary hearing report to the SPCMCA for review. If the SPCMCA believes a general court-martial is warranted, the SPCMCA forwards the preliminary hearing report along with the charges to the general court-martial convening authority (GCMCA) for review and possible referral to a general court-martial.

    --- The GCMCA can refer the charges to a general court-martial and convene the court-martial, return the charges to the SPCMCA for disposition, or dismiss the charges

- Once the charge has actually been referred to trial, the appointed trial counsel will then formally serve the accused with a copy of the charges and specifications. This is documented in section 15, block IV of the charge sheet.

- Time constraints are involved in the preferral and trial of court-martial charges. An accused's right to a speedy trial and the impact of unnecessary delay can have on the effectiveness of military justice require charges be disposed of promptly.

References

UCMJ Art. 30

Rules for Courts-Martial 306 and 307 (2015)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

DD Form 458, *Charge Sheet* (May 2000)

PRETRIAL RESTRAINT AND CONFINEMENT

Pretrial restraint and pretrial confinement are tools to ensure the appearance of the accused at their upcoming court-martial and/or to prevent the commission of serious misconduct by the accused while awaiting court-martial. There are four types of pretrial restraint: (1) conditions on liberty; (2) restriction in lieu of arrest; (3) arrest; (4) pretrial confinement. Pretrial restraints are not required in every court-martial case. Before ordering any form of pretrial restraint, the commander must be convinced that probable cause establishes that: (1) a UCMJ violation was committed; (2) that the accused committed it; and (3) that the restraint imposed is required by the circumstances to either ensure the presence of the accused at court-martial, or to prevent foreseeable serious criminal misconduct by the accused while pending court-martial. Pretrial restraint/confinement is not intended to be, and should not be used as, pretrial punishment. Pretrial restraints should only be imposed in association with pending court-martial charges.

Overview

- Pretrial restraint (Rule for Courts-Martial (RCM) 304): moral or physical restraint on a person's liberty, imposed before and during disposition of court-martial level offenses

- Pretrial confinement (RCM 305): physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges

  -- Pretrial confinement is the most severe form of pretrial restraint

  -- There is no "bail" in the military justice system, therefore placement into pretrial confinement requires a series of procedural safeguards requiring the government to ultimately demonstrate by a preponderance of the evidence (i.e., more likely than not) that pretrial confinement is necessary under the circumstances

- Selecting the appropriate form of pretrial restraint: Commanders should select the least rigorous restraint necessary to assure appearance of accused at court-martial or prevent commission of foreseeable serious misconduct pending court-martial

- Never impose any form of pretrial restraint without first consulting the local legal office

- The imposition of any form of pretrial restraint starts the speedy trial clock under RCM 707 (120 days), regardless of whether charges have been preferred

Who May Order Pretrial Restraint?

- Only an Airman's commander may impose pretrial restraint on an officer. This authority **MAY NOT** be delegated.

- Any commissioned officer may impose pretrial restraint on any enlisted person

- A commanding officer can delegate authority to order pretrial restraint of enlisted personnel under their command to non-commissioned officers (usually the first sergeant)

Pretrial Restraint Prerequisites

- Requires a reasonable belief that:

  -- An offense triable by court-martial has been committed;

  -- The person to be restrained committed it; and

  -- Restraint is required by the circumstances

- Notice to Individual: Restrained individual must be personally notified of the nature of the offense which is the basis for the restraint and terms of the restraint

- Release from Pretrial Restraint: Except as otherwise provided by RCM 305, a person may be released from pretrial restraint by any person authorized to impose the restraint

Types of Pretrial Restraint

- The four types of pretrial restraint (from least to most severe):

  -- Conditions on Liberty (RCM 304(a)(1))

  -- Restriction in lieu of Arrest (RCM 304(a)(2))

  -- Arrest (RCM 304(a)(3))

  -- Pretrial Confinement (RCM 304(a)(4); 305)

- Conditions on Liberty: Imposed by orders directing a person to do or refrain from doing specified acts
    - May be imposed in conjunction with other forms of restraint or separately
    - Typical examples include orders to report periodically to a specified official, orders not to go to a certain place, and orders not to associate with specified persons
- Restriction in lieu of Arrest: Imposed by ordering a person to remain within specified limits
    - Normally restriction is to remain within the confines of the base
    - A restricted person shall, unless otherwise directed, perform full military duties
- Arrest: The restraint of a person, directing the person to remain within specified limits
    - An arrested person does not perform full military duties
- Pretrial Confinement: Most severe type of pretrial restraint; see requirements below

Procedures Upon Entry Into Confinement

- Placement into pretrial confinement requires additional procedural safeguards to ensure that it is both necessary and justified under the circumstances, including the following four levels of review over the course of the first week of any pretrial confinement:
    - 24-hour commander notification
    - 48-hour probable cause review by a neutral officer
    - 72-hour commander review of necessity of continued pretrial confinement
    - 7 day hearing conducted by a neutral pretrial confinement reviewing officer
- Upon placement into pretrial confinement, the person to be confined must be promptly notified of the following:
    - Nature of the offenses for which he or she is being held
    - Right to remain silent and that any statement made may be used against him/her

  - Right to request assignment of military counsel; or
  - Retain civilian counsel at no expense to the United States
  - Procedures by which pretrial confinement will be reviewed

- UCMJ, Art. 10 requires that "immediate steps" shall be taken to try the person or to dismiss the charges and release the person (usually requiring government to bring accused to trial within 120 days)

24-Hour Notification

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

48-Hour Probable Cause Determination

- Within 48 hours of entry into confinement, a neutral and detached officer must review the adequacy of probable cause to continue confinement by considering the following:
  - Nature and circumstances of the suspected offense
  - Weight of the evidence against the accused
  - Accused's ties to the local community, including family, off-duty employment, financial resources, and length of residence
  - Accused's character and mental condition
  - Accused's service record
  - Accused's record of appearance or flight from similar proceedings
  - Likelihood the accused will commit further serious misconduct if not confined
  - Effectiveness of lesser forms of restraint
- If the commander is neutral and detached and acts within 48 hours, the provision calling for a 48-hour probable cause determination will be satisfied. However, if the commander is not neutral and detached, another officer must make the 48-hour probable cause determination.

72-Hour Commander Review

- If confinement is continued, within 72 hours of entry into confinement, the confinee's commander must prepare a written memorandum justifying continued confinement
  - -- Continued confinement is warranted if the commander has a reasonable belief that:
    - --- Offense triable by court-martial has been committed
    - --- Prisoner committed it
  - -- Confinement is necessary because it is foreseeable that:
    - --- Prisoner will not appear at trial; or
    - --- Prisoner will engage in further serious criminal conduct; and
    - --- Less severe forms of restraint are inadequate
- It is not necessary to try lesser forms of restraint, but they **MUST** be considered in determining whether confinement is appropriate (i.e., commanders should not order someone into pretrial confinement until they have considered whether a lesser restraint would accomplish the task)
- Convenience of the unit is **NOT** a valid reason for pretrial confinement

7-Day Pretrial Confinement Review

- A reviewing officer must make written findings, within seven days of entry into confinement, whether the confinee shall be released or remain confined
- Reviewing officer must be neutral and detached
  - -- Pretrial confinement review officer (PCRO) may be, with limited exception, a member appointed by the convening authority;
  - -- A military magistrate appointed by the convening authority; or
  - -- A military judge, although it is unusual for a judge to conduct initial review of pretrial confinement unless it is after referral of charges

- The PCRO must review the commander's 72-hour memorandum to determine whether the requirements for pretrial confinement are met

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

- A representative of command, such as the commander, first sergeant or other person, may also appear before the hearing officer

- The review is not an adversarial proceeding; prisoner and counsel have no right to cross-examine witnesses, although this is customarily permitted

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

- Prisoners usually receive day-for-day credit for pretrial confinement against any confinement adjudged by the court. Credit for unlawful pretrial confinement, including pretrial punishment, or for restriction tantamount to confinement may lead to additional credit.

No Pretrial Punishment of Pretrial Confinees

- Pretrial confinees **MAY NOT** be treated the same as sentenced prisoners, such as required to wear special uniforms for sentenced prisoners, perform punitive labor, or undergo punitive duty hours

- Whether a particular condition amounts to pretrial punishment is a matter of the intent of the official imposing the condition or of the purposes served by the condition, and whether such purposes are reasonably related to a legitimate governmental objective. However, unduly rigorous circumstances or excessive conditions may give rise to a permissive inference that a particular condition constitutes punishment.

- Pretrial punishment includes public denunciation and degradation

- Commingling pretrial and sentenced prisoners, without more, is not automatically considered pretrial punishment. Case precedent has established commingling with sentenced prisoners or non-resident aliens may lead to credit toward an adjudged sentence.

Review by Military Judge

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

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

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References

UCMJ Arts. 10, 12, and 13
United States v. Zarbatany, 70 M.J. 169 (C.A.A.F. 2010)
United States v. Stringer, 55 M.J. 92 (C.A.A.F. 2001)
Rules for Courts-Martial 304-05, 707 (2015)
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

IMMUNITY

Immunity for an individual should be granted only when testimony or other information from the person is necessary for purposes of maintaining good order and discipline, and when the person has refused or is likely to refuse to testify or provide the information on the basis of the privilege against self-incrimination.

Types of Immunity

- There are two types of immunity under Rule for Courts-Martial (RCM) 704
  - -- Testimonial Immunity: Bars the use of the immunized person's testimony, statements, and information directly or indirectly derived from such testimony or statements against that person in a later court-martial
  - -- Transactional Immunity: Bars **ANY** subsequent court-martial action against the immunized person concerning the immunized transaction, regardless of the source of the evidence against that person
- Testimonial immunity is preferred because it does not prevent the government from trying the person for the criminal offense they testified about, so long as the government does not use immunized statements in any way to prosecute the person
  - -- Best practice is to prosecute that individual first, then obtain a grant of immunity to obtain statements or testimony to be used in the prosecution of the other case
  - -- If prosecution of an immunized person occurs after that person has testified or provided statements under the grant of immunity, the government must prove at the later court-martial that it has not used the person's immunized testimony or statements in any way for the prosecution of that person
- Only a general court-martial convening authority (GCMCA) may grant testimonial or transactional immunity
  - -- The GCMCA may grant immunity to any person subject to the UCMJ
  - -- The GCMCA can disapprove immunity requests for witnesses not subject to the UCMJ
  - -- The GCMCA can only approve immunity requests for witnesses not subject to the UCMJ with authorization from the Department of Justice (DOJ)

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

-- In national security cases, immunity requests **MUST** be coordinated with DOJ and other interested U.S. agencies

Immunity Approval Authority (Non-National Security Cases)

	Court-Martial	U.S. Prosecution
Person Subject to UCMJ	GCMCA	DOJ
Person NOT Subject to UCMJ	GCMCA can disapprove, but may approve only with DOJ approval	DOJ

- A grant of immunity may also include an order to testify

  -- Under Military Rule of Evidence 301(d), an immunized person may not refuse to testify by asserting the Fifth Amendment right against self-incrimination because, as a result of the grant of immunity, that person will not be exposed to criminal penalty

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

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

- Care is required when dealing with an accused or suspect to avoid a grant of *de facto* immunity. This occurs when a person other than the GCMCA:

  -- Manifests apparent authority to grant immunity (commanders, first sergeants, and investigative agents may, by actions or words, manifest apparent authority)

  -- Makes a representation that causes the accused to honestly and reasonably believe that a grant of immunity will be issued if a certain condition is fulfilled and the accused relies on the representation to his/her detriment

- Do not make promises of immunity to any witness without first obtaining immunity approval from the GCMCA

  -- Promises of immunity without GCMCA approval may still be enforced by courts-martial as exercises of "*de facto*" (in fact) immunity

  -- *De facto* ("in fact") immunity will operate the same as an actual grant of immunity

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References

Military Rules of Evidence 301 (2015)
United States v. Morrissette, 70 M.J. 431 (C.A.A.F. 2011)
Rule for Courts-Martial 703 (2015)
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

PRETRIAL AGREEMENTS

Pretrial agreements (PTAs) are agreements between the accused and the convening authority. Generally, the accused agrees to enter a plea of guilty to one or more offenses in exchange for an upper limit on the sentence (period of confinement, type of punitive discharge, amount and/or period of forfeitures, etc.) that the convening authority will approve. The decision to accept or reject a PTA offer submitted by an accused is within the sole discretion of the convening authority that referred the case to trial. The accused is entitled to have the convening authority personally act upon the offer before trial.

Procedures: Initiation of a PTA

- Initiation: Either the government or the defense may initiate PTA negotiations. The defense however, must submit the actual written PTA offer to the staff judge advocate (SJA).

- The SJA will provide the written PTA to the convening authority with a recommendation

- Special Processing for Cases with Department of Justice (DOJ) Interest: SJA will obtain the appropriate approval from the DOJ to enter into PTA discussions or agreements in cases involving an offense of espionage, subversion, aiding the enemy, sabotage, spying, or violation of punitive rules or regulations and criminal statutes concerning classified information or the foreign relations of the United States. This includes attempt, conspiracy, and solicitation to commit any of the above offenses.

- Written PTA Required: Entire PTA must be in writing and signed by the accused, defense counsel, and the convening authority. No informal oral promises/representations are permitted.

Permissible PTA Conditions

- Rule for Courts-Martial (RCM) 705 contains restrictions for permissible PTA terms/conditions

- A promise to enter into a reasonable stipulation of fact concerning the facts and circumstances surrounding the offenses to which the accused pleads guilty

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

- A promise to provide restitution

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

- A promise to waive certain procedural requirements, such as:

  -- An Article 32 investigation

  -- Right to a trial before court members

  -- Right to a trial before military judge sitting alone

  -- Opportunity to obtain the personal appearance of certain witnesses at sentencing proceedings

Withdrawal from PTA

- Before Trial: Either party may void a PTA by withdrawing from it before trial and before either party has begun to act upon the conditions of the PTA

- Convening Authority Withdrawal from PTA: Convening authority may withdraw upon any of the following conditions:

  -- Any time before the accused begins performance of promises contained in the agreement

  -- Upon the accused's failure to fulfill any material promise or condition of the agreement

  -- When the military judge's inquiry discloses a disagreement as to a material term of the PTA

  -- When the findings of guilty are set aside during the appellate review

  -- If an accused has violated conditions of a PTA that involve post-trial misconduct, the convening authority may withdraw up to the time of his/her final action in the case

    --- Convening authority may not withdraw from a PTA in any way that would be unfair to the accused

    --- Any withdrawal must be in writing

Implementation of the PTA at Court-Martial

- At trial, the military judge will conduct a full inquiry into the specific terms of the PTA to ensure the accused fully understands both the meaning and effect of each provision of the PTA, has voluntarily entered into the PTA, and that no oral promises were made in connection with the PTA

- In a trial by military judge alone, the military judge will not examine any sentence cap portions of the PTA until after he or she has independently adjudged a sentence

- In a trial by members, the members will not be told about the PTA until the conclusion of the trial

- Accused will get the benefit of the lesser sentence, regardless of whether it was adjudged or in the PTA

  -- If the sentence adjudged by the military judge or members exceeds the limits of the agreed upon sentencing cap, the convening authority may only approve the lesser sentence agreed to in the PTA

  -- If the adjudged sentence is less than the sentencing cap, only the adjudged sentence may be approved

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References

Rule for Courts-Martial 705 (2015)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

TRIAL FORMAT

A military accused may elect to be tried by a military judge alone or by a panel of court members (the military equivalent of a civilian jury). All panel members must be senior in rank to the accused. In either case, the trial will consist of two major portions: (1) findings (guilt/innocence determination) and, in the event of a conviction at findings, (2) sentencing.

Findings

- First part of the trial during which guilt or innocence is determined. An accused may plead guilty or not guilty

- Guilty Plea:

  -- Military judge questions the accused under oath to make sure he understands the meaning and effect of their plea, and that he/she is, in fact, guilty

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

  -- Guilty pleas are not allowed in death penalty cases

- Not Guilty Plea:

  -- Forum Choice: Accused determines by what type of court martial they wish to be tried. Types of forum depend upon the accused status as officer or enlisted.

    --- Enlisted Accused: An enlisted accused may elect trial by one of the following methods: (1) military judge alone; (2) officer members; (3) mixed panel of officer and enlisted members (at least one-third enlisted members included on the court-martial panel, all of whom must be senior in rank to the accused)

    --- Officer Accused: (1) military judge alone; (2) officer members (all of whom must be senior in rank to the accused)

    --- Trial by military judge alone is not allowed in capital cases

-- Accused is presumed innocent

--- Prosecution must prove the accused's guilt beyond a reasonable doubt

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

-- Court-Martial Panel Voting – Non-Capital Cases: In a trial with members, two-thirds of the members, voting by secret written ballot, must concur in any finding of guilty

-- Court Martial Panel Voting – Capital Cases: In order to sentence the accused to death in a capital case, the vote of guilty on findings must be unanimous

Sentencing

- Second part of the trial during which an appropriate punishment is determined

-- Unlike many civilian courts, sentencing normally occurs immediately following findings

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

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

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

--- Judge-alone sentencing is not permitted in capital cases

-- Sentencing is an adversarial process

--- Prosecution can present matters in aggravation or show lack of rehabilitation and can rebut evidence the accused presents

--- Defense can present matters in extenuation to explain the circumstances surrounding the commission of the offense and/or matters in mitigation to lessen the punishment to be adjudged by the court-martial

--- As in the findings portion of trial, the accused also has an absolute right to remain silent and present no evidence during sentencing

--- A crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at a sentencing hearing relating to that offense

-- In sentencing by members, two-thirds must concur, voting by secret written ballot, in any sentence **EXCEPT**:

--- Sentences over 10 years: three-fourths vote required

--- Death penalty: unanimous vote required

References

Rules for Courts-Martial 903, 910, 913, 918, 921, 1001, 1001A, 1004, and 1006 (2015)

CONFIDENTIALITY AND PRIVILEGED COMMUNICATIONS

In the military, only certain relationships are recognized as involving privileged communication and therefore have confidentiality. Because privileges run contrary to a court's truth-seeking function, they are narrowly construed. Privileges may be waived by the privilege holder. Waiver occurs when the privilege holder voluntarily discloses or consents to disclosure of any significant part of the matter or communication. Commanders must respect the privileges set forth below, absent waiver or an applicable exception to the privilege.

Communications to Clergy (Military Rule of Evidence 503)

- A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made as a formal act of religion or matter of conscience

- Applies to civilians and service members; "clergyman" includes a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman

- Privilege extends to the chaplain's or clergyman's staff

Attorney Client Privilege (Military Rule of Evidence 502)

- Privilege applies to all information confided to an Area Defense Counsel (ADC), Special Victims' Counsel (SVC) or legal assistance attorney during representation, except with respect to some future crimes or frauds upon the court

- Communications between a commander and staff judge advocate are privileged only when the commander is acting as an agent or official of the Air Force and the commander's interests in no way conflict with those of the Air Force

- Privilege extends to non-lawyer members of the attorney's staff, e.g., paralegals, secretaries, etc.

Physician-Patient

- The Military Rules of Evidence (MRE) generally do not recognize a physician-patient privilege

- No privilege for civilians treated in a military facility, but Privacy Act and other federal regulations protect any illegal third party disclosure

Medical Records

- Military medical records are the property of the Air Force

- Information in the health record is personal to the individual and will be properly safeguarded pursuant to the federal Healthcare Information Portability and Protection Act (HIPPA)

- Commanders or commanders' designees may access members' military medical records but only to the extent necessary to ensure mission accomplishment

Psychotherapist-Patient Privilege (Military Rule of Evidence 513 / AFI 44-172)

- A limited privilege exists between persons subject to the UCMJ and psychotherapists

  -- Generally, the limited privilege protects only confidential communications which are made to a psychotherapist (or assistant) for the purpose of diagnosis or treatment of the person's mental or emotional condition in cases arising under the UCMJ

  -- Exceptions include, but are not limited to: when the patient is dead; the communication is evidence of child abuse or neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse, and when there is an allegation of such misconduct the communication contemplates future misconduct; when necessary to ensure safety and security of military personnel or property; or law or regulation imposes a duty to report the information

- Under AFI 44-172, *Mental Health*, communications between a patient and a psychotherapist (or assistant) made for purposes of facilitating diagnosis or treatment of the patient's mental or emotional condition are confidential and must be protected against unauthorized disclosure

  -- A limited privilege also applies to active duty military members ordered to undergo a sanity board pursuant to Rules For Courts-Martial (RCM) 706 and MRE 302

  -- A limited privilege also exists under the Limited Privilege Suicide Prevention (LPSP) Program pursuant to AFI 44-172, which applies to confidences made after notification of an investigation or of suspicion of commission of a criminal act, and placement into the LPSP program

Victim Advocate-Victim Consultations Privilege (Military Rule of Evidence 514)

- A limited privilege exists between victim advocates and victims of a sexual or violent offense

  -- Generally, the limited privilege protects only confidential communications between a victim and a victim advocate in sexual and violent offenses arising under the UCMJ, made for the purpose of facilitating advice or supportive assistance to the victim

  -- Exceptions include, but are not limited to: when the patient is dead; federal/state law or service regulations impose a duty to report; the communication clearly contemplated the future commission of a fraud or crime; when necessary to ensure safety and security of military personnel or property; or disclosure is constitutionally required

Drug/Alcohol Abuse Treatment Patients

- AFI 44-121, *Alcohol And Drug Abuse Prevention And Treatment (ADAPT) Program*, para. 3.7.1, grants limited protections for Air Force members who voluntarily disclose personal drug use or possession. Those protections do not include any future drug abuse.

  -- Such disclosure may not be used as the basis for UCMJ action or for the characterization of service in a discharge proceeding

  -- A member must disclose their drug abuse before the use is discovered or the member is placed under investigation. The member may not disclose after he is ordered to give a urine sample as part of the drug testing program in which the results are pending or have been returned as positive.

- Federal law protects confidentiality of medical records pertaining to drug and alcohol abuse

Spousal Privilege (Military Rule of Evidence 504)

- A spouse may elect not to testify against the other spouse as long as a valid marriage exists at the time they are to provide testimony

- A spouse may prevent testimony by the other spouse (or ex-spouse) regarding private communications made during the marriage even if the marriage has been dissolved at the time of testimony

- Neither privilege applies when one spouse is charged with a crime against, the person or property of the other spouse, child or children of either spouse, if the marriage is a sham as determined by state law, or if the spouses are co-conspirators in crime

Medical Quality Assurance Privilege

- 10 U.S.C. § 1102 generally restricts access to information emanating from a medical quality assurance program activity. Exception: release is authorized "[t]o an officer, employee, or contractor of the Department of Defense who has a need for such [information] to perform official duties."

- Information must only be used for official purposes and safeguarded in accordance with the Privacy Act and other applicable laws and regulations

Family Support Center Program

- Family Support Center (FSC) staff should neither state nor imply that confidentiality exists

- Information collected from members and families must only be used for official purposes and must be safeguarded in accordance with the Privacy Act

- FSC Director will notify the appropriate authority when an Air Force member constitutes a potential danger to self, others, or could have an impact on Air Force mission

References

The Privacy Act of 1974, 5 U.S.C. § 552a
10 U.S.C. § 1102
42 U.S.C. § 290dd-2
Mil. R. Evid. 302, 501-513
United States v. Jasper, 72 M.J. 276 (C.A.A.F. 2013)
Rule for Courts-Martial 706 (2015)
DoD 6025.18-R, DoD *Health Information Privacy Regulation* (24 January 2003)
AFI 33-332, *Air Force Privacy and Civil Liberties Program* (12 January 2015)
AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011
AFI 36-3009, *Airmen and Family Readiness Centers* (7 May 2013), incorporating Change 2, 16 July 2014, AFI36-3009_AFGM2016-01, 18 February 2016
AFI 44-172, *Mental Health* (13 November 2015)
AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment* (ADAPT) Program (8 July 2014)
AFI 41-210, *Tricare Operations and Patient Administration Functions* (6 June 2012)
AFI 51-110, *Professional Responsibility Program* (5 August 2014), including AFI51-110_AFGM2016-01, 7 July 2016

USE OF INFORMATION IN THE PERSONAL INFORMATION FILE AND REHABILITATION TESTIMONY AT COURT-MARTIAL

Personnel records of the accused are generally admitted as evidence at any court-martial sentencing hearing so long as those records are kept in accordance with Air Force regulations. These records are important information to demonstrate a service member's duty record and have a direct bearing on the ultimate sentence imposed at court-martial. Further information about the character of the accused is provided via "rehabilitative potential testimony," which may be provided by any person with sufficient contact with the accused to form an intelligent opinion as to the accused's ability to be rehabilitated to a useful position in society following court-martial.

Information in the PIF

- Documents in a personnel information file (PIF) can be admitted into evidence by the prosecution during the sentencing phase of a court-martial contingent on the following prerequisites:
    - -- Clear from the face of the document that the member received a copy of the document
    - -- Member had an opportunity to respond to the allegations
    - -- Document is not over 5 years old on the date charges were referred to trial
- Document must be complete and kept in accordance with Air Force instructions
- Any response submitted by the member becomes part of the record and must be filed with the action. Otherwise, the record is incomplete and may not be admitted.

Rehabilitation Evidence

- Rule for Courts-Martial (RCM) 1001(b)(5) permits evidence of rehabilitative potential to be introduced in the sentencing phase of the trial
- "Rehabilitative potential" for RCM 1001(b)(5) purposes means "the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society"
    - -- Evidence may be in the form of opinion concerning the accused's previous performance as a service member and potential for rehabilitation

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

-- Witness cannot express an opinion as to whether the accused should receive a punitive discharge or any euphemism as to the appropriateness of a particular sentence

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

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References

Rule for Courts-Martial 1001(b)(2), 1001(b)(5) (2015)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

POST-TRIAL MATTERS, CLEMENCY SUBMISSIONS, CONVENING AUTHORITY ACTION, AND APPEALS

Most parts of court-martial sentences do not go into effect automatically. Rather, they go into effect upon action by the convening authority. All sentences of courts-martial are subject to post-trial clemency review by the convening authority, and appellate review by applicable military authorities. In the event of a court-martial conviction and sentence, the accused has the right to submit post-trial matters to the convening authority for clemency consideration. Further appellate review of the accused's case is determined by the severity of the sentence. Finally, in the event of a court-martial conviction and sentence involving a victim, the victim is also entitled to submit post-trial matters for the convening authority's review during clemency.

Post-Trial Actions: Production of the Record of Trial and Staff Judge Advocate Recommendation

- Following a court-martial conviction, the accused is entitled to a copy of the authenticated record of trial (ROT) and the staff judge advocate's post-trial recommendation (SJAR) to the convening authority as to whether to approve the findings and sentence in the case

- After receipt of the later of these documents, the accused is allotted 10 calendar days (7 for summary courts-martial) to submit clemency matters to the convening authority for the convening authority's consideration as to whether to approve findings of guilt or to approve or disapprove all or part of the sentence

  -- Accused may also request an extension of time of up to 20 days to submit clemency matters

  -- Accused may also waive his/her right to submit clemency matters

- <u>Accused Clemency Submissions</u>: Written clemency matters submitted by an accused may include:

  -- Allegations of legal errors that affect the findings or sentence

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

  -- Matters in mitigation that were not available for consideration at trial, except as may be limited by Rule for Courts-Martial (RCM) 1107(b)(3)(C)

-- Clemency recommendations by any court member, the military judge, or any other person

-- Written clemency matters submitted by the accused may not include matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded

- Victim Clemency Submissions: A crime victim of an offense tried by any court-martial shall have the right to submit a statement to the convening authority after the sentence is adjudged

  -- "Crime victim" for the purposes of RCM 1105A is a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty, and on which the convening authority takes action under RCM 1107

  -- Statement must be in writing and signed by the victim. It may include photographs, but shall not include video, audio, or other media.

  -- The crime victim may submit the statement no later than 10 days after the later of:

    --- Date the victim receives an authenticated copy of the record of trial or waives the right; or

    --- Date on which the staff judge advocate recommendation is served on the victim

  -- For summary courts-martial, the victim has 7 days after the sentence is announced

- Trial counsel, or a summary court-martial officer, shall make reasonable efforts to inform a crime victim of the right to submit a statement and the manner in which it may be submitted

- A crime victim may waive their right to submit a statement by expressly waiving such in writing or by failing to submit a statement within the prescribed time period

Convening Authority Action

- Findings and sentence adjudged by a court-martial are not final until approved or disapproved by the convening authority, this is referred to as "action"

- Before completing action in a case, the convening authority is required to review the SJAR, the SJAR Addendum, clemency mattes submitted by the accused, and matters submitted by the victim (if applicable)

- Generally speaking, during the clemency process, the convening authority has limited authority to: (1) disapprove findings of guilt (if the offense concerned did not involve a rape or sexual assault conviction, and the maximum confinement for that offense was 2 years or less); and (2) reduce or disapprove only those aspects of the sentence pertaining to confinement of 6 months or less; reductions in grade; forfeitures of pay; hard labor without confinement; restriction to limits; and reprimands

  -- Fiscal Year 2014 National Defense Authorization Act limited the power of a convening authority to modify the findings and sentence of a court-martial under UCMJ, Art. 60 in certain cases. Commanders should consult their servicing legal office when considering modification.

Effective Date of Court-Martial Punishments

- Punitive Discharge: Not effective unless and until approved after appellate review

- Confinement: Effect immediately unless deferred (i.e., delay the effective date) by the convening authority

- Reduction in Grade: Effective 14 days after announcement of the sentence or convening authority action, whichever is sooner. The convening authority may also defer (i.e. delay the effective date of) the reduction in grade.

- Forfeiture of Pay and Allowances: Effective 14 days after announcement of the sentence or action by the convening authority, whichever is sooner. The convening authority may also unless defer the forfeiture of pay until action. In addition, when taking action, the convening authority may lessen the impact of "automatic" forfeitures of pay by "waiving" them for up to 6 months for the benefit of the accused's dependents.

-- Automatic Forfeitures: An accused automatically forfeits pay and allowances, up to the jurisdictional limits of their court-martial (general court-martial (GCM)—total forfeitures of pay and allowances; special court-martial (SPCM)—2/3 forfeitures of pay, only), during any period of confinement if the adjudged sentence includes death or a punitive discharge, or any sentence to confinement for more than 6 months

-- Waiver of Automatic Forfeitures: A convening authority may waive mandatory forfeitures but only in cases where the accused has dependents. To do so, the convening authority must also defer, suspend, mitigate or disapprove all or part of adjudged total forfeitures.

- Hard Labor Without Confinement: Effective 14 days after announcement of the sentence or convening authority action, whichever is sooner

- Restriction to Limits: Effective 14 days after announcement of the sentence or convening authority action, whichever is sooner

- Reprimand: Provided by the convening authority in conjunction with "action" on the case

Appellate Review

- Type of appellate review depends upon the adjudged sentence and type of court-martial

- Unless appellate review is waived by an accused, the Air Force Court of Criminal Appeals (AFCCA) automatically reviews all cases involving sentences of death, punitive discharge, or confinement of one year or more

- After review by the AFCCA, the Court of Appeals for the Armed Forces (CAAF) may elect to review any case. Review is automatic in death penalty cases and cases certified to the court for review by The Judge Advocate General of any service.

- Cases reviewed by the CAAF may be considered for review by the Supreme Court of the United States

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

-- Members are placed in mandatory excess leave (non-pay) status (also known as "appellate leave") in cases where a punitive discharge is approved by the convening authority and confinement, approved by the convening authority, has been completed. When no confinement is adjudged, and a punitive discharge is approved, excess leave ("appellate leave") should start when the convening authority takes action.

-- Once appellate review is complete, the convening authority, or successor, must take additional action to execute the punitive discharge by publishing a Final Court-Martial Order, which will be drafted for the Convening Authority's signature by the Staff Judge Advocate's Office

- The Judge Advocate General is the review authority in general courts-martial where the sentence does not include death, punitive discharge, or confinement for one year or more. The Judge Advocate General may elect to certify any case to the AFCCA for further review.

- A judge advocate will conduct a review of all summary courts-martial and special courts-martial that do not include a punitive discharge or one year confinement (unless the accused waives appellate review)

- Appellate review is not required for cases where the accused was acquitted on all charges

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References

UCMJ Arts. 57(a), 58(b), 60, 66-69 and 76a
Rule for Courts-Martial 1101-07, 1201-05 (2015)
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

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CHAPTER SIX: PERSONNEL ISSUES FOR THE COMMANDER—GENERALLY

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TOTAL FORCE: AIR RESERVE COMPONENT (ARC)

Regular Air Force, Air National Guard (ANG), and Air Force Reserve (AFR) Airmen work together as a team in air, space, and cyberspace worldwide. Together, the AFR and ANG make up the Air Reserve Component (ARC). The ARC's mission is to provide combat ready forces to the the Air Force whenever needed.

ARC Personnel Categories

- Ready Reserve: Includes the Selected Reserve and Individual Ready Reserve who are available to be involuntarily ordered to active duty in time of war or national emergency, pursuant to 10 U.S.C. §§ 12301 and 12302

  -- Selected Reserve: Those units and individuals within the Ready Reserve approved by the Joint Chiefs of Staff as so essential to initial wartime missions that they have priority over all other reserves. It includes traditional reservists, individual mobilization augmentees (IMA), active guard reservists (AGR), and military technicians.

  -- Individual Ready Reserve (IRR): Individuals who have had training and previous experience in the Regular component or the Selected Reserve and still have a military service obligation

  -- Includes all ANG (including inactive National Guard (ING))

- Active Guard Reserve (AGR): Reservists on full-time active duty (AD) for the purpose of administering, recruiting, instructing or training Reserve Component units, or performing duties prescribed in 10 U.S.C. § 12310. AGRs are assigned in a mobilization position in the unit they support.

- Standby Reserve: Pool of trained individuals (other than those in the Ready Reserve or Retired Reserve) who could be ordered to active duty only in time of war or national emergency

- Retired Reserve: Reservists who have at least 20 years of service and are either waiting to turn 60 years of age to collect retirement pay (nicknamed a "Gray Area" retiree) or are over age 60 and receiving retirement pay

- Regular Active Duty Retired: May be ordered to active duty by the Secretary of the Air Force (SecAF) if deemed necessary for the national defense

Air Force Reserve (AFR)

- AFR is an integrated Total Force partner in every Air Force core mission, providing combat-ready forces to fly, fight, and win. In addition to categories (above), participating reservists hold a duty status.

- Types of Reserve Personnel Duty Status:

  -- Air Reserve Technician (ART): Members are full-time federal civil service employees of an Air Force reserve unit and serve in dual roles as both civilians and Reserve Airmen

  -- Traditional Reservist (CAT A): Assigned to stand-alone reserve units

    --- Required to perform annual training (AT) 12 weekends during unit training assemblies (UTAs) in inactive duty training (IDT) status (each UTA day counts for 2 IDTs , for a total 48 IDTs required)

    --- Also required to perform 15 days of active duty service per year

  -- Individual Mobilization Augmentees (IMAs) (CAT B): Attached to and augment active-component and government agency missions and are rated by active duty or government agency supervisors

    --- Required to perform 12 days of IDT per year (2 IDT periods per day for a total of 24 IDTs) and 12-14 annual days of active duty service per year

    --- IMAs may volunteer for additional active duty orders or be mobilized to fill Air Force mission requirements

  -- Participating Individual Ready Reservist (PIRRs): Attached to an active duty unit and participate for points towards retirement

Air National Guard (ANG)

- ANG members have a dual-role based on the Militia Clause of U.S. Constitution, Art. 1, sec. 8

  -- Federal Role (Title 10): Mission is to maintain well-trained, well-equipped units available for prompt mobilization under Title 10 of the United States Code during war and national emergencies

  -- State Role (Title 32): Mission is to provide trained, organized and disciplined units and individuals to protect life, property, and preserve peace, order and public safety within the state or territory by providing emergency relief support, search and rescue, support to civil defense authorities and counterdrug operations

  -- There are also National Guard technicians or military technicians (MTs) who are federal civilian employees occupying technician positions. They must be members of both state ANG and federal civil service.

- ANG Required Training: 12 weekends of IDTs (2 IDTs per day for a total of 48 IDTs) and 15 days of active duty service per year

Administrative and Disciplinary Action

- Air Force Reservists:

  -- Reservists are subject to the UCMJ while in active duty status and inactive duty training status

  -- Address questions of alleged misconduct involving IMA reservists to their active duty staff judge advocate (SJA) who coordinates with HQ AFRC/JA

  -- Address questions about alleged misconduct involving Traditional Reservists and ARTs to their reserve unit's SJA

  -- If deployed, look to member's activation orders for guidance

- Air National Guard Members:

  -- Misconduct of ANG members is governed by the member's status at the time of the action. ANG personnel are only subject to the UCMJ when "in federal service" UCMJ Art. 2(a)(3).

  -- Activation orders show if member is in Title 10 or Title 32 status and where assigned for administrative control/operational control

  -- If in Title 10 status, contact local SJA, who will coordinate with the 201st MSS/JA at DSN 612-8614

  -- If in Title 32 status, contact local SJA, who will coordinate with the member's home unit SJA (unless orders direct otherwise)

  -- If a MT, contact local SJA, who will coordinate through member's home unit (if in military status) or the applicable State Human Resources Office (if in civilian status)

References

U.S. Const. Art. 1, § 8
UCMJ Art. 2(a)(3)
Reserve Officer Personnel Management Act, 10 U.S.C. §§ 10141-10154
Reserve Forces Revitalization Act of 1996, 10 U.S.C. § 10215-10218
Reserve Forces Act of 1955, 10 U.S.C. § 12301, *et seq.*
DoDI 1215.06, *Uniform Reserve, Training, and Retirement Categories for the Reserve Components* (11 March 2014), incorporating Change 1, 19 May 2015
AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

ACTIVE GUARD AND RESERVE CURTAILMENTS

The Air Force Reserve (AFR) Active Guard and Reserve (AGR) Program is established by Department of Defense policy and implemented in AFI 36-2132, Vol. 2, *Active Guard/ Reserve (AGR) Program*. The AGR career program provides an AGR with career opportunities for promotion, career progression, retention, education, and professional development. This program may lead to an active duty retirement after attaining the required years of Federal service.

- Initial entry into the AGR Program is by individual application for selection for assignment. Initial assignment length is normally 4 years, except for colonels for whom the initial assignment length is 3 years.

- An AGR has career status upon being accepted into the AGR career program. An AGR is accepted into the career program (1) when accepted by an AGR review board, (2) when orders enable the AGR to exceed the 6-year probationary period as an AGR, or (3) when the AGR reaches sanctuary, as established in AFI 36-2131, *Administration of Sanctuary in the Air Reserve Component*.

- A voluntary release from an AGR tour is referred to as a curtailment

  -- AGRs may request a curtailment of an AGR tour based on position realignment, personal hardship, retirement or other valid reasons

  -- AGRs submit a curtailment request through the chain of command to arrive at AFRC/A1A or AFRC/A1L at least 120 days prior to and no more than 365 days before requested date of separation (DOS)

  -- Curtailment requests for the purpose of retirement must be received by AFRC/ A1A (AFRC/A1L for colonel positions) no later than 60 days prior to the requested permissive temporary duty assignment (TDY)/terminal leave start date but not less than 120 days before retirement date

- <u>Involuntary Curtailment</u>: Commanders considering involuntary curtailment should use all quality force management tools available prior to initiating an involuntary curtailment

  -- Depending on the nature of the involuntary curtailment, commanders should consider discharge in lieu of involuntary curtailment

  -- Commanders should consult with AFRC/A1A (AFRC/A1L for colonels) and their servicing legal office to determine if an involuntary curtailment is appropriate

References

DoDI 1205.18, *Full-Time Support (FTS) to the Reserve Components* (12 May 2014), incorporating Change 1, 19 May 2015

AFI 36-2131, *Administration of Sanctuary in the Air Force Reserve Components* (27 July 2011)

AFI 36-2132, Volume 2, *Active Guard/Reserve (AGR) Program* (20 March 2012), incorporating Change 1, 10 February 2014, with administrative changes, 28 April 2016

REASSIGNMENT TO THE INDIVIDUAL READY RESERVE

The Individual Ready Reserve (IRR) is a manpower pool consisting of individuals who have had some training and who have served previously in the active component or in the Selected Reserve. Members may voluntarily participate in training for retirement points and promotion, in accordance with AFI 36-2254, Vol. 1, *Reserve Personnel Participation*. Transfers to the IRR may be voluntary or involuntary.

Voluntary Reassignment to the IRR

- Members who no longer desire to actively participate in the Air Force Reserve may request to be reassigned to the IRR

- Commanders **MUST** deny "voluntary" requests for reassignment to the IRR when discharge is more appropriate

- Application: Members request reassignment to the IRR by submitting AF IMT 1288, *Application for Ready Reserve Assignment* or a personal letter to the wing commander or equivalent (unit reserve program) or to the Readiness Integration Organization (RIO) detachment commander (Individual Mobalization Augmentee (IMA) program)

  -- As part of the completion of AF IMT 1288, members must certify that they either have or have not received an Unfavorable Information File (UIF) within the last 2 years (enlisted) or 5 years (officers). If the member has had a UIF during this period, the last five OPRs/EPRs must accompany the assignment request.

- Approval Authority:

  -- Wing commander or equivalent (unit program) or the RIO detachment commander (IMA program) is the approval authority for voluntary requests

  -- In the unit reserve program, any commander in the chain of command may disapprove a request for reassignment

  -- In the IMA program, the RIO detachment commander may disapprove a request for reassignment

  -- Approved IRR reassignment requests must have an effective date not earlier than 6 months from the date the request is submitted. The wing commander or equivalent (unit program) or ARPC/DPR (IMA program) may waive the 6-month requirement.

Involuntary Reassignment to the IRR

- Involuntary reassignment to the IRR from the Ready Reserve for cause is generally inappropriate

  -- Use involuntary reassignment only as a last resort

  -- Initiate involuntary reassignment for cause or derogatory reasons only after all appropriate disciplinary and/or administrative actions have been taken and documented

  -- Consider exceptions to these policies on a case-by-case basis

- Involuntary reassignment is not a substitute for discharge. If administrative discharge is warranted, process in accordance with AFI 36-3209*, Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*.

- Appropriate Situations: Some potential situations where involuntary reassignment may be appropriate include (but are not limited to):

  -- Unexcused Absences: In the unit reserve program, if a member has nine or more unexcused absences from Unit Training Assemblies (UTAs) in a 12-month period, commanders should reassign the member to the IRR (if not discharging the member)

  -- Repeated Fitness Failures: Members who fail to meet minimum fitness standards for reasons other than documented disability may be discharged in accordance with the standards laid out in AFI 40-501, *The Air Force Fitness Program*

  -- Health Assessment Non-compliance: Failure to comply with requirement for reserve component periodic health assessment

  -- Whereabouts Unknown: Member not immediately available (whereabouts unknown), but not Missing in Action

- Evaluation: Unit commander (or RIO detachment commander, for IMAs) will examine and evaluate any information received that indicates a member should be considered for involuntary reassignment

- Memorandum of Notification: If a commander determines grounds exist to warrant initiation of involuntary reassignment action, a memorandum of notification (MON) is sent to the member in accordance with AFI 36-2115, *Assignments Within The Reserve Component*. A sample MON is provided in the AFI at Attachment 5, and includes a list of information which must be provided to the member.

  -- Personally Deliver: When feasible, the MON should be personally delivered to the member

    --- Delivering official must obtain a written acknowledgement of receipt, and a sample is provided at AFI 36-2115, Attachment 6

    --- If member refuses to acknowledge receipt, the delivery official makes an annotation to that effect on the receipt, including the date and time of delivery of the notification. The receipt should be kept in the case file.

  -- Certified Mail: When personal delivery is not feasible, the unit should send the MON by certified mail, return receipt requested, to the member's last known address

    --- If attempts to deliver the MON by certified mail are unsuccessful, send the MON by first class mail using the format at AFI 36-2115, Attachment 7

    --- If the member resides outside the United States, an equivalent form of notice may be used

  -- Undelivered: If postal service returns the MON without indicating a more current address, file the returned envelope in the case file and request verification of last permanent mailing address from the postmaster using the format at AFI 36-2115, Attachment 8

    --- If an address correction is received, send the MON to the member at that address.

    --- If all attempts to deliver the MON by certified and first class mail are unsuccessful, complete the Affidavit of Service by Mail at AFI 36-2115, Attachment 9

-- Review:

--- Member: Member must be allowed 15 calendar days after receipt of the MON to consult with legal counsel and submit statements or documents on his or her behalf. If the member fails to submit statements or documents during this time period, the case may be processed based on the information available, without further notice to the member.

--- Commander: The commander reviews any matters submitted by the member and determines whether to continue involuntary reassignment action

-- Determination:

--- If the commander elects to continue the involuntary reassignment action, the case file must be processed through the servicing staff judge advocate and chain of command to the approval authority

--- The approval authority reviews the case to determine whether the facts are properly substantiated. The approval authority then approves or denies the reassignment and notifies the member.

- It is in the best interest of both the Air Force and the member to process the case as expeditiously as possible. Commanders should monitor the process to ensure cases are processed without undue delay.

References

AFI 36-2115, *Assignments within the Reserve Components* (8 April 2005), certified current, 2 May 2008

AFI 36-2254, Volume 1, *Reserve Personnel Participation* (26 May 2010)

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

AF IMT 1288, *Application for Ready Reserve Assignment*

DEBARMENT

Installation commanders have broad authority to control activities on their installations, including the authority to remove or exclude any person whose presence on the installation is unauthorized or disrupts good order and discipline. This authority enables a commander to fulfill his or her responsibilities to protect personnel and property, to maintain good order and discipline, and to ensure the successful, uninterrupted performance of the DoD mission. The terms debarment, barment, and barred are often used interchangeably to mean that an individual is no longer permitted access to a DoD installation.

Commander's Responsibilities and Options

- An installation commander's decision to remove or exclude a person from the installation is subject to judicial review
    - However, the decision is given substantial deference and will not be overturned unless proven to be arbitrary or capricious
    - An illegal debarment could subject a commander to personal civil liability in a lawsuit
- An installation commander **may not** delegate the authority to debar an individual from an installation to a subordinate

Who is Subject to Debarment?

- Members of the armed forces are not normally debarred. Service members being involuntarily separated may, in conjunction with their discharge, be debarred for good cause.
- Civilians may be debarred from a military installation
- Dependent family members and retirees may be debarred from an installation, but they must still be granted access to the installation to receive any medical care they are entitled to (a statutory right–10 U.S.C. §§ 1074, 1076)
- Civilian employees may be debarred, but they should be removed from federal service before being debarred
    - Otherwise, the employee may still be entitled to collect a salary

  - Check with the Civilian Personnel Office to determine if the local collective bargaining agreement, should one exist, contains additional due process requirements

- Salespersons and businesses may be debarred for misconduct. Misconduct may lead to debarment of a single agent or an entire firm.

- Contractor employees may be debarred for misconduct. Contractor employees with security clearances are not entitled to greater protection from debarment.

- Possession, distribution, or use of drugs is commonly used as a good cause for debarment, while exceeding weight standards, on the other hand, would not be a good reason

Procedural Requirements

- A person who is debarred from an installation should be notified, in writing, that he or she is prohibited from entering the installation. The notification (called a "debarment letter") should state the reason for and period of the debarment.

- Determining the debarment period is a matter of discretion

  - Commanders should consider the individual, the reason for the proposed debarment, and the need for good order, discipline, and security. The bottom line is what is reasonable given all the circumstances.

  - Length of the debarment period should be stated in the debarment letter. The commander may debar an individual for a specific length of time or, in appropriate cases, the debarment may be for an indefinite period of time.

- Individual can ask the installation commander to lift the debarment at any time, regardless of whether the debarment is for a set period or indefinite

- A copy of the debarment letter should be hand-delivered to the individual or sent by certified mail to ensure a record of receipt

- An individual who enters an installation after receiving notice of debarment from the installation commander is subject to federal criminal prosecution under *Entering Military Naval or Coast Guard Property*, 18 U.S.C. § 1382. Maximum penalty for violation of the law is 6 months confinement and a $500 fine.

References

10 U.S.C. § 1076

18 U.S.C. § 1382

50 U.S.C. § 797

DoDI 5200.08, *Security of DoD Installations and Resources and the DoD Physical Security Review Board (PSRB)* (10 December 2005), incorporating through Change 3, 20 November 2015

32 C.F.R. § 809a (2015)

DTM 09-012, *Interim Policy Guidance for DoD Physical Access Control* (8 December 2009), incorporating through Change 6, 20 November 2015

AFMAN 31-113, *Installation Perimeter Access Control* (FOUO) (2 February 2015), incorporating Change 1, 27 July 2015

DRIVING PRIVILEGES

Driving on a military installation, whether in a government owned vehicle (GOV) or a privately owned vehicle (POV) is a privilege granted by the installation commander or designee. This authority may be delegated to the vice commander, mission support group commander, or other appropriate official not occupying a law enforcement, investigative, or other position raising the appearance of a conflict of interest.

Operating a POV on the Installation

- A person must do the following in order to drive on an Air Force installation:
  - -- Lawfully be licensed to operate motor vehicles in appropriate classifications and not under suspension or revocation in any state or host country
  - -- Comply with all laws and regulations governing motor vehicle operations on base
  - -- Comply with installation vehicle registration requirements
  - -- Possess, while operating a motor vehicle, and produce on request the following:
    - --- Proof of ownership or state registration, if required by state of host nation;
    - --- A valid state driver's license (or host nation/status of forces agreement (SOFA) license);
    - --- A valid vehicle safety inspection sticker, if required by state or host nation;
    - --- Documents that establish identification and status of cargo and vehicle occupants, when appropriate;
    - --- Proof of valid insurance; and
    - --- Operators of GOVs must have proof of authorization to operate the vehicle

Implied Consent

- When operating a motor vehicle on a military installation, a driver gives implied consent in a number of areas:
  - -- Consent to test for the presence of alcohol or drugs in their blood, on their breath, and in their urine, provided there is a lawful stop, apprehension, or citation for

any impaired driving offense committed while driving or in physical control of a motor vehicle on a military installation

-- Consent to the removal and temporary impoundment of their POVs if it is (1) illegally parked; (2) interfering with military operations; (3) creating a safety hazard; (4) disabled by accident or incident; (5) abandoned; or (6) left unattended in a restricted or controlled access area

Suspension

- Installation commander can administratively suspend or revoke installation driving privileges

  -- A suspension of up to 6 months may be appropriate if a driver continually violates installation parking standards, or habitually receives other non-moving vehicle violations

  -- Installation commander will immediately suspend installation driving privileges pending resolution of an intoxicated driving incident under any of the following circumstances:

    --- Refusal to take or complete a lawfully requested chemical test for the presence of alcohol or other drugs in the driver's system

    --- Operating a motor vehicle with blood alcohol content (BAC) or breath alcohol content (BRAC) of 0.08 percent by volume or higher, or in excess of the applicable BAC or BRAC level in the local civilian jurisdiction, whichever is applicable

    --- Receipt of an arrest report or other official document reasonably showing an intoxicated driving incident occurred within a reasonable time period

Revocation

- Installation commander will immediately revoke driving privileges for a period of not less than 1 year in any of the following circumstances:

  -- Person is lawfully apprehended for intoxicated driving and refuses to submit to or complete tests to measure blood alcohol or drug content

- -- Conviction, nonjudicial punishment, or a military or civilian administrative action resulting in the suspension or revocation of a driver's license for intoxicated driving

- -- Installation commander determines an immediate revocation is required to preserve public safety or the good order and discipline of military personnel

Procedures

- A point system is used on-base to provide a uniform administrative device to supervise traffic offenses impartially. Points are assessed for violations of motor vehicle traffic regulations for on-base and off-base traffic offenses. Certain procedural guidelines apply before an individual's driving privilege may be suspended or revoked.

  - -- Individual has the right to a hearing before a designated hearing officer. Individual must be notified of his or her right to a hearing, but it is only held if the individual requests it within the prescribed time period.

  - -- A suspension for a driving while intoxicated offense may be effective immediately if based on reliable evidence. Such evidence can include witness statements, a military or civilian police report, chemical test results, refusal to complete chemical testing, video tapes, written statements, field sobriety test results, or other evidence.

- Civilian offenders may be prosecuted in Federal Magistrate Court for on-base traffic offenses., however, this is subject to the type of installation jurisdiction where the offense occurred. Installation commanders are authorized to prescribe installation traffic rules.

References

AFMAN 31-116, *Air Force Motor Vehicle Traffic Supervision* (18 December 2015)

AFI 31-101, *Integrated Defense* (FOUO) (8 October 2009), incorporating through Change 2, 7 March 2013, including AFI31-101_AFGM2015-01, 21 May 2015

AFI 31-218(I), *Motor Vehicle Traffic Supervision* (22 May 2006), certified current 15 July 2011, including AFI31-218_AFGM2015-01, 10 March 2015

ARMY AND AIR FORCE EXCHANGE SERVICE AND COMMISSARY BENEFITS

Although DoD directives and service regulations govern exchange and commissary benefits, commanders may exercise some discretion in granting, suspending, or revoking privileges.

Exchange

- Army and Air Force Exchange Service (AAFES): The establishment of an exchange is authorized by the Departments of the Army and the Air Force at each installation where extended active duty military personnel are present and assigned for duty

- An exchange may be established at other locations, such as state-operated National Guard installations or Reserve Training Centers, provided it is cost-effective

Exchange Privileges

- Unlimited exchange privileges extend to all uniformed, retired, and and other personnel (such as Medal of Honor recipients) and their dependents

- Unlimited exchange privileges may be extended to government departments or agencies outside the DoD when:

  -- Local commander determines the desired supplies or services cannot be conveniently obtained elsewhere, and

  -- Supplies or services can be furnished without unduly impairing the service to exchange patrons

- Limited exchange privileges extend to some government civilian employees and to others, such as members of foreign military services visiting a military installation

- In non-foreign areas outside the Continental United States, e.g., Alaska, Hawaii, and Puerto Rico, the responsible commander may extend limited or unlimited privileges to other personnel or organizations if it is in the best interest of the mission of the command concerned

- Exceptions involving patron privileges are based on alleviating personal hardships and may only be granted by the Secretary of the department concerned upon request by the installation commander through command channels

Abuse of Exchange Privileges

- Exchange patrons are prohibited from abusing privileges, including:

  -- Purchasing items for the purposes of resale, transfer, or exchange to unauthorized persons

  -- Using exchange merchandise or services in the conduct of any activity for the production of income

  -- Theft, intentional or repeated presentation of dishonored checks, and other indebtedness

Commander Actions when Abuse of Exchange Privileges Occurs

- When an abuse of privileges occurs, the commander will take prompt disciplinary and other appropriate action, such as revocation or suspension of exchange privileges

  -- Commanders may revoke exchange privileges for any period deemed appropriate, except the minimum period of revocation is 6 months for shoplifting, employee pilferage, and intentional presentation of dishonored checks

  -- Individual concerned will be provided notice of the charges and the opportunity to offer rebutting evidence

  -- On appeal, the commander who revoked the privileges, or the next higher commander, may reinstate exchange privileges for cogent and compelling reasons

Commissary Privileges

- The DoD operates commissaries as an integral element of the military pay and benefits system and as an institutional element to foster the sense of community among military personnel and their families. The intent of patronage is to provide an income effect benefit through savings on food and household items necessary to subsist and maintain the household of the military family.

- <u>Authorized Patrons</u>:

  -- Several classes of individuals are authorized commissary privileges by regulation, including: active duty and their dependent family members, retired personnel and their dependent family members, reservists, and others

- -- At overseas locations, military commanders or Secretaries of military departments may extend commissary privileges to certain individuals and groups of individuals, provided it is without detriment to the ability to fulfill the military mission

- Restrictions on Purchases:

  - -- Authorized personnel may not sell or give away commissary purchases to individuals or groups not entitled to commissary privileges

  - -- Personnel are prohibited from using commissary purchases to support a private business

  - -- Sanctions for violating restrictions on purchases range from temporary suspension or permanent revocation of commissary privileges to appropriate action under regulation, UCMJ, or federal or state law

Appointing Agents for Authorized Users

- An installation commander is authorized to extend exchange and commissary privileges to the agent of an authorized user. Appointment typically occurs when the authorized user is unable to exercise their privileges on their own behalf.

References

DoDI 1330.17, *DoD Commissary Program* (18 June 2014)
AFI 34-211(I), *Army and Air Force Exchange Service Operations* (5 October 2012)

SUBSTANCE ABUSE

Air Force Drug Use Policy

- Military and civilian personnel are expected to refrain from drug abuse and maintain standards of behavior, performance, and discipline consistent with the UCMJ, public law, and Air Force policy

- Illegal use of drugs by Air Force members is a serious breach of discipline that is incompatible with Air Force standards. This misconduct places the member's continued service in jeopardy and could lead to action resulting in a punitive discharge or an administrative discharge under other than honorable conditions.

Air Force Alcohol Abuse Policy

- The Air Force recognizes that alcohol misuse negatively affects public behavior, duty performance, and physical and mental health

- The Air Force provides comprehensive clinical assistance to eligible beneficiaries seeking help for alcohol abuse problems

Unit Commanders and Supervisor Responsibilities

- Observe and document the performance and conduct of subordinates and direct immediate supervisors to do the same

- Evaluate potential or identified abusers through the evaluation process of AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*

- Provide appropriate incentives to encourage members to seek help for problems with drugs or alcohol without fear of negative consequences

- Commander is responsible for and has control of all personnel, administrative, and disciplinary actions pertaining to members involved in the Air Force ADAPT program

- Command involvement is critical to a comprehensive treatment program, as well as during aftercare and follow-up services. The commander shall also provide command authority to implement the treatment plan when the member does not voluntarily comply.

Abuser Identification (Military Members)

- Self-Identification (Drug Abuse): Members who voluntarily disclose prior drug use or possession are granted limited protections. Such disclosure may not be used against the member in UCMJ actions or in characterizing an administrative discharge as long as he or she:

  -- Is seeking treatment and voluntarily discloses evidence of personal drug use or possession to the unit commander, first sergeant, substance use/misuse evaluator or a military medical professional; and

  -- Has not previously been apprehended for drug involvement, placed under investigation for drug abuse, ordered to give a urine sample as part of the drug-testing program in which the which the results are still pending or have been returned as positive, advised of a recommendation for administrative separation for drug abuse, or has entered treatment for drug abuse

  -- The limited protection available for self-identification does not apply to disciplinary or other action based on independently derived evidence (other than the results of a commander-directed drug test), including evidence of continued drug abuse after the member initially entered a treatment program

- Self-Identification (Alcohol Abuse): Air Force members with substance alcohol abuse problems are encouraged to seek assistance from their commander, first sergeant, a military medical professional, or mental health professional

  -- Self-identification is reserved for members who are not currently under investigation or pending action as a result of an alcohol related misconduct

  -- Self-identified members who enter the ADAPT assessment process will be held to the same standards as others entering substance abuse and misuse education, counseling and treatment programs. However, if the member is not diagnosed with a substance use disorder, the member's chain of command will not be notified.

- Commander Referral: A unit commander will refer all service members for assessment when substance use or misuse is suspected to be a contributing factor in any misconduct, e.g., driving under the influence (DUI)/driving while intoxicated (DWI), public intoxication, drunk and disorderly, spouse/child abuse and maltreatment, underage drinking, positive drug test, or when notified by medical personnel pursuant to AFI 44-121

  - Commanders should also refer a member for assessment when drugs or alcohol are thought to be a contributing factor in any incident, such as deteriorating duty performance, excessive tardiness, absenteeism, misconduct, or unacceptable social behavior

  - Commanders who fail to comply with this requirement place members at increased risk for developing severe substance problems and jeopardize the mission

- Incident to Medical Care: Medical personnel must notify a member's unit commander and the ADAPT program manager when a member is observed, identified, or suspected to be under the influence of drugs or alcohol, receives treatment for any injury or illness that may be the result of substance abuse or is suspected of abusing substances

- Random Drug Testing: Positive drug test results mandate a substance abuse evaluation

- Probable Cause Searches: Commanders who receive information of a positive drug test conducted pursuant to a probable cause search must refer the member for a substance abuse assessment

- Inspections: Commanders may order inspections (to include urinalysis) of his/her unit, in whole or in part, pursuant to Military Rule of Evidence (MRE) 313 so long as the primary purpose is to determine and to ensure the security, military fitness, or good order and discipline of the unit

  - Positive drug test results mandate a substance abuse evaluation

Substance Abuse Assessment

- The ADAPT program attempts to identify and provide assistance to military members with drug problems, but the focus of the ADAPT program is prevention and clinical treatment

  - ADAPT staff members evaluate all members suspected of drug or alcohol abuse in order to help the commander understand the extent of the substance abuse problem and to determine the patient's need for treatment and the level of care required

  - Except in cases of self-identification, personal information provided by the member in response to assessment questions **MAY** be used against the member in a court-martial or considered for characterizing service in an administrative discharge

- Before the assessment, the patient is advised of the ADAPT program's nature, the limits on confidentiality, the Privacy Act, and the Health Insurance Portability and Accountability Act (HIPAA), the responsibilities of the ADAPT staff, the purpose, access and disposition of mental health records and the potential consequences of refusing assessment, preventive counseling and/or treatment

- Upon completion of the assessment, the information gathered will form the basis for patient diagnosis, treatment planning, and delivery of substance abuse services. Assessment results for individuals who are charged with DUI or DWI will be provided to the patient's commander.

- Information is presented to the Treatment Team (TT) so that the TT may develop and guide the clinical course of treatment. The TT decides the proper course of action and treatment plan for the client after examining all the facts presented.

- TT is comprised of:

  -- Commander and/or first sergeant. These individuals must be involved at program entry, termination and any time there are significant treatment difficulties with the patient.

  -- Patient's immediate supervisor

  -- ADAPT program manager

  -- Certified substance abuse counselor

  -- Mental health provider currently involved in patient care

  -- The patient, unless deemed clinically inappropriate

Management of Drug and Alcohol Abusers

- Tools available to the unit commander to manage drug abusers include:

  -- Nonjudicial punishment under UCMJ, Art. 15

  -- Court-martial

  -- Line of Duty (LOD) determinations, when appropriate in accordance with AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCOM) and Incapacitation (INCAP) Pay)*

-- Action involving security clearance, access to classified information, or access to restricted areas in accordance with AFI 31-501, *Personnel Security Program Management*

-- Suspension from Personnel Reliability Program (AFMAN 13-501)

-- Duty assignment review to determine if member should continue in current duties

-- Unfavorable Information File (UIF) or control roster action based on drug related misconduct or substandard duty performance in accordance with AFI 36-2907, *Unfavorable Information File (UIF) Program*

-- Separation under AFI 36-3206, A*dministrative Discharge Procedures for Commissioned Officers* and AFI 36-3208, *Administrative Separation of Airmen* for documented failure to meet standards (members who fail the ADAPT program due to refusal to cooperate may be separated)

-- Administrative demotion, withholding of promotion, and denial of reenlistment

Administrative Discharge for Drug Abuse

- Drug abuse is incompatible with military serve and all Airmen who abused drugs, even once, are subject to discharge for misconduct

  -- Drug abuse is defined in AFI 36-3208 as the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug. This includes:

    --- Improper use of prescription medication

    --- Any controlled substance in schedules I, II, III, IV, and V of 21 U.S.C. § 812

    --- Any intoxicating substance, other than alcohol, introduced into the body in any manner for purposes of altering mood or function

  -- Evidence obtained through urinalysis or from the member in connection with initial entry in rehabilitation and treatment may be used to establish a basis for discharge

-- Generally, a member found to have abused drugs will be discharged unless the member meets **ALL SEVEN** of the following criteria:

--- Drug abuse is a departure from the member's usual and customary behavior

--- Drug abuse occurred as the result of drug experimentation

--- Drug abuse does not involve recurring incidents, other than drug experimentation

--- Member does not desire to engage in or intend to engage in drug abuse in the future

--- Drug abuse under all the circumstances is not likely to recur

--- Member's continued presence in the Air Force is consistent with the interest of the Air Force in maintaining good order and discipline

--- Drug abuse did not involve drug distribution

- It is the member's burden to prove retention is warranted under these limited criteria

- Similar retention criteria does not exist for officers

Civilian Employees (Drug Abuse)

- The Air Force Civilian Drug Testing Program is designed to achieve a drug-free workplace, consistent with Executive Order 12564 and 5 U.S.C. § 7301

- AFI 90-508, *Air Force Civilian Drug Demand Reduction Program*, provides policy and procedures to prevent, reduce and eliminate illicit drug use and rehabilitate and treat civilian drug abusers

- Similar to military members, civilian employees who self-identify for illicit drug use are provided a "safe haven" from disciplinary action if they:

-- Voluntarily identify themselves as a user of illicit drugs prior to being notified of the requirement to provide a specimen for testing or being identified through other means (e.g., drug testing, investigation)

-- Obtain and cooperates with appropriate counseling or rehabilitation

  - Agree to and signs a last chance or statement of agreement

  - Thereafter refrain from illicit drug use

- Commanders and supervisors must be alert to behaviors that could indicate a substance abuse problem and advise employees they may voluntarily seek assessment and treatment referral services

- Commanders should consult with the Civilian Personnel Section and/or the legal office if they suspect a civilian employee's poor performance, discipline or conduct may be caused by drug abuse

Civilian Employees (Alcohol Abuse)

- AFI 90-508 provides an overview of the counseling and assistance available to rehabilitate civilian employees who abuse alcohol

- Under the Rehabilitation Act, alcohol abuse may be considered a disability that entitles an employee to special considerations. Be sure to consult with the staff judge advocate (SJA) and Civilian Personnel Section if such issues arise.

Legal Aspects of Alcohol Related Issues

- Drunk Driving: Operation of a motor vehicle while under the influence of alcohol or driving while intoxicated, on or off the installation, is a serious offense and is incompatible with Air Force standards

  - Military members who commit this offense are subject to punitive action under the UCMJ

  - Civilian employees apprehended for DUI on exclusive or concurrent federal jurisdiction installations are subject to prosecution in U.S. Magistrate Court

  - A DUI conviction, in either state or federal court, will subject the individual to revocation of on-base driving privileges

- Minimum Drinking Age: The minimum age for purchasing, possessing, or consuming alcoholic beverages on Air Force installations will be consistent with the law of the state, territory, possession, or foreign country in which the installation is located. Adults may only furnish alcohol to minors in accordance with applicable state law.

  - Air Force members who violate these restrictions may be punished under Article 92, UCMJ, for a violation of AFI 34-219, *Alcoholic Beverage Program*

-- When an entire unit marks a unique or non-routine military occasion on a military installation, the minimum drinking age for military attendees at a particular unit gathering may be lowered. However, the minimum drinking age must be 18 or above.

-- Military personnel 18 years old or older may purchase, serve, sell, possess, and consume alcoholic beverages outside the United States, its territories, and possession unless a higher drinking-age requirement exists in accordance with local laws (e.g., the drinking age in Canada is 19, the drinking age in Japan is 20)

- Dram Shop Liability: The "Dram Shop" theory is a legal theory of liability, created either by statute or court decision, which imposes upon the owner, operator, and/or employees of any establishment serving alcoholic beverages the duty to refuse to serve additional alcoholic beverages to a customer who reaches or appears to be reaching the point of intoxication

  -- When an establishment continues to sell alcoholic beverages to such a customer and the customer subsequently departs and causes harm to himself or herself, or to others, the owner, operator, and (or) employees of the establishment can be held liable for damages

  -- To protect the assets and interests of the Air Force, organizations and staff that serve alcoholic beverages must adhere to the following procedures:

    --- Operating Instructions (OIs) are written and published that prohibit personnel from serving alcoholic beverages to individuals who appear intoxicated or close to being intoxicated

    --- Staff that serve alcoholic beverages acknowledge their understanding of this policy in their employee work folders

    --- Ensure proper safeguards or controls to protect the welfare of an intoxicated patron are implemented

    --- Promptly report any incident that may result in a potential claim to the Force Support Squadron (FSS) commander or civilian leader and SJA

- Private organizations may not sell or serve alcoholic beverages on Air Force installations, subject to narrow exceptions found in AFI 34-219, para. 2.3 for private organization personnel assisting at Morale Welfare & Recreation functions for a fee

References

UCMJ Art. 15
5 U.S.C. § 7301
Controlled Substance Act, 21 U.S.C. § 812
Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*
Executive Order 12564, D*rug-Free Federal Workplace* (1986)
Military Rule of Evidence 313 (2015)
DoD Manual 5210.42, AFMAN 13-501, *Nuclear Weapons Personnel Reliability Program (PRP)* (29 May 2015)
AFI 31-501, *Personnel Security Program Management* (27 January 2005), incorporating through Change 2 (29 November 2012), including AFI31-501_AFGM2015-01, 20 November 2015
AFI 34-219, *Alcoholic Beverage Program* (4 February 2015)
AFI 36-2907, *Unfavorable Information File (UIF) Program* (26 November 2014)
AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCOM) and Incapacitation (INCAP) Pay* (8 October 2015)
AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), incorporating through Change 7, 2 July 2013, including AFI36-3206_AFGM2016-01, 24 June 2016
AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7 (2 July 2013), including AFI36-3208_AFGM2016-01, 24 June 2016
AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (8 July 2014)
AFI 90-508, *Air Force Civilian Drug Demand Reduction Program* (28 August 2014), certified current, 18 December 2015

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PRIVATE ORGANIZATIONS

Definition

- A private organization (PO) is a self-sustaining special interest group, set up by people acting outside the scope of any official position they may have in the federal government

- POs are **NOT** integral parts of the military service nor are they federal entities. They are **NOT** nonappropriated fund instrumentalities (NAFIs), nor are they entitled to the sovereign immunities and privileges given to NAFIs.

- When an unofficial activity's or organization's current monthly assets (which include cash inventories, receivables, and investments) exceed a monthly average of $1,000 over a three month period, the activity or organization must either become a PO, discontinue on-base operations, or reduce its current assets

Operating Rules

- Each PO must be approved in writing by the installation commander or designee

- Force support squadron commander or director monitors and advises all POs and directs the resource management flight chief to keep a file on each PO

- Resource management flight chief reviews each PO annually to make sure documents, records and procedures are in order

- POs must be self-sustaining and cannot receive direct financial assistance from a NAFI in the form of contributions, dividends or donations

- Allowable logistical support to POs is very limited. Consult the staff judge advocate (SJA) before providing any support to POs.

- POs with gross revenues of $250,000 or more must have an annual audit done by a certified public accountant (CPA). POs with gross revenues of at least $100,000 but less than $250,000 must have an annual financial review conducted by an accountant (CPA not required). POs with gross revenues of less than $100,000 but more than $5,000 are not required to conduct independent audits or financial reviews, but must prepare an annual financial statement for review by the resource management flight.

- Installation staff chaplain should coordinate on requests to establish religiously oriented POs

- POs may not unlawfully discriminate on any proscribed basis, including race, color, sex, marital status, age, religion, national origin, political affiliation, or physical handicap

- Each PO has the responsibility of obtaining adequate insurance or a waiver from the requirement to obtain adequate insurance by the installation commander or designee. A waiver of the insurance requirement will not protect the PO or its members from valid claims or successful lawsuits.

- POs will not engage in activities that duplicate or compete with activities of the Army and Air Force Exchange Service (AAFES) or Services NAFIs

- POs must comply with all applicable federal, state and local laws governing such activities. POs desiring tax-exempt status must file an application with the IRS. To qualify as tax-exempt organizations for federal tax purposes, POs must be organized for one or more of the purposes specifically outlined in the Internal Revenue Code.

- Fundraising by POs is governed by AFI 36-3101, *Fundraising Within the Air Force*, and DoD 5500.07-R, *Joint Ethics Regulation* (JER)

- POs are prohibited from conducting games of chance, lotteries, or other gambling activities, except in **very** limited circumstances, e.g., certain types of raffles, as set forth in AFI 34-223, *Private Organizations (PO) Program*, para. 10.16, and the JER

- POs may not sell or serve alcoholic beverages subject to the limited exception for PO personnel contained in AFI 34-219, *Alcoholic Beverage Program*, para. 2.3

- POs will not engage in resale activities unless specific authorization is granted. The installation commander or designee may authorize occasional sales for fund raising purposes such as bake sales, dances, carnivals, and similar infrequent functions.

- "Occasional sales" for fund-raising purposes is specifically defined as not more than two fund-raising events per calendar quarter. This prohibition against frequent or continuous resale activities does not preclude collective purchasing and sharing of purchased items by members of POs or unofficial activities and organizations so long as there is no actual resale.

The Role of Spouses' Clubs

Officer or NCO spouses' clubs are POs that the installation commander may authorize to operate on base when he or she concludes the organization will make a positive contribution to the lives of base personnel.

- Because spouses' clubs are POs, it is important to remember these organizations are composed of individuals "acting outside the scope of any official position they may have in the federal government"

- Unlike the Air Force and other instrumentalities of the federal government, which have distinct legal and regulatory systems of command, spouses' clubs have no formal lines of authority interconnecting the various base clubs

- Many of the activities that spouses' clubs engage in are subject to state and federal laws and regulations

- POs including spouses' clubs are bound by the terms of their constitutions and bylaws

- To operate on Air Force installations, spouses' clubs, like other POs, must comply with AFI 34-223, governing the basic responsibilities, policies, and practices of private organizations. Further, AFI 34-223 defines and classifies POs.

- With the exception of thrift shop sales of used clothing and other used merchandise, POs are generally prohibited from engaging in frequent or continuous resale activities and may not operate amusement or slot machines

- Continuous operation of a thrift shop requires specific approval of the installation commander (or designee)

- Clubs must get specific permission from the installation commander (or designee) to conduct bake sales, carnivals, and other occasional sales for fundraising purposes

Logistical Support to Private Organizations

- Only limited logistical support to POs is permitted. Always consult the SJA.

- Logistical support to POs is permitted when the installation commander determines that it meets the follow test under the JER 3-211:

  -- Does not interfere with performance of official duties or detract from readiness

-- Community relations or other public affairs purposes are served by the support

-- It is appropriate to associate DoD with the event

-- Event is of interest and benefits the local community or DoD

-- Base is able and willing to provide comparable support to other similar events

-- Support is not restricted by other statutes

-- There is no admission fee beyond reasonable costs

-- POs in overseas areas can request additional support through the installation commander to MAJCOM/A1S

References

DoD 5500.07-R, *Joint Ethics Regulation (JER)*, 30 August 1993, with changes 1 through 7 (17 November 2011)

AFI 34-223, *Private Organization (PO) Program* (8 March 2007), incorporating Change 1, 30 November 2010, certified current, 4 April 2011

AFI 36-3101, *Fundraising within the Air Force* (12 July 2002)

FREE SPEECH, DEMONSTRATIONS, OPEN HOUSES AND HATE GROUPS

Air Force commanders have the inherent authority and responsibility to execute the mission, protect resources, and maintain good order and discipline. This authority and responsibility includes placing lawful restrictions upon certain demonstration and protest activities.

Commander Responsibilities

- Commanders must preserve all service member's right of expression, consistent with good order, discipline and national security, to the maximum extent possible. To properly balance these interests, commanders must exercise prudent judgment and consult with their staff judge advocate (SJA).

  -- Air Force members may not distribute or post any unofficial printed or written material within any Air Force installation without permission of the installation commander

  -- Air Force members may not write for unofficial publications during duty hours

  -- Military personnel must reject participation in organizations that advocate or espouse supremacist, extremist, or criminal gang doctrine (ideology) or causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in an effort to deprive individuals of their civil rights

    --- Members who actively participate in such groups or activities are subject to adverse administrative and disciplinary action, including separation and punishment under the UCMJ

    --- Mere membership in these groups is not prohibited; however, membership must be considered in evaluating or assigning members, particularly supervisory positions

    --- One tool for identifying whether a particular organization is a recognized criminal gang is the FBI's National Gang Threat Assessment. Assessments are found at https://www.fbi.gov/stats-services/publications. This assessment is periodically updated, so users should verify that they are accessing the FBI's most recent report. However, this publication may be supplemented, with Air Force Office of Special Investigations (AFOSI) input, at any level, to locally augment the list of recognized criminal gangs.

Controlling or Prohibiting Demonstrations and Protests

- Commanders may also take measures to control or prevent demonstrations and protest activities within the installation

  -- Demonstrations or related activities on an Air Force installation may be prohibited if:

    --- They interfere with mission accomplishment, or

    --- They present a clear danger to loyalty, discipline, or morale of service members

  -- No one may enter a military installation for any purpose prohibited by law or regulation, or reenter an installation after having been barred by order of the installation commander

  -- Air Force members are prohibited from participating in demonstrations when they are on duty, when they are in a foreign country, when they are in uniform, when their activities constitute a breach of law and order, or when violence is likely to result. Members who violate this provision are subject to disciplinary action under UCMJ, Art. 92.

Political Activities by Members of the Air Force

- Air Force members may register to vote and express a personal opinion on political candidates and issues, but not as a representative of the Armed Forces

- For a list of prohibited and permitted political activities, see AFI 51-902, *Political Activities by Members of the U.S. Air Force*, paras. 3 and 4

Open House Requirements and Responsibilities

- An open house where the general public is invited onto the installation does not, in and of itself, cause the installation to lose its status as "closed" for the purposes of limiting political or ideological speech. "Closed" means not a public forum for protests or demonstrations.

  -- Open houses are for local community relations. Commanders retain the authority to prevent political or ideological speech or demonstrations on the installation during an open house.

-- Commanders can prevent or stop political or ideological speech because such speech creates a danger to loyalty, good order, and discipline

--- Commanders need not wait until loyalty, good order or discipline are actually negatively affected before preventing or stopping the speech

--- Speech that presents such a danger can be prevented at the outset because it presents such a danger

-- If a person or group attempts to engage in political or ideological expression or demonstrations on an installation, the commander should escort the offending party or parties off the installation and issue a barment letter, the violation of which can subject the offender to criminal penalties

-- An installation loses its status as "closed" for the purposes of preventing political or ideological speech or demonstrations **ONLY IF** the commander allows political or ideological speech or demonstrations to occur or by abandoning control over the installation or parts of it

- Installation commanders should be careful about whom they invite onto the installation and what they allow those people to do. It is important to work closely with the SJA to plan open houses so that potential problems can be prevented and to solve free speech issues should they arise.

References

DoDD 1344.10, *Political Activities by Members of the Armed Force*s (19 February 2008)
AFI 51-902, *Political Activities by Members of the U.S. Air Force* (27 August 2014)
AFI 51-903, *Dissident and Protest Activities* (30 July 2015)
AFI 51-904, *Complaints of Wrongs under Article 138, Uniform Code of Military Justice* (28 July 2015)

RELIGIOUS ISSUES IN THE AIR FORCE

Issues involving religion have an inherent potential to generate media, advocacy group, and political attention quickly. Resolution of religious issues (particularly regarding accommodation and whether speech or practices in a duty context are permissible) is always highly fact and situation dependent and seldom amenable to simple, bright line, "one-size-fits-all" rules. It is essential that commanders consult their staff chaplains and staff judge advocates (SJAs) when religious issues arise.

Constitutional Basis

- First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."
  - -- Establishment Clause: Essentially requires (in appearance and reality) the government not exercise a preference for one religion over another, or religion over non-religion
  - -- Free Exercise Clause: Constitutional protection for religious speech and practices (does **NOT** absolutely protect all religious expression under all circumstances)
  - -- Consult your SJA for analytical standards/tests for governmental restrictions on religious expression based upon most current Supreme Court holdings

Religious Expression Authorities

- Religious expression in the Air Force is governed primarily by the Free Exercise Clause and the Religious Freedom Restoration Act (RFRA)
- RFRA provides broad protection for religious liberty and ensures the government shall not substantially burden a person's exercise of religion unless the burden is:
  - -- (1) In furtherance of a compelling governmental interest, and
  - -- (2) Is the least restrictive means of furthering that compelling governmental interest

General Principles for Leaders

- Per AFI 1-1, *Air Force Standards*, para. 2.12, leaders at all levels must balance constitutional protections for free exercise of religion with the constitutional prohibition against governmental establishment of religion

- Commanders must ensure their words and actions cannot reasonably be construed to be officially endorsing or disapproving of, or extending preferential treatment for any faith, belief, or absence of belief

  -- Commanders must be sensitive to the potential for real-world military implications when religion and official business intersect. Context is critical and commanders should exercise caution before engaging in activities in the military setting that would leave a reasonable observer with the impression that the commander is endorsing, sponsoring, or inhibiting religion.

  -- Not all members of the command will share the commander's beliefs; they may feel alienated or marginalized when their commander espouses a particular religious belief or preference for one religion

  -- Some may question whether they will be viewed with impartiality or with disfavor if they do not agree with their new commander's religious views

Religious Expression in the Workplace

- Voluntary discussions of religion are permissible, even if conducted in uniform, to the same extent that they may engage in comparable private expression about subjects not related to religious issues, where it is clear that the discussions are personal, not official, and they are free from coercion or appearance of coercion

- Restrictions on such expression must be based on generally applicable, content-neutral factors, such as whether the expression would disrupt mission accomplishment or would have an adverse impact on good order and discipline. Additionally, restrictions on religious-related expression are appropriate if the member's expression can reasonably be attributed to the Air Force, thus constituting an impermissible endorsement.

- When religious expression is directed towards other Airmen, the speaker must refrain from such expression when an Airman asks that it stop or otherwise demonstrates that it is unwelcome

- Leaders should be mindful that subordinates could perceive their religious expression as coercive, even if it is not intended as such. Consequently, supervisors must not use their authority to require or discourage religious expression among subordinates.

- There is nothing wrong with an Airman sharing his/her faith or inviting another co-worker to attend his/her place of worship as long the Airman respects the views and requests of the co-worker

Prayer

- As a general rule, prayer constitutes protected religious expression. However, in official circumstances, or when superior/subordinate relationships are involved, superiors must be sensitive to the potential that personal expressions may appear official or coercive.

- Public prayer must not endorse, or appear to endorse, religion

  -- It should not be part of routine official business, e.g., staff meetings

  -- If a chaplain is asked to pray at an official event, the choice of prayer is in the discretion of the chaplain as long as the prayer does not state or imply any Air Force endorsement of a specific religion

- Mutual respect and common sense should serve as a guide, including consideration of unusual circumstances, such as a recent death, imminent danger, etc

- Leaders should avoid leading prayers at official functions. Any prayers should be led by a chaplain, if possible, or another Airman.

- Religious content/prayer is acceptable as an exercise of free exercise in ceremonies that are primarily personal to the honoree, such as retirements. If a commander is the presiding official for the event, the commander could ask to have the "emcee" announce that the religious content/prayer is at the request of the honoree.

  -- All such requests should be coordinated with the commander well in advance of the ceremony. The commander retains responsibility for ensuring that the proposed religious content does not violate Air Force instructions or regulations.

- Attendance at National Prayer Breakfast activities in uniform is neither prohibited nor encouraged (i.e., it is left to attendee's discretion)

Religious Displays

- Displays of religious articles are permissible in government offices where it is clear that the articles are personal and are not used to promote a specific religious belief to office members

- Supervisors may restrict all posters regardless of content, or posters of a certain size, in private work areas, or require that such posters be displayed facing the employee, and not on common walls. However, a supervisor is not permitted to specifically

single out religious posters (e.g., the Ten Commandments) for either negative or preferential treatment compared to other posters.

- Context is critical: while the Ten Commandments may be permissible in the employee's cubicle, religious displays have the potential to send a message of endorsement of particular religious beliefs

Official Communications

- Installations and units are encouraged to use or assist their chaplains in using official communication channels to distribute and communicate Chaplain Corps religious events/services

- Chaplains should handle advertisement of special religious events (e.g., religion-based marriage enrichment seminars, workshops conducted by a chaplain of one faith solely for people of that faith) when possible

  -- If this is not possible, the advertising commander must ensure the audience understands the announcement is being distributed on behalf of the chaplain. The commander must avoid the appearance that he or she is endorsing the underlying religious viewpoint. The higher the organizational level of the announcement, the more important it is to be sensitive to this.

- In official government correspondence, including e-mail messages, the Air Force determines what is appropriate for inclusion

- Supervisors may restrict the inclusion of extraneous information (including religious or other messages) that have no relationship to Air Force business, so long as the restriction prohibits religious (or anti-religious) extraneous messages in the same manner as it restricts all other types of extraneous language

Accommodation of Religious Practices

- The Air Force places a high value on the rights of Air Force members to observe the tenets of their respective religions or to observe no religion at all

- 10 U.S.C. § 774, permits wear of religious apparel in uniform unless, as determined pursuant to service regulation, the apparel would interfere with performance of duty or is not neat and conservative

- Commanders and supervisors must fairly consider requests for religious accommodation. Airmen requesting accommodation will continue to comply with directives,

instructions and lawful orders from which they are requesting accommodation unless and until the request is approved.

- Religious Accommodation Resolution Factors:

  -- The first question is whether the exercise of religion for which the Airman is requesting accommodation is grounded in a sincerely held religious belief. If so, the relevant exercise of religion can include any religious practice, whether compelled by, or central to, a system of religious belief.

  -- The next question is whether the policy, practice, or duty from which the Airman is requesting accommodation substantially burdens the exercise of religion. A substantial burden is one that significantly interferes with the exercise of religion. If exercising a sincerely held religious belief without an accommodation would result in an adverse action being taken, the policy, practice, or duty likely significantly interferes with the exercise of religion.

  -- If the member's exercise of religion is substantially burdened, the request for religious accommodation may be denied only when the military policy, practice, or duty furthers a compelling governmental interest (a military requirement that is essential to accomplishment of the military mission), and is the least restrictive means of furthering that compelling governmental interest

  -- In determining whether a compelling governmental interest exists and the restriction is narrowly tailored and uses the least restrictive means to achieve the compelling interest, consider the following factors, in addition to any other factors deemed appropriate:

    --- Importance and need for the specific policy, practice, or duty in terms of mission accomplishment, including military readiness, unit cohesion, good order, discipline, health, and safety

    --- Cumulative impact of multiple and/or repeated requests of a similar nature

    --- Mission related circumstances surrounding the relevant time period, including operational tempo, location, and threat level

    --- Previous decisions on similar requests, including decisions on similar requests made for other than religious reasons

  -- If the governmental interest is found to be compelling, alternative ways to accomplish the interest so the request can be approved must be considered. With the

advice of a chaplain, alternative ways (partial approval) to satisfy the requested accommodation can also be considered.

-- When the policy, practice or duty from which the Airman is requesting accommodation does not substantially burden the exercise of religion, the needs of the requesting Airman are balanced against the needs of mission accomplishment. The request will only be denied when the needs of mission accomplishment outweigh the needs of the Airman.

-- If a religious accommodation request based on a sincerely held religious belief cannot be approved, alternative administrative personnel actions may be considered for the purpose of assisting the Airman. These actions can include reassignment, reclassification, or a voluntary separation.

-- Requests for religious accommodations must be assessed on a case-by-case basis, considering the unique facts, requiring consultation with your servicing SJA and chaplain

Religious Apparel

- Definition: Religious apparel is defined as apparel worn as part of the observances of a religious faith practiced by an Airman

- Religious Apparel During Worship Services: Does not require a religious accommodation request, and may be worn in uniform while Airmen are present at a worship service, rite, or other ritual distinct to a faith or denominational group

  -- Commanders may, for operational or safety reasons, limit the wear of non-subdued items of religious apparel during services conducted in the field based on military necessity

- Religious Apparel (Not Visible or Otherwise Apparent): Does not require a religious accommodation request, and may be worn in uniform, provided it does not interfere with the performance of the member's military duties or the proper wearing of any authorized article of the uniform

  -- Commanders may, for operational or safety reasons, limit the wear of religious apparel that is not visible or otherwise apparent

- Religious Apparel (Visible or Apparent): For religious apparel that is visible or apparent, Airmen may request a waiver of AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, to permit wear of neat and conservative religious apparel

- Religious Apparel on Uniform: Items may not be temporarily or permanently affixed to any authorized uniform article. With the exception of chaplain function badges, religious apparel visible or otherwise apparent will not be worn during parades, ceremonial details, ceremonial functions, or in official photos.

- Considerations: Commanders should take the following into account when considering requests for uniform and dress and appearance-related religious accommodation:

  -- Team identity

  -- Unit cohesion

  -- Subordination of self to military service

  -- Public access to the location

  -- Operations

  -- Safety

- Minimally Conspicuous Headgear: Installation Commanders may approve requests for wear of religious head coverings indoors that are minimally conspicuous and may approve the wear of religious head coverings outdoors if concealed under military headgear

  -- "Minimally conspicuous" means that the religious headgear is neat and conservative, is plain and dark blue or black, and would not, in the commander's judgment, draw the focus of an observers' attention from the uniform as a whole

- Non-standard Grooming and Personal Appearance: Some religious beliefs require members to maintain grooming standards, religious tattoos/body art, and/or personal appearance modifications that conflict with Air Force dress and personal appearance standards

  -- Factors to consider include whether approving the religious accommodation would impair the safe and effective operation of weapons, military equipment, or machinery; pose a health or safety hazard; interfere with the wear or proper function of special or protective clothing or equipment; otherwise impair discipline, morale, unit cohesion, or accomplishment of the unit mission

  -- During tours of less than 30 days, Air Force Reserve (AFR) and Air National Guard (ANG) chaplains not on extended active duty may request a beard waiver for religious observance when consistent with their faith

Social Media

- Social media includes, but is not limited to, weblogs, message boards, video sharing, and other media sharing web sites. AFI 35-113, *Internal Information*, provides social media guidance.

- Generally, the Air Force views personal web sites and weblogs positively, and it respects the right of Airmen to use them as a medium of self-expression, including religious expression, even if their status as Air Force members is apparent

- Airmen must abide by certain restrictions to avoid harming good order and discipline. Expression that palpably prejudices good order and discipline or discredits the Air Force is subject to the UCMJ.

- Whether expression of the poster's identity can/should be restricted involves such considerations as, for example, whether the member uses express or inferential language suggesting Air Force endorsement of the expression or religious belief, or implicates DoD 5500.07-R, *Joint Ethics Regulation* (JER) by making indications of federal support of non-federal entities

- While service members may generally use their grade and service even when acting in their personal capacity, they should not do so in situations where the context may imply official sanction or endorsement of their personal religious opinions

- Stronger, more prominent disclaimer than the minimums suggested/required by AFIs can minimize potential problems for the poster and the Air Force, as well as better inform readers of a personal social media site or post

Advocacy from Interest Groups Might Sound Authoritative, but it's Still Just Advocacy

- Interest group advocates (including lawyers) seeking a particular resolution of a religious issue of which they have become aware might call you directly, advising you that the law "requires" you to adopt their position. If this happens, here are some suggestions based on experience:

    -- Avoid sounding sympathetic or agreeable to their pronouncements

    -- Threats of adverse publicity or litigation are to be expected; just tell the caller that you'll let public affairs (PA) and/or your SJA know

-- Do not take unilateral action (i.e., action without first consulting JA and/or PA) to do what the caller is requesting or demanding!

-- Thank the caller for bringing the matter to your attention. Do not make any promises or statements indicating you or anyone else will investigate the matter, or take some action within a specific time frame. Following the call, notify your SJA, chaplain, and or PA.

-- If you believe a follow-up response is appropriate, it is preferable to disengage yourself and notify your SJA, chaplain, and PA

References

U.S. Const. Amend. 1

10 U.S.C. § 774

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*

DoDI 1300.17, *Accommodation of Religious Practices within the Military Services* (10 February 2009), incorporating Change 1, 22 January 2014

DoDI 5500.7-R, *Joint Ethics Regulation* (JER) (30 Aug 1993), incorporating through Change 7, 17 November 2011

AFI 1-1, *Air Force Standards* (7 August 2012) incorporating Change 1, 12 November 2014

AFI 35-113, *Internal Information* (11 March 2010)

AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel* (18 July 2011), incorporating through Change 4, 28 May 2015, including AFI36-2903_AFGM2016-03, 30 March 2016

SOCIAL MEDIA

Social media is a tool that allows the Air Force to conduct outreach with the general public, as well as for Airmen—military and civilian—to interact personally with friends, family, the media, elected officials, and strangers. The rules for social media use within the DoD are frequently updated. Consult your staff judge advocate (SJA) for the latest standard. Social media tools have become a staple of modern life and most Airmen have one or more personal social media accounts. The rules for use of social media can be divided into two categories: official use (use by the Air Force to conduct official Air Force duties) and personal use.

Official Use

- Official use of social media must comply with all DoD and Air Force guidance

- Any official use of social media must be approved by Air Force Public Affairs (PA) and follow policies established by SAF/PA (http://www.defense.gov/socialmedia/education-and-training.aspx)

  -- Air Force official social media sites are alternative forms of distribution of government information. As such, all information on a third party social media site must also be posted on an official .mil/.gov web site.

  -- Air Force official social media sites may not contain any non-public information or link to any site that contains non-public information

  -- Air Force social media sites may not "follow/fan/like" any non-Federal government sites unless there is a mission critical reason to do so (such as State Air Guard, NATO)

  -- All Air Force official social media sites must link back to an official .mil page

  -- All Air Force official social media sites must contain disclaimers, comment policies, and privacy policies. Contact your local PA office for sample disclaimers and comment policies.

  -- Comments received on Air Force official social media sites must be moderated for topic and language (as outlined in the comment policies). Comments may not be deleted for political opinions or because they disagree with the Air Force position on a subject. An official Air Force organizational e-mail address must also be provided to allow users to comment directly to the Air Force.

-- All Air Force official social media posts and comments received must be maintained in accordance with Air Force records retention guidelines

Personal Use

- Same rules that bind Airmen when communicating in person, by phone, e-mail, or mail also apply when communicating via social media. Specifically, all UCMJ articles and Air Force regulations that pertain to communications apply to social media. Some common social media issues include:

  -- Fraternization/Unprofessional Relationships: Airmen are obligated to maintain appropriate communication and conduct with officer and enlisted personnel, peers, superiors, and subordinates (to include civilian superiors and subordinates)

  -- Offensive Conduct: Airmen must avoid offensive and/or inappropriate behavior that could bring discredit upon the Air Force, themselves in their capacity as an Air Force member, or that would otherwise be harmful to good order and discipline, respect for authority, unit cohesion, morale, mission accomplishment, or the trust and confidence that the public has placed in the Air Force

  -- Political Communications: Airmen, in their personal capacity, may engage in political discussions through social media, but may not engage in political discussions that include non-public information or the intricacies of the Air Force or the DoD

    --- Airmen must be careful that personal opinions and activities are not directly, or by implication, represented as those of the Air Force

    --- If, when expressing a personal opinion, personnel are identified by a social media site as DoD employees (for example, the "work and education" section on a Facebook profile lists "United States Air Force"), the posting must clearly and prominently state that the views expressed are those of the individual only and not of the DoD or the Air force

    --- Active duty military members and certain restricted civilian employees are prohibited from participating in partisan political activity. Therefore, while these employees may "follow," "friend," or "like" a political party or candidate running for partisan office, they may not post links to, "share" or "re-tweet" comments or tweets from the Facebook page or Twitter account of a political party or candidate running for partisan office. Such activity is deemed to constitute participation in political activities.

- Airmen may use their official title in social media profiles when the title is listed as part of a profile's biographical information section. That section **must include** at least three other biographical items (such as education, hobbies, or social organizations) in order to meet this requirement. Otherwise, the use of official title is barred in personal social media use.

- In a personal capacity, Airmen may not post Air Force non-public record information obtained from official duties on social media web sites

- Airmen may use government devices to access social media sites under the limited personal use exception when it does not interfere with their official duties; however that use must be approved by their supervisor and cannot otherwise interfere with their official duties

- For further guidance on Air Force social media, refer to: http://www.af.mil/Portals/1/documents/SocialMediaGuide2013.pdf

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References

The National Defense Authorization Act for Fiscal Year 2013, 41 U.S.C. 4712(e)
5 U.S.C. § 7323
Pickering v. Bd. of Educ., 391 U.S. 563 (1968)
5 C.F.R 734.208, *Participation in Fundraising*
5 C.F.R. 2635.702-705, *Misuses of Position*
5 C.F.R. 2635.807, *Teaching, Speaking, and Writing*
5 C.F.R. 2635.808, *Fundraising Activities*
OMB M-10-22, *Guidance for Online Use of Web Measurement and Customization Technologies* (25 June 2010)
OMB M-10-23, *Guidance for Agency Use of Third-Party Websites and Applications* (25 June 2010)
DoDD 1344.10, *Political Activities of the Armed Forces on Active Duty* (19 February 2008)
DoDI 8550.1, *DoD Internet Services and Internet-Based Capabilities* (11 September 2012)
Social Media and the Hatch Act, Office of Special Counsel Memorandum (December 2015)
AFI 1-1, *Air Force Standards* (7 August 2012), incorporating Change 1, 12 November 2014

FREEDOM OF INFORMATION ACT (FOIA)

The Freedom of Information Act (FOIA) is a disclosure statute that permits access to information maintained by government agencies. The basic goals of the FOIA are to ensure an informed citizenry, to serve as a check against corruption, and to help hold the government accountable. The Act applies to the DoD, Department of the Air Force, and other federal executive agencies. Enacted in 1966, FOIA generally provides a right of access to federal executive agency information, except records (or portions) that are protected from disclosure by one of the FOIA exemptions provided in the statute.

FOIA Exemptions

- There are seven exemptions under the FOIA which provide a basis for withholding information:

  -- Classified information (e.g., confidential, secret, top secret). "For Official Use Only" is not a security classification.

  -- Matters relating solely to the internal personnel rules and practices of the agency

  -- Information exempted by another statute (e.g., drug rehabilitation information, or information protected by the Privacy Act)

  -- Trade secrets or commercial or financial information submitted on a privileged or confidential basis. (e.g., bid contract proposals)

  -- Interior intra-agency documents normally privileged in the civil court context (e.g., attorney work-product and pre-decisional policy discussions)

  -- Law enforcement information (e.g., information that would disclose the identity of confidential informants)

  -- Information in personnel, medical, and similar files which, if disclosed to the requester, would result in a clearly unwarranted invasion of personal privacy

    --- Some examples of personal information which are releasable because there is no unwarranted invasion of personal privacy are: name, rank, date of rank, gross pay, present and past duty assignments, future assignments which have been finalized, office/organizational address, and duty phone number. However, the names and addresses (postal and/or e-mail) of DoD military and civilian personnel in sensitive units, routinely deployable units, or assigned in foreign territories are normally not releasable.

--- Information not normally releasable as an unwarranted invasion of personal privacy includes home addresses, home phone numbers, and social security numbers

FOIA Requests

- When a FOIA request is received immediately submit the request to the base FOIA office for processing. By law, the agency must respond to the requester within 20 working days of receiving a perfected FOIA request.

- The FOIA request can be made by "any person," which has been broadly defined to include foreign citizens and governments, corporations, and state governments. To comply with the rules, the request must:

  -- Be in writing (includes requests sent by facsimile, or electronically)

  -- Explicitly or implicitly invoke the FOIA

  -- Reasonably describe the desired record

  -- Give assurances to pay any required fees or explain why a waiver is appropriate

FOIA Processing

- The office of primary responsibility (OPR) (not the FOIA office or the servicing staff judge advocate (SJA)) is responsible for conducting an initial review of the responsive records and making proposed redactions based on the exemptions in the FOIA discussed above

- After initial review, forward to the SJA for comment

  -- If the SJA recommends approval, local release authority can approve request and release information

  -- If the SJA recommends denial, then a legal review is attached and the case is forwarded immediately to the initial denial authority (IDA), typically the MAJCOM commander or designee

- The IDA takes appropriate action. If records are denied, wholly or in part, the IDA tells requester the reason for the denial and the appeal procedure to follow. The IDA must issue its decision within 20 working days of receipt of the request by the base FOIA office.

- Appeals are taken to SAF/GCA for resolution after being reassessed by the MAJCOM FOIA office

- Requester may file suit in federal district court to compel the release of the requested information if the appeal results in denial

- Agencies are not required to create, compile, or obtain records not already in their possession to comply with a FOIA request. However, they are required to make reasonable efforts to extract data from existing records to comply with a FOIA request, so long as such an extraction is within the agency's normal business practices.

- Honoring form or format requests: In making any record available to a person, the agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Agencies are required to make reasonable efforts to maintain their records in forms or formats that are reproducible and have an affirmative duty to search for records in electronic form or format (e.g., in e-mails).

- Multi-track processing is authorized if the number of pending requests or complexity of a request precludes response within the statutory 20-working day limit. All tracks operate on a first-in, first-out system. If the base FOIA office determines a request is not eligible for its fastest track, it must give the requester the opportunity to limit the scope of the request.

  -- Simple Requests: Ones that clearly identify the requested records, have few responsive records, deal with only one installation and, generally, one OPR, and do not involve Privacy Act, classified, or deliberative process materials

  -- Complex Requests: Ones that include massive responsive records, cause significant impact on units, require coordination from multiple offices, or include material that is classified or privileged, or originated from a non-government source

  -- Expedited Track: Agencies are required to promulgate regulations providing for expedited processing of requests for records if the requester demonstrates a "compelling need." Agencies must notify expedited processing requesters whether the request has been granted within 10 calendar days.

    --- A "compelling need" means failure to receive the records in an expedited manner reasonably poses an imminent threat to the life or physical safety of an individual

--- Denial of a request for expedited processing, whether initially or on appeal, is subject to judicial review

--- Agencies may process "urgently needed" material in the expedited track after "compelling need" requests have been fulfilled

Electronic Reading Rooms

- Installation commanders must establish electronic reading rooms on the installation web site and make frequently requested records (records typically requested three or more times per quarter) available through links in the reading room site

- Certain records, such as policy statements, created on or after 1 November 1996, must be made available electronically in a public reading room within 1 year of creation

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References

Freedom of Information Act, 5 U.S.C. § 552
Privacy Act, 5 U.S.C. § 552a
DoDD 5400.07, *DoD Freedom of Information Act (FOIA) Program* (2 January 2008), certified current through 2 January 2015
DoD 5400.7-R_AFMAN 33-302, *Freedom of Information Act Program* (21 October 2010) incorporating through Change 2 (22 January 2015)

PRIVACY ACT

The Privacy Act (PA) is designed to accomplish several purposes. Primarily, it limits the government's ability to collect information about an individual to those instances authorized by law or executive order and necessary for government business. The PA also authorizes individuals to access records maintained on them by the government and to correct factual errors in those records. The PA only governs activities of the federal executive branch of government.

Basic Structure of PA Systems

- Every system of records must be listed in the Federal Register before information may be collected

- A system of records contains information on individuals that is retrieved by the individual's name or personal identifier, such as a social security number. All systems of records must have a PA warning on them.

  -- System of records developers and managers must perform privacy impact assessments before creating a system of records or modifying information contained in a system of records

  -- Do not place PA information in areas where individuals without an official need to know will have access (including common drives on computer systems)

  -- Personal notes maintained by a supervisor as memory aids at her own initiative are not considered a system of records, even if maintained by name or personal identifier, unless the records are required by command policy or regulation, or the supervisor shows the records to other agency personnel

- Contractors who maintain systems of records for an executive agency are bound by the PA

- Before being required to provide information for a system of records, an individual must be given the opportunity to read the privacy act statement (PAS) for the system of records

  -- PAS appears in the Federal Register listing for the system of records and can be posted as a sign or printed and handed to the individual.

  -- PAS may also be verbally told to the individual

-- PAS includes the authority for collecting the information, whether disclosure is voluntary or mandatory, routine uses of the information, and the consequences of not providing the information, if any

Disclosure Procedures

- To the Individual Subject of the Record:

  -- Subjects of PA records and their designated representatives may request copies of their records

    --- Individuals do not need to state a reason for requesting access

    --- System managers must verify the requester's identity

  -- Requesters must describe the records they are seeking—"all records on me" is not sufficient—system managers may ask for clarification

  -- Requesters **MAY NOT** use government resources to create or send their request

  -- If records will be released, the system manager must notify the sender within 10 work days and provide access to the record within 30 work days of receiving the request. The system manager may take up to 20 work days to determine whether release is authorized if he notifies the requester of the reason for the delay within 10 work days.

  -- The requester may have to pay fees if the record exceeds 100 copied pages

- To Third Parties:

  -- The PA requires written consent from the subject before releasing information unless an exception applies

  -- Exceptions allowing disclosure to third parties without subject consent

    --- To DoD employees with an official need to know

    --- Disclosure is required by the Freedom of Information Act (FOIA). Consult your servicing staff judge advocate (SJA) and Freedom of Information Act (FOIA) office before providing information subject to the PA

--- To agencies outside DoD, if consistent with the routine uses listed in the Federal Register's system of records notice

--- To the Bureau of the Census

--- Compilations of statistical data where individual data is not identifiable

--- To the National Archives and Records Administration for permanent storage

--- To a federal, state, or local agency for civil or criminal law enforcement action

--- To an individual or agency requiring the information for compelling health or safety reasons

--- To Congress

--- To the Comptroller General

--- To a court of competent jurisdiction in response to a court order from a judge

--- To a consumer reporting agency, if allowed by system of records notice

Denials

- For a record to be denied, it must be covered by an exemption
- Only specific documents in the record covered by the exemption may be denied
- Segregate non-exempt documents and release them
- Third-party information contained in the record may be redacted depending on the nature of the information and its relevance to the record; always contact your servicing SJA for guidance on releasing third party information in a PA record
- System managers send recommendations for denials to their servicing SJA and PA office for review within 5 days of receiving the request
- MAJCOM commanders take action on recommended denials

- Commonly encountered limits on release to the subject of record are as follows:

  -- Do not release information collected in anticipation of civil litigation or created as attorney work product

  -- Have medical records reviewed by a doctor before release; if the doctor determines disclosing the records could cause mental harm or hardship to the requester, ask the requester for the name of a physician to whom the records can be sent. Include a letter to that physician with the records explaining the reviewing doctor's basis for not disclosing the records directly to the requester. Consult AFI 41-210, *Tricare Operations and Patient Administration Functions*, and DoD 6025.18-R, *DoD Health Information Privacy Regulation*, for additional guidance regarding medical records.

Special Handling Requirements

- Medical Records of Minors:

  -- If overseas and the minor is between ages 15 and 17, do not release a minor's medical records to the minor's parents or legal guardians without court order or consent from the minor, if regulation or statute provides for confidentiality of the records and the minor has asked for confidentiality

  -- If within the territorial United States, state laws may limit parental access to medical records of their children. Consult with your servicing SJA for compliance requirements.

- When transmitting PA material using e-mail, the sender must include a warning that the e-mail contains PA material and is for official use only (FOUO) at the beginning of the message and include "FOUO" at the beginning of the subject line

- Do not place PA material on Internet sites accessible by individuals without an official need to know the information

Violations

- Subjects may file suit in civil court to gain access to PA materials and correct errors in those materials. The court may award attorney's fees, court costs, and damages.

- Individuals may be criminally prosecuted for willful, unauthorized disclosures of PA information or maintenance of an unauthorized system of records both by civilian authorities and under the UCMJ

References

Privacy Act of 1974, 5 U.S.C. § 552a
DoD 6025.18-R, *DoD Health Information Privacy Regulation* (24 January 2003)
AFI 33-332, *Air Force Privacy and Civil Liberties Program* (12 January 2015)
AFI 41-210, *Tricare Operations and Patient Administration Functions* (6 June 2012)

RETURN OF MILITARY PERSONNEL, EMPLOYEES, AND FAMILY MEMBERS FROM OVERSEAS FOR TRIAL

Congress requires the Armed Services to have uniform regulations for delivering military members accused of a crime to civil authorities. DoD regulations requires cooperation with federal and state officials who request assistance to enforce court orders pertaining to the witness testimony or in court appearance of a military member, employee, or family member.

Adherence to Court Orders to Testify

- Air Force members, civilian employees, and family members are expected to comply with orders issued by a federal or state court of competent jurisdiction unless non-compliance is legally justified. Members and employees who persist in non-compliance are subject to adverse administrative action, including separation for cause.

- Air Force officials will ensure that members, employees, and family members do not use assignments or officially sponsored residences outside the United States to avoid complying with valid court orders.

Procedure: Witness Request for Military Members Who Are Overseas

- When federal, state, or local authorities request delivery of an Air Force member who is stationed outside the United States and who is convicted of, or charged with, a felony or who is sought for the unlawful taking of a child, he or she will normally be expeditiously returned to the United States for delivery to the requesting authorities. The office of primary responsibility (OPR) for this process is AFLOA/JAJM.

  -- Requests for delivery of military members to state or local authorities must be accompanied by a warrant or a representation by a federal marshal or agent that such a warrant has been issued

  -- Before taking action to return a member under these circumstances, the member must be afforded an opportunity to show legitimate cause for non-compliance

  -- The Judge Advocate General (TJAG) may direct return for less serious offenses when deemed appropriate under the facts and circumstances of a particular case

  -- Return is not required if the controversy can be resolved without returning the member to the United States

  - If approved, the member receives permanent change of station (PCS) orders from the Air Force Personnel Center (AFPC) with an assignment to an installation as close to the requesting jurisdiction as possible

  - Requesting authorities will be notified of member's new assignment, port of entry, and estimated time of arrival

- A request for return of a member to the United States by civilian authorities may be denied if any of the following exist:

  - Member's return would have an adverse impact on operational readiness or mission requirements

  - An international agreement precludes the member's return

  - Member is subject to foreign judicial or court-martial proceedings or a military department investigation

  - Member shows satisfactory evidence of legal efforts to resist the request or other legitimate causes for non-compliance

  - Other unusual facts or circumstances warrant a denial

- Commanders send recommendations for denial through their legal office to AFLOA/JAJM, SAF/GC, and SAF/MI. The Under Secretary of Defense for Personnel and Readiness (USD/P&R) is the decision authority.

- Requests must be processed expeditiously. A delay of up to 90 days may be granted by TJAG if any of the following apply:

  - Efforts are in progress to resolve the controversy without the member's return

  - Additional time is required to permit the member to provide satisfactory evidence of legal efforts to resist the request or show legitimate cause for non-compliance

  - Additional time is needed to determine the mission impact of the member's loss or impact on any international agreement, foreign judicial proceeding or ongoing military department investigation or court-martial

  - Other unusual facts or circumstances warrant delay

Procedure: Civilian Employees or Family Members Who Are Overseas

- Upon receipt of a request for assistance from federal, state, or local authorities for custody involving non-compliance with a court order—such as arrest warrant, indictment, information, or contempt violation involving the unlawful removing of a child. After exhausting all reasonable efforts to resolve the matter without the employee or family member returning to the United States, the commander shall strongly encourage the employee or family member to comply.

- If an employee does not comply, the commander shall consider imposing disciplinary action including removal against the employee. If a family member does not comply, the commander shall consider withdrawing command sponsorship of the family member.

References

DoDI 5525.09, *Compliance of DoD Members, Employees, and Family Members Outside the United States with Court Orders* (10 February 2006)

DoDI 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members* (3 March 2005)

AFI 51-1001, *Delivery of Personnel to United States Civilian Authorities for Trial* (28 August 2014)

CITIZENSHIP FOR MILITARY MEMBERS

Members and certain veterans of the U.S. military may be eligible for naturalization through their military service under Section 328 or 329 of the Immigration and Nationality Act (INA). The INA also allows for posthumous naturalization for service members who served during a designated period of hostilities under section 329A.

Naturalization through Peacetime Service

- A member who has served honorably in the U.S. armed forces at any time may be eligible to apply for naturalization under Section 328 of the INA

- In general, an applicant for naturalization under Section 328 of the INA must:

  -- Be age 18 or older

  -- Have served honorably in the U.S. armed forces for at least 1 year and, if separated from the U.S. armed forces, have been separated honorably

  -- Be a permanent resident at the time of examination on the naturalization application

  -- Be able to read, write, and speak basic English

  -- Demonstrate knowledge of U.S. history and government (civics)

  -- Have been a person of good moral character during all relevant periods under the law

  -- Have an attachment to the principles of the U.S. Constitution and be well disposed to the good order and happiness of the United States during all relevant periods under the law

  -- Have continuously resided in the United States for at least 5 years and have been physically present in the United States for at least 30 months out of the 5 years immediately preceding the filing date of the application, **UNLESS** the applicant has filed an application while still in the service or within 6 months of separation. In the latter case, the applicant is not required to meet these residence and physical presence requirements.

Naturalization through Wartime Service

- Generally, members of the U.S. armed forces who serve honorably for any period of time (even 1 day) during specifically designated periods of hostilities are eligible for naturalization under Section 329 of the INA

- In general, an applicant for naturalization under INA Section 329 must:

  -- Have served honorably in active duty status, or as a member of the Selected Reserve of the Ready Reserve, for any amount of time during a designated period of hostilities and, if separated from the U.S. armed forces, have been separated honorably

  -- Have been lawfully admitted as a permanent resident at any time after enlistment or induction, **OR** have been physically present in the United States or certain territories at the time of enlistment or induction (regardless of whether the applicant was admitted as a permanent resident)

  -- Be able to read, write, and speak basic English

  -- Demonstrate knowledge of U.S. history and government (civics)

  -- Have been a person of good moral character during all relevant periods under the law

  -- Have an attachment to the principles of the U.S. Constitution and be well disposed to the good order and happiness of the United States during all relevant periods under the law

- There is no minimum age requirement for an applicant under this section. The designated periods of hostilities are:

  -- April 6, 1917 to November 11, 1918

  -- September 1, 1939 to December 31, 1946

  -- June 25, 1950 to July 1, 1955

  -- February 28, 1961 to October 15, 1978

  -- August 2, 1990 to April 11, 1991

  -- September 11, 2001 until the present

- Current designated period of hostilities starting on September 11, 2001, will terminate when the President issues an Executive Order terminating the period

Posthumous Citizenship for Military Members

- Members who served honorably in the U.S. armed forces and who died as a result of injury or disease incurred while serving in an active duty status during specified periods of military hostilities, as listed above, may be eligible for posthumous citizenship under section 329A of the INA

- Form N-644, *Application for Posthumous Citizenship*, must be filed on behalf of the deceased service member within two years of his or her death. If approved, a Certificate of Citizenship will be issued in the name of the deceased veteran establishing posthumously that he or she was a U.S. citizen on the date of his or her death.

Application Processing

- Service members must apply for naturalization through the U.S. Citizenship and Immigration Services (USCIS). Service members are not charged filing or biometrics fees associated with the naturalization process.

- Every military installation should have a designated point of contact to assist members with Form N-400, *Naturalization Application* and Form N-426, *Request for Certification of Military or Naval Services*

- Once the packet is complete, it should be sent to the specialized military naturalization unit at the USCIS Nebraska Service Center for expedited processing

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References

Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*
8 U.S.C. §§ 1439(a), 1440
N-400, *Naturalization Application*
N-426, *Request for Certification of Military or Naval Services*

THE AIR FORCE REVIEW BOARDS AGENCY

The Air Force Review Boards Agency (AFRBA) is a Field Operating Agency that acts for the Secretary of the Air Force (SecAF) to make recommendations or decisions on individual personnel cases and applications reserved for Secretarial action. The AFRBA is functionally aligned as a directorate (SAF/MRB) under the Assistant Secretary of the Air Force for Manpower and Reserve Affairs (SAF/MR). The Director of the Review Boards Agency is a member of the Senior Executive Service, vested with substantial delegated authority from SecAF and SAF/MR.

The AFRBA's mission is to ensure equity, fairness, justice, and due process for the affected individuals and the United States Air Force in the most sensitive personnel actions, including officer discharges, approval or disapproval of restricted retirements, grants or denials of clemency and parole, officer and enlisted grade determinations, final agency action on Equal Opportunity (EO) complaints, appeals of security clearance revocations, and much more. The AFRBA is the home of more than nine statutory and regulatory boards, described below, including the SAF Personnel Council and the Air Force Board for Correction of Military Records.

The Air Force Board for Correction of Military Records (AFBCMR)

- Provides the highest level administrative review of military personnel issues within the Department of the Air Force; unless procured by fraud, its corrections are final and conclusive on all officers of the United States

- Applicants must exhaust all other administrative remedies before applying to the AFBCMR

- Applicants have the burden of proof to show that their records contain error or injustice

- By law, the AFBCMR voting members are civilians in the executive part of the Department of the Air Force

The Secretary of the Air Force Personnel Council (SAFPC)

- Acts for, recommends to, and announces decisions on behalf of SecAF for a variety of total force military personnel issues reserved for Secretarial action. Delegates certain authorities (such as unrestricted, voluntary separations and retirements) to special assistants at the AFPC and the ARPC.

- Composed of active duty, United States Air Force Reserve (AFR), and Air National Guard (ANG) commissioned officers, non-commissioned officers, and Department of the Air Force civilians

- SAFPC is Comprised of Seven Component Boards:

  -- Air Force Personnel Board (AFPB)

    --- Charged by Secretarial delegation through SAF/MR with reviewing certain military personnel matters requiring Secretarial action. An extensive list of the types of cases the AFPB considers is included in AFI 36-2023, *The Secretary of the Air Force Personnel Council and the Air Force Personnel Board*. Procedures for processing cases to the AFPB are contained in the respective AFI governing the underlying action.

    --- Common matters reviewed by the AFPB include:

      ---- Resignations, retirements, separations, transfers and releases

      ---- AFPB is the final recommending entity for:

        ----- Cases regarding involuntary officer discharges (including resignations and retirements in lieu of discharge or court-martial)

        ----- Involuntary enlisted discharges/denials of reenlistments for lengthy service (16 or 18 years of service) and retirement eligible Airman (including lengthy service probation (LSP))

        ----- Most conscientious objector applications

        ----- Certain restricted retirements (such as retirements in lieu of demotion), certain restrictions on voluntary officer separation/retention

        ----- Disability separation/retirement appeals and dual actions

        ----- Collateral consequences of disenrollment from the Air Force Academy

      ---- Entitlements, benefits, and pay. Establishes the highest grade an individual satisfactorily held for retirement or separation.

-- Air Force Discharge Review Board (AFDRB)

--- Statutory board that examines an applicant's administrative discharge and may change the characterization of service and/or reason for discharge based on standards of equity or propriety

--- Applications submitted on DD Form 293, *Application for the Review of Discharge from the Armed Forces of the United States*

--- Permits applicants to appear personally or via video teleconference

--- Applicants may appeal to the AFBCMR if they do not receive the desired outcome

-- Air Force Decorations Board

--- Acts on behalf of the Secretary in reviewing recommendations for all high level decorations and awards

--- Maintains the integrity and prestige of the Air Force's highest awards, ensuring nominations meet standards established by law and policy for past, present, and future conflicts. Individual awards include the Airman's Medal through the Medal of Honor. Unit awards include the Air Force Organizational Excellence Award through the Presidential Unit Citation, and Air Force Civilian Honorary Awards.

--- Approves, disapproves, downgrades, upgrades, or recommends upgrade of decorations, unit awards, or other awards/decorations requiring SecAF approval

--- Determines entitlement, at time of approval, to 10 percent increase in retirement pay (applies to enlisted personnel only) for award of the Silver Star, Distinguished Flying Cross (noncombat), and Airman's Medal awarded for extraordinary heroism, in accordance with 10 U.S.C. § 8991

--- Drafts statutory time waivers for Medal of Honor nominations considered under 10 U.S.C. § 1130 to be included in the nomination package that the SecAF forwards to the Secretary of Defense (SecDEF)

-- Air Force Clemency and Parole Board

--- Assists the SecAF in executing clemency, parole, mandatory supervised release, and return to duty authorities established by law

-- DoD Civilian/Military Service Review Board

--- Assists SecDEF in determining if civilian service in support of the U.S. Armed Forces during a period of armed conflict is equivalent to active military service for Veteran Affairs (VA) benefits

-- SAF Remissions Board

--- Acts on behalf of SecAF in reviewing remission applications and providing final decisions or recommendations to the Director, AFRBA

--- Permits applicants to request remission of debts to the United States Air Force which were incurred while serving on active duty. Applications are submitted to the servicing Financial Services Office.

--- Prior to applying, the debt must be established and any administrative procedures and appeals regarding the existence, validity or amount of the debt must have been completed

--- Applicant bears the burden to prove remission of the debt is in the best interest of the United States. The application must demonstrate the collection of the debt is unjust, inequitable, or would create undue hardship.

--- Applicants may appeal decisions which do not grant the full relief requested. When the decision was issued by the SAF Remissions Board, the appellate authority is the Director, AFRBA. When the decision was issued by the Director, AFRBA, the Principal Deputy Assistant Secretary for Manpower and Reserve Affairs (SAF/MR (PDAS)) is the appellate authority.

-- Air Force Disability Review Board

--- Reviews the case of a member or former member of the uniformed services, upon request, retired or released from active duty without pay for physical disability, the findings and decisions of the retiring board, board of medical survey, or disposition board in the member's case

The Air Force Civilian Appellate Review Office (AFCARO)

- Processes and adjudicates discrimination complaints and administrative grievances by civilian employees and military applicants, filed against the Air Force

- AFCARO analyzes grievances and complaints, recommends final Air Force decisions to the Director, AFRBA, and is the Air Force liaison to the Equal Employment Opportunity Commission (EEOC) in all matters involving civilian discrimination complaints

The Personnel Security Appeals Board (PSAB)

- Adjudicates appeals of security eligibility/clearance withdrawals by the Air Force Central Adjudication Facility (AFCAF)

- Determines whether to reinstate an appellant's eligibility/clearance, or renders a final decision to deny the appeal

The DoD Physical Disability Board of Review (PDBR)

- By Congressional mandate, reviews any applications submitted by personnel that received a disability rating of 20% or less from all services between September 11, 2001 and December 31, 2009

- As the DoD Lead Component, the Air Force, through SAF/MRB, oversees operation of the PDBR

- Also utilized to offer additional disability reviews to other select groups as identified by Congress

References

10 U.S.C. §§ 874, 951-954

10 U.S.C. § 8991

10 U.S.C. § 1130

10 U.S.C. §§ 1552-1554

32 C.F.R. §§ 70.1–70.9

DoDD 1000.20, *Active Duty Service Determinations for Civilian or Contractual Groups* (11 September 1989), certified current 21 November 2003

SAF/MR Memo, *Re-delegation of Authority for Individual Personnel Actions*, 12 April 2010 (supersedes Secretary of the Air Force Order No. 240.8 and subsequent memoranda) OPR: SAF/MRB Legal Department

SAF/MR Memo, *Re-delegation of Authority to Act on Certain Applications and Complaints*, 9 October 2013 (supersedes Secretary of the Air Force Order No. 240.8 and subsequent memoranda) OPR: SAF/MRB Legal Department

AFI 31-105, *Air Force Corrections System* (15 June 2015)

AFI 36-2023, *The Secretary of the Air Force Personnel Council and the Air Force Personnel Board* (8 March 2007), certified current 11 April 2011

AFI 36-2603, *Air Force Board for Correction of Military Records* (5 March 2012)

AFI 36-2803, *The Air Force Military Awards and Decorations Program* (18 December 2013), incorporating Change 1 (22 June 2015)

AFI 36-2911, *Desertion and Unauthorized Absence* (15 October 2009)

AFI 36-3034, *Remission of Indebtedness* (21 November 2013)

AFI 36-3213, *Air Force Discharge Review Board (DRB)* (15 April 2008), certified current 11 April 2014

DD Form 493, *Application for the Review of Discharge from the Armed Forces of the United States* (August 2015)

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CHAPTER SEVEN: PERSONNEL ISSUES FOR THE COMMANDER

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HUMANITARIAN REASSIGNMENTS/DEFERMENTS

When Air Force members incur substantial and continuing personal or family problems that can be relieved by reassigning them to a particular geographical area or allowing them to stay in a current assignment instead of being moved, the member may apply for a humanitarian reassignment or deferment under the provisions of AFI 36-2110, *Assignments*. This instruction applies to both officer and enlisted members.

General Policies

- A move may not be made at government expense when it is based solely on humanitarian reasons. The determining factor is the needs of the Air Force.

- If the problem can be solved by the member taking ordinary or emergency leave, humanitarian deferment or reassignment will ordinarily not be granted

- Requests will normally be disapproved when it is likely the problem will exist for an indefinite period of time

- When the commander learns of a member with personal hardships who may be interested in applying for a humanitarian reassignment or deferment, he or she should first direct the member to AFI 36-2110

  -- Following that, the member receives additional counseling from the local Military Personnel Flight (MPF) assignments section, which will provide the member with the information needed to submit a formal application

- Requests are submitted through the Total Force Service Center (TFSC) via vMPF with supporting documentation. The burden is on the applicant to provide sufficient justification for the request.

- HQ AFPC/DPAPH is the approval/denial authority

Eligibility

- To be eligible for a humanitarian action, several conditions must be met, including:

  -- A valid vacancy must exist at the new duty station and member must meet service retainability requirements for a permanent change of station (PCS)

  -- The problem must be more severe than those normally encountered by comparable Air Force members

- The member's presence is absolutely essential to alleviate the problem
- The problem can be resolved within a reasonable period of time (normally 12 months)

Circumstances

- While not inclusive, requests with problems arising from any of the following circumstances usually warrant approval:
  - Recent death (within 12 months) of member's spouse or child or stepchild under age 18, including miscarriage at 20 or more weeks gestation
  - Serious financial problems not the result of overextension of personal military income that cannot be resolved by leave, correspondence, power of attorney, or other person or means
  - Spouse abandons dependents while the service member is serving an unaccompanied overseas tour
  - Terminal illness of family member when death is imminent within 2 years
  - State law requires presence to complete adoption procedures
  - Successful establishment or operation of an effective family advocacy program
  - Sexual abuse or assault of a dependent when it would be detrimental to stay in the area where the incident occurred

Expedited Transfer

- Service members who file an unrestricted report of sexual assault have the option of requesting a temporary or permanent expedited transfer to a different command or installation or reassignment of the alleged offender
  - Vice Wing Commander must act on the request within 72 hours of receiving the request
  - If the request is disapproved, the service member may request review of the decision by the first general officer in the chain of command in accordance with DoDI 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures,* Enclosure 5

References

AFI 36-2110, *Assignments* (22 September 2009), incorporating through Change 2, 8 June 2012, including AFGM2016-01, 23 June 2016

DoDI 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures* (28 March 2013), incorporating through Change 2, 7 July 2015

THE AIR FORCE URINALYSIS PROGRAM

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

Objectives

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

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

- Enhance mission readiness and foster a drug free environment through a comprehensive program of education, prevention, deterrence and community outreach in support of the President's National Drug Control Strategy

Procedures

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

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

  -- If proper procedures are not followed, then use of urinalysis test results in UCMJ or administrative actions may be limited or, in some cases, prohibited

Air Force Drug Testing Laboratory (AFDTL)

- With the exception of urine samples tested for steroids and other nonstandard drugs of abuse, nearly all Air Force member urine samples are tested at the Air Force Drug Testing Laboratory (AFDTL), Joint Base San Antonio-Lackland, Texas. Some member samples are tested at the Forensic Toxicology Drug Testing Laboratory at Tripler Army Medical Center, Hawaii, due to geographic proximity.

- The AFDTL can test for the presence of cocaine, amphetamine/methamphetamine, marijuana, designer or analog amphetamines (to include MDMA (Ecstasy), MDA and MDEA), 6-MAM (heroin metabolite), opiates (codeine, morphine, hydrocodone, hydromorphone), benzodiazepines, opioids (oxycodone, oxymorphone), and synthetic cannabinoids (e.g., "Spice")

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

  -- Each sample must undergo at least two tests before it may be considered positive: (1) screen and (2) confirmation

  -- Screen Test: Conducted primarily using immunoassay testing, with occasional directed screen testing done using liquid chromatography/tandem mass spectrometry (LC-MS/MS)

  -- Confirmation Test: Gas chromatography/mass spectrometry (GC/MS) or LC-MS/MS is used for all confirmation testing

  -- The DoD prescribes a minimum level beyond which a test is reported as positive

    --- Only samples that test positive above the DoD minimum level on every test are reported as positive

    --- Samples not testing positive on any screen test or on the confirmation test are discarded

Urinalysis Testing

In addition to unit administered random drug testing, there are 5 common situations that may require urinalysis testing; consent, probable cause, commander directed, inspection, and medical care. Each of these has its own legal considerations for when it can be taken and how it can be used so consult with the staff judge advocate (SJA) before determining which situation to use.

- Consent:

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

  -- When practicable, consent should be given in writing, using an AF IMT 1364

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

  -- Always coordinate with the SJA before collecting urine through consent

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

- Probable Cause:

  -- To have probable cause there must be a reasonable belief illegal drugs, or drug metabolites, will be present in the individual's urine

  -- Requires a search and seizure authorization from a military magistrate or a neutral and detached commander with authority over the person being searched to seize a urine specimen

  -- Always coordinate with the SJA prior to obtaining a urine sample through a probable cause search

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

- Commander Directed:

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

  -- Drug rehabilitation testing is commander directed

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

  -- Commander directed test results **CANNOT** be used to take UCMJ action, such as court-martial or Article 15, or to adversely characterize administrative discharges

- Inspection:

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

  -- Primary purpose of an inspection is to determine and ensure the security, military fitness, or good order and discipline of the unit. This may include an inspection to determine whether the command is functioning properly, if proper standards of readiness are maintained, and if personnel are present, fit, and ready for duty.

- -- Sometimes called a "unit sweep," an entire unit or a part of the unit may be inspected, or an individual may be directed to participate in a base-wide random selection process

- -- Individual members **MAY NOT** be singled out for inspection (especially as a means to work around a lack of consent or probable cause)

- -- **DO NOT** use an inspection when you suspect a specific individual of drug abuse. Consult the SJA for more appropriate options.

- -- Coordinate inspections with the installation Drug Demand Reduction Program Manager (DDRPM). Do not announce the inspection in advance to those being inspected.

- -- Inspection testing is the best deterrent available against drug abuse

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

- Medical Care:

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

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

Positive Results

- Upon receipt of a positive test report, regardless of type of test, **immediately** contact the SJA

- Upon notification of a positive urinalysis test, AFOSI or SFS will schedule an interview with the service member. Do not advise the service member in advance of the interview or positive test result.

Actions Authorized by Positive Drug Test Results

AFI 90-507, Table 7.1

Basis for Test	Affects Discharge Characterization	Administrative Actions (See Note 1)
Inspection – Military Rule of Evidence (Mil. R. Evid.) 313 (see Note 2)	Yes	Yes
Voluntary Consent – Mil. R. Evid. 314(e)	Yes	Yes
Probable Cause – Mil. R. Evid. 315, 316 (see Note 3)	Yes	Yes
Commander Directed (see Note 4)	No	Yes
Self-Identification, Initial Testing (see Note 5)	No	Yes
Valid Medical Purpose – Mil. R. Evid. 312(f) (see Note 6)	Yes	Yes

Notes:

1. Administrative actions include, but are not limited to, letters of admonishment, counseling and reprimand, denial of re-enlistment, removal from PRP, removal from duties involving firearms, removal from flying status or sensitive duties, suspension of security clearance, and removal of restricted area badges. If there are any questions regarding actions authorized for positive drug test results, consult the local servicing staff judge advocate.

2. Inspections under Mil. R. Evid. 313(b) include those under the installation's random urinalysis drug testing program and unit sweeps.

3. Probable cause tests are authorized searches and seizures ordered by a military magistrate or commander (see Mil. R. Evid. 315 and 316).

4. Absent probable cause, commander directed results may not be used for disciplinary action under the UCMJ or to characterize service under administrative separation. Exception: Commander directed results may be offered for impeachment purposes or in rebuttal when a member first introduces evidence to infer or support a claim of non-use of drugs.

5. Members may not be disciplined under the UCMJ when they legitimately self-identify for drug abuse and enter the Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program. In the interests of safety and security, commanders may initiate non-adverse administrative actions such as removal from flying status or, PRP, or terminating restricted area badges, etc. Individuals in the ADAPT Program may also be disciplined under the UCMJ when independent evidence of drug use is obtained.

6. Specimens from an exam for a valid medical purpose may be used for any lawful purpose.

References

Military Rules of Evidence 312-316 (2015)

DoDI 1010.01, *Military Personnel Drug Abuse Testing Program* (13 September 2012)

DoDI 1010.16, *Technical Procedures for the Military Personnel Drug Abuse Testing Program (MPDATP)*(10 October 2012)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (8 July 2014)

AFI 90-507, *Military Drug Demand Reduction Program* (22 September 2014), certified current 18 December 2015

AF IMT 1364, *Consent for Search and Seizure* (18 April 2016)

URINALYSIS CHECKLIST FOR UNIT COMMANDERS

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

Generally

- Do you brief the consequences of drug abuse at commander's calls? Do you consult the staff judge advocate (SJA) before you do so? Do you invite a judge advocate to speak?

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

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

Personnel

- Are tests coordinated with the Drug Demand Reduction Program Manager (DDRPM) or Drug Testing Program Administrative Manager (DTPAM)?

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

- Have you chosen credible people to serve as trusted agent and urinalysis observers in the program in accordance with AFI 90-507, *Military Drug Demand Reduction Program*?

  -- Is the trusted agent someone of unquestionable integrity and trustworthiness?

  -- Have you reviewed the personnel information files (PIFs) of the trusted agent and observers and determined they have no Unfavorable Information File (UIF), history of conviction by prior courts-martial or civilian court (within the previous 5 years), Article 15s, Letter of Reprimands (LORs), or similar administrative action for misconduct involving dishonesty, fraud, or drug abuse?

  -- Have you ensured no trusted agent or observer has any pending criminal action, either UCMJ or otherwise, or any administrative action pertaining to drug abuse, dishonesty, fraud or other integrity offenses?

-- Do all observers have more than 6 months remaining time in service until either separation or retirement from active duty (1 year from separation or transfer from active participation status for Air Force Reserve Component (AFRC) and Air National Guard (ANG))?

-- Have you ensured that the trusted agent and observers have no medical or mental health conditions that could prevent them from performing observer duties?

-- Are the observers either commissioned officers or non-commissioned officers (NCOs)? If a senior airman are selected, have you obtained the concurrence of the SJA?

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

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

Notifications

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

  -- If not, are you personally aware of the identity of each member who has been randomly selected before a pre-signed letter (by you) is issued to the member by the trusted agent?

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

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

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

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

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

- Do you make sure shift workers or personnel on scheduled "days off" report for testing on their next duty day?

Other Considerations

- Do you make sure members who are unavailable for testing due to leave, pass, temporary duty assignment (TDY), quarters, flying status, crew-rest, missile duty, or non-duty status are tested upon return of the member to duty? Do you coordinate this with the DDRPM?

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

- Do you immediately contact the SJA for advice and assistance regarding all positive test results?

Reference

AFI 90-507, *Military Drug Demand Reduction Program* (22 September 2014), certified current 18 December 2015

FRATERNIZATION AND UNPROFESSIONAL RELATIONSHIPS

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

Overview

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

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

Unprofessional Relationships

- Unprofessional relationships, whether pursued on- or off-duty, are those relationships that detract from the authority of superiors or result in, or reasonably create the appearance of, favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests

- Unprofessional relationships can exist between officers, between enlisted members, between officers and enlisted members, and between military personnel and civilian employees or contractor personnel

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

  -- Familiar relationships in which one member exercises supervisory or command authority over another member

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

- Tailored rules for unprofessional relationships exist in the recruiting, training, and education environments. These rules draw very specific lines for types of activities a trainer and trainee or a recruiter and a recruit can participate in, locations where they may not be at the same times, and limitations on personal interaction. See DoDI

1304.33, *Protecting Against Inappropriate Relations During Recruiting and Entry Level Training* and AETCI 36-2909, *Recruiting, Education, and Training Standards of Conduct*

- All military members share responsibility for maintaining professional relationships, but the senior member in a personal relationship bears primary responsibility

Fraternization

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

- The following officer conduct is specifically prohibited by AFI 36-2909, and may be prosecuted under Arts. 92, 133, and/or 134 UCMJ, with reasonable accommodation of married members or members related by blood or marriage:

  -- Officers will not gamble with enlisted members

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

    --- An exception exists for infrequent, non-interest-bearing loans of small amounts to meet exigent circumstances (e.g., an individual who forgets his/her wallet or purse and can't pay for lunch at a unit function)

  -- Officers will not engage in sexual relations with or date enlisted members

    --- In dealing with officer/enlisted marriages, the evidence should first be assessed. When evidence of fraternization exists, the fact that an officer and enlisted member subsequently marry does not preclude appropriate command action based on the prior fraternization.

  -- Officers will not share living accommodations with enlisted members except when reasonably required by military operations

  -- Officers will not engage, on a personal basis, in business enterprises with enlisted members, or solicit or make solicited sales to enlisted members, except as permitted by DoD 5500.07-R, *Joint Ethics Regulation* (JER)

Command and Supervisory Responsibilities

- A commander or supervisor must take corrective action if a relationship is prohibited by AFI 36-2909 and/or is causing a degradation of morale, good order, discipline, or unit cohesion. Failure to take corrective action may lead to punishment of the commander or supervisor.

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

  -- Counseling is often an effective first step in curtailing unprofessional relationships. However, the full spectrum of administrative actions should be considered.

    --- More serious cases may warrant nonjudicial punishment

    --- Referral of charges to a court-martial is only appropriate in aggravated cases

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

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

---

References

UCMJ Art. 92, 133, and 134

DoDI 1304.33, *Protecting Against Inappropriate Relations during Recruiting and Entry Level Training* (28 January 2015)

DoD 5500.07-R, *Joint Ethics Regulation* (JER), 30 August 1993, incorporating through Change 7, 17 November 2011

AFI 36-2909, *Professional and Unprofessional Relationships* (1 May 1999), including AFI36-2909_AFGM2016-01, 15 June 2016

AETCI 36-2909, *Recruiting, Education, and Training Standards of Conduct* (2 December 2013)

AFI 36-2909 USAFASUP, *Professional and Unprofessional Relationships* (17 November 2011)

HAZING

DoD policy recognizes the potential adverse effects hazing can have on morale, operational readiness, and mission accomplishment. Hazing is prohibited and should never be tolerated.

Definitions

- Hazing is defined as any conduct whereby a military member without proper authority causes another military member, regardless of service or rank, to suffer or be exposed to any activity which is cruel, abusive, humiliating, oppressive, demeaning, or harmful
    - -- Physical contact is not necessary; verbal or psychological abuse will suffice
    - -- Soliciting or encouraging another to engage in such activity is also considered hazing
    - -- Hazing is typically associated with "rites of passage" or initiations
- Some examples include hitting or striking, tattooing, branding, shaving, "blood pinning," and forcing alcohol consumption
- Hazing does not include authorized training of any sort, administrative corrective measures, or additional military instruction
- Actual or implied consent to hazing does not eliminate the perpetrator's culpability

Command Action

- Commanders and senior NCOs must promptly and thoroughly investigate all allegations of hazing and take appropriate action if a hazing allegation is substantiated
- A commander's options begin with counseling and reprimands and extend to court-martial for serious cases that involve assault, aggravated assault, maltreatment of subordinates, etc.
- Commanders must evaluate all activities that appear to be an initiation or "rite of passage" to ensure that the dignity and respect of all members are maintained

Punitive Regulations and the Uniform Code of Military Justice

- Although the Secretary of Defense has authorized all services to incorporate this policy into a punitive regulation, the Air Force does not have such a regulation and there are no plans to incorporate the policy into such a regulation; however, the Air Force may pursue disciplinary action under the UCMJ for dereliction of duty or for the underlying misconduct, such as assault, battery, maltreatment of subordinates, etc.

Reference

AFI 1-1, *Air Force Standards* (7 August 2012), incorporating Change 1, 12 November 2014

PERSONAL BANKRUPTCY

Filing for bankruptcy protection in federal court is a statutory right of all citizens and does not provide a basis for adverse action. However, filing for bankruptcy may effect a member's eligibility for a security clearance.

Types of Bankruptcy

- There are two general types of personal bankruptcy:

  -- Chapter 7: Under Chapter 7 of the Bankruptcy Code an individual's present assets (except for exempt property) may be liquidated to pay their debts

  -- Chapter 13: Under Chapter 13 of the Bankruptcy Code, an individual's future income (except necessary for basic living expenses) may be applied against their debts for a fixed period of time

Financial Responsibility

- Air Force members are required to meet financial obligations in a timely manner

- While no adverse action shall be taken against members for filing bankruptcy, underlying misconduct associated with the circumstances leading to indebtedness may be a proper basis for discipline

- As with any question of financial responsibility, the commander must balance the personal interests and well-being of the individual against the needs of good order and discipline

  -- Bankruptcy is one way of dealing with financial problems responsibly. Unfortunately, it is sometimes the result of actionable financial irresponsibility.

Support & Coordinating Agencies

- The base legal office assists in the following two ways:

  -- Legal assistance attorneys assist Air Force members and eligible beneficiaries with advice regarding personal bankruptcy

  -- Legal office staff advises commanders whether disciplinary action is appropriate in a particular case. The staff judge advocate will resolve any potential conflicts of interest between a legal assistance attorney who advises an Air Force member on

personal bankruptcy and the attorney who advises the commander on potential disciplinary action.

- The financial services office (FSO) also ensures DFAS-HGA/CL is aware of bankruptcy filings which can affect debt payments coming directly from military pay

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References

Title 11, United States Code, Bankruptcy Code
Protection against Discriminatory Treatment, 11 U.S.C. § 525
UCMJ Art. 123a
UCMJ Art. 134
AFI 36-2906, *Personal Financial Responsibility* (30 May 2013)
AFI 65-601, V1, *Financial Management* (1 Aug 2012), incorporating Change 1, 29 July 2015

FINANCIAL RESPONSIBILITY

Air Force members are expected to timely and properly satisfy financial obligations. Failure to do so can result in administrative or disciplinary action and/or their debt being paid involuntarily via official Air Force channels.

Commander's Responsibilities

- In cases of financial responsibility, the commander is responsible for the following:
  - -- Reviewing and assessing the basis of any allegation of financial irresponsibility
  - -- Advising military members of the Air Force policy to provide adequate financial support to to dependent family members
  - -- Monitoring the processing of a complaint for failure to provide adequate financial support to dependent family members and attempting to respond within 15 days
  - -- Advising military members of the procedures that a family member may implement to obtain involuntary collection of support through garnishment or statutory allotments
  - -- Providing copies of any pertinent financial fact sheet, see AFI 36-2906, *Personal Financial Responsibility*, attachments 2 and 3
  - -- Advising a military member and a complainant that the Air Force has no authority to arbitrate disputed cases of nonsupport or personal indebtedness
  - -- Referring members with demonstrated financial irresponsibility to the appropriate base agency for assistance, normally through the Airmen and Family Readiness Center
  - -- Considering whether administrative or disciplinary action is appropriate
  - -- Considering the action with the appropriate base agencies (e.g., staff judge advocate (SJA), military personnel flight (MPF), inspector general (IG))

Financial Support to Dependents

- Members are expected to provide adequate financial support to their dependents
  - -- The amount of support should be based on the member's ability to pay

- -- Support may be "in kind," such as paying mortgage, car payments, or joint debts

- -- The Air Force can terminate the Basic Allowance for Housing (BAH) with dependent rate allowances for those failing to provide adequate financial support to family members

- -- The Air Force can recoup the BAH with dependent rate allowances received by the member during periods the member failed to provide adequate financial support to family members

- -- Commanders should not order members to pay a specific dollar amount to dependents

- -- Members who falsify support documentation subject themselves to disciplinary or administrative action

Child Support and Alimony Payments

- State courts with jurisdiction over dependent children or a state agency with the proper authority can order child support payments

- A complainant can provide a garnishment order to Defense Finance and Accounting Service (DFAS) and receive a portion of the payment directly

- Child support may also be secured through a statutory allotment

- A commander should ensure a military member involved in these processes has access to a legal assistance attorney if they are not already represented by a civilian attorney

Third Party Allotments

- A third party can secure an involuntary allotment from a military member to satisfy a final judgment from a court with jurisdiction over the parties

  - -- When a request for involuntary allotment is received, DFAS notifies the member and the member's commander

  - -- Notification includes the DD Form 2654, *Involuntary Allotment Notice and Processing*, and explains that the allotment will be established against the member's pay if a response is not received within 90 calendar days from the original date of mailing

--- If the member is unavailable to respond, then the member's commander may grant a reasonable extension of time. The commander must notify DFAS and should provide appropriate documentation supporting the determination to allow for the extension.

--- In the absence of any additional correspondence from the commander, the allotment application may be processed within 15 calendar days after a response was due

-- If the member is available, then within 5 days of receipt of the notification, the commander will notify the member of the application, provide the member with a copy of the entire application package received from DFAS and counsel the member on how to complete the DD Form 2654, *Involuntary Allotment Notice and Processing*

-- If the military member consents to the allotment, the commander completes the DD Form 2654 and returns the completed form to DFAS

-- If the allotment is contested, the member must fully explain and support the reasons contesting the allotment

--- A list of reasons to contest an allotment is found in DoD 7000.14-R, *Department of Defense Financial Management Regulation,* Volume 7A, Chapter 41, para. 410506.B.1

-- If the military member fails to respond within the time allowed, the commander notes the failure to respond and notifies DFAS

-- If a member asserts an "exigencies of military duty" defense to the allotment the commander should contact the servicing legal office for further guidance

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References

Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043
DoD 7000.14-R, *Department of Defense Financial Management Regulation* (June 2011)
DoDI 1344.09, *Indebtedness of Military Personnel* (8 December 2008)
AFI 36-2906, *Personal Financial Responsibility* (30 May 2013)
DD Form 2654, *Involuntary Allotment Application* (December 1999)

BAD CHECKS

When a military member writes a check that fails to clear for payment, it may be necessary to take administrative or disciplinary action to correct the behavior. Consult with the legal office to determine if administrative or disciplinary action is appropriate.

- For a first or relatively minor incident, counseling the member about Air Force policy and referral to the Personal Financial Management Program may be an appropriate first step

- Repeated cases of dishonored checks, or a single instance involving a large amount of money, may be the basis for administrative action, such as a letter of reprimand (LOR), Unfavorable Information File (UIF), control roster, administrative separation, and/or involuntary deductions by DFAS for personal indebtedness to the federal government

- Writing bad checks may constitute a violation of UCMJ Article 123a if the member:

  -- Either wrote a check for the purpose of obtaining anything of value with intent to defraud, or wrote a check to pay a past due obligation or other purpose, with intent to deceive; and

  -- Delivered the check knowing at the time that he/she had not or would not have sufficient funds in, or credit with the bank for the payment of that check

  -- Evidence of intent to defraud or deceive and knowledge of insufficient funds can be shown by proof of notice of a dishonored check from the holder and failure to make payment within 5 days after such notice

- Writing bad checks may also constitute a violation of UCMJ Article 134 if the member:

  -- Dishonorably failed to maintain funds **AFTER** the check was made and delivered

  -- Proof of intent to defraud or the accused's knowledge of insufficient funds to cover the check when written is not required; bad faith or gross indifference is sufficient

- A civilian judgement based on dishonored check may be the basis for an involuntary allotment of pay as provided in DoDI 1344.09, *Indebtedness of Military Personnel*

References

UCMJ Arts. 123a and 134
DoDI 1344.09*, Indebtedness of Military Personnel* (8 December 2008)
AFI 36-2906, *Personal Financial Responsibility* (30 May 2013)

ADOPTION EXPENSE REIMBURSEMENT AND TAX CREDIT

Adoption can be expensive, but military members may be eligible for reimbursement of reasonable and necessary adoption expenses of up to $2,000 per child and $5,000 per calendar year. Additionally, taxpayers may claim a tax credit and/or income exclusion of up to $13,460 (amount subject to change annually) per child for qualified adoption expenses.

Adoption Expense Reimbursement Procedure

- Member contacts local military personnel flight (MPF) for guidance and copies of the application form (DD Form 2675, *Reimbursement Request for Adoption Expenses*)

- Member provides required documentation, including: certified copy of adoption certificate or order (with certified translation to English if necessary), and receipts/canceled checks substantiating expenses

- Unit commander certifies claim's validity in Section VI of the completed DD Form 2675

- MPF forwards the package to the Defense Finance and Accounting Service (DFAS) by certified mail for review, decision, and payment

- Detailed instructions are in DoD 7000.14-R, *Department of Defense Financial Management Regulations* (FMRs)

Time Limitations

- The member must be on active duty when adoption becomes final

- Member must also be on active duty and have served at least 180 consecutive days on active duty when he/she files a claim

- Member must file no later than 1 year after the adoption is final (or 1 year after child's U.S. citizenship in a foreign adoption)

- Benefits may be paid only after the adoption is final

Qualifications

- Reimbursement is limited to "qualifying" adoptions

  -- Qualifying adoptions include adoption of a child under 18 years of age, adoption by a single person, an intercountry adoption, adoption of a child with special needs (as defined by 42 U.S.C. § 673(c)), and adoption of stepchild by military member

  -- Adoption must have been arranged by either a qualified adoption agency or other source authorized to place children for adoption under State or local law

- Reimbursement is limited to "qualifying" expenses

  -- Must be "reasonable and necessary" adoption expenses: agency fees, placement fees, legal fees and court costs, certain medical expenses, and required temporary foster care fees

  -- Travel costs are not reimbursable (but see Tax Credit below)

  -- A member cannot be reimbursed twice for same expense

    --- Expenses paid to or for a member of the Armed Forces under any other adoption benefits program administered by the Federal Government or under a state or local government program are not reimbursable by military

  -- In case of married service members, only one member may claim expenses for each adopted child and the couple is limited to the $5000 per calendar year maximum

Tax Credit and Exclusions

- As of 2016, taxpayers are able to claim a combined tax credit and/or income exclusion of qualified expenses up to $13,460 per eligible adopted child (subject to change each year)

- Claim credit or exclusion by completing and returning an Internal Revenue Service (IRS) Form 8839 with IRS Form 1040

- An eligible child is an individual who is under the age of 18, or is physically or mentally incapable of self-care

  -- Stepchild adoption does not qualify

- Cannot claim both the tax credit and income exclusion for the same expenses
  - -- Taxpayer may claim an income exclusion for any reimbursement of adoption expenses paid by employer
  - -- Must claim any allowable exclusions before claiming any allowable credit, and those exclusions reduce the amount of available credit
  - -- The credit is not refundable to taxpayer; it is limited to taxpayer's tax liability
- Taxpayer may claim credit for adoption expenses incurred over multiple tax years for the same adoption, but the total benefit may not exceed the $13,460 (as of 2016) per child
  - -- For domestic adoption, qualified expenses paid before the year the adoption becomes final are allowable as a credit the tax year after paid (even if the adoption is never finalized)
  - -- For foreign adoption, qualified expenses paid before and during the year are allowable as a credit for the year the adoption is final
  - -- Qualified adoption expenses paid after the adoption is final are allowable as a credit for the year of payment (foreign or domestic)
- Qualified adoption expenses consist of reasonable and necessary adoption fees, court costs, attorney fees, travel costs and other expenses which are directly related to the adoption of an eligible child
- The credit can be claimed even if the adoption is unsuccessful, except in the case of a foreign adoption

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References

10 U.S.C. § 1052
42 U.S.C. § 673(c)
DoDI 1341.09, *DoD Adoption Reimbursement Policy* (3 November 2007), incorporating Change 1, 23 April 2009
DD Form 2675, *Reimbursement Request for Adoption Expenses* (July 2016)
DoD Financial Management Regulations, 7000.14-R, Vol 7A, Appendix A, *Reimbursement of Adoption Expenses* (September 2015)
IRS Form 8839, *Qualified Adoption Expenses*
IRS Topic 607–*Adoption Credit and Adoption Assistance Programs*

CIVILIAN JURY SERVICE BY MILITARY MEMBERS

When an Air Force member **on active duty** receives a summons to state or local jury duty, the member should inform his/her immediate commander. For the purpose of jury service, "active duty" includes full-time duty in the active military service, full-time training duty, annual training duty, active duty for training, and attending a service school while on active military service.

Exemption from Jury Service

- Categorical Exemption: All general officers, commanders, operating forces (forces whose primary missions are participating in and supporting combat), personnel in training, and personnel stationed outside the United States are categorically exempt from serving on a state or local jury

- General Exemption (Not Categorical): For all other personnel, the commander determines whether jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity

  -- Authority to determine such exemptions is pursuant to 10 U.S.C. § 982 and has been delegated to commanders by the Secretary of the Air Force (SecAF)

  -- The immediate commander is delegated exemption denial authority while the special court-martial convening authority (SPCMCA) is delegated approval authority

Procedures

- If the member is categorically exempt, the immediate commander or designee notifies the issuing state or local official by written notice (complying with the format in AFI 51-301, *Civil Litigation, para. 9.27.4.*)

- If the member is generally (but not categorically) exempt, the immediate commander decides whether jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity

  -- If jury duty would not unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity, the member must perform jury duty

  -- If the immediate commander decides jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command or

activity, the immediate commander requests approval of the exemption from the SPCMCA using the criteria in AFI 51-301

-- The SPCMCA may then decide whether:

--- Exemption is inappropriate and instruct the member to comply with the jury summons

--- Exemption is appropriate, and direct the immediate commander to send a written notice of exemption to the issuing state or local official complying with AFI 51-301

--- The SPCMCA's determination is final

- Time spent by military members on jury duty service should not be charged against them as leave

- Pay or entitlements should not be deducted for the period of jury service

Fees and Reimbursement

- Military members are not entitled to keep any fees for jury service; those fees should be made payable to the U.S. Treasury and turned in at the local finance office

- Military members may receive and keep reimbursement from the state or local jury authority for expenses incurred in the performance of jury duty, such as transportation costs or parking fees

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References

10 U.S.C. § 982
DoDI 5525.08, *Service by Members of the Armed Forces on State and Local Juries* (3 January 2007)
AFI 51-301, *Civil Litigation* (20 June 2002)

HUMAN IMMUNODEFICIENCY VIRUS (HIV)

Medical Background

- HIV is a viral disease involving the breakdown of the body's immune system

- Acquired Immune Deficiency Syndrome (AIDS) is an advanced stage of HIV infection, where there is evidence of immune deficiency by illness or laboratory traits

- Medical experts believe the nonsexual, person-to-person contact that occurs among co-workers within the workplace does NOT pose a risk for transmitting the virus

HIV and Military Members

- Testing: The Air Force tests all members for antibodies to HIV, medically evaluates all infected members, and educates members on means of prevention

  -- All applicants for the Air Force are screened for the HIV infection. Applicants infected with HIV are ineligible to join the Air Force, with no waiver authorized.

  -- All active duty personnel are screened for HIV infection every 2 years, preferably during their Preventive Health Assessment. They are also tested for clinically indicated reasons, with newly diagnosed active tuberculosis, during pregnancy, when diagnosed with a sexually transmitted disease, upon entry to drug or alcohol rehabilitation programs, and prior to incarceration.

  -- Air Reserve Component (ARC) personnel are screened for HIV infection every 2 years, preferably during their PHA and must have a current HIV test within two years of the date called to active duty for 30 days or more

  -- An active duty member testing positive for HIV is referred to San Antonio Military Medical Center (SAMMC) at Joint Base San Antonio for medical evaluation and to determine status for continued military service

  -- HIV-infected active duty members retained on active duty must be medically evaluated annually and are assigned within the continental United States, Alaska, Hawaii or Puerto Rico. HIV-infected members shall not be assigned to outside the continental United States (OCONUS) mobility positions. HIV-infected members on flying status must be placed on duty not involving flying (DNIF) status pending medical evaluation.

    --- Waivers are considered using normal procedures established for chronic diseases

- Testing Confidentiality: Air Force policy strictly safeguards results of positive HIV testing

  -- In accordance with DoDI 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members,* the privacy of a service member with laboratory evidence of HIV infection is protected consistent with the Health Insurance Portability and Accountability Act (HIPAA) and the Privacy Act

  -- Very limited release within Air Force on "need-to-know" basis only (e.g., unit commanders should not inform First Sergeants and/or supervisors unless a determination is made that those individuals truly need to know)

Limitations on Use of Information

- Laboratory test results confirming HIV infection may not be used as an independent basis for any administrative or disciplinary action, including punitive action under the UCMJ

- Information obtained by Department of Defense (DoD) as a result of epidemiological assessment (EA) interview **MAY NOT** be used to support any adverse personnel action against the member

  -- "Adverse personnel actions" includes court-martial, nonjudicial punishment, line of duty determination, demotion, involuntary separation for other than medical reasons, denial of promotion or reenlistment; administrative or punitive reduction in grade, and unfavorable entry in a personnel record

  -- "Nonadverse personnel actions" in which limits on use of epidemiological assessment results do not apply include: reassignment, disqualification (temporary or permanent) from the Personnel Reliability Program (PRP), denial; suspension; or revocation of security clearance, suspension or termination of access to classified information, transfer between Reserve components, removal (temporary or permanent) from flight status or other duties requiring high degree of stability or alertness, and removal of Air Force Specialty Code (AFSC)

    --- These nonadverse actions **CANNOT** be accompanied by unfavorable entries in service member's records (other than an accurate entry concerning the action)

Safe Sex Orders

- "Order to Follow Preventive Medicine Requirements" is issued to all Active Duty and Air Reserve Component HIV-positive personnel

  -- The health care provider will notify the member that he or she has tested positive. The member's unit commander will also be notified through separate channels.

  -- For active duty members, the unit commander issues the order to follow preventive medicine requirements

  -- For unit assigned reservists, the order is issued after the immediate commander determines the member will be retained in the Selected Reserve

  -- The order should be signed and dated by the commander and member. The order is given in the presence of a credentialed healthcare provider, who can answer the member's questions.

    --- If the member refuses to sign, the commander should annotate in the acknowledgement section

  -- The unit commander is responsible for confidentially safeguarding the order

  -- Upon reassignment, the unit commander forwards the order in a sealed envelope to the gaining commander marked "TO BE OPENED BY ADDRESSEE ONLY"

  -- Upon the individual's separation from the Air Force, the order is destroyed

Disability Evaluation and Medical Separation

- Laboratory test results under the HIV program **MAY NOT** be used as the sole basis for separation of a member

  -- Results may be used to support a separation based on a physical disability

- A member subject to separation undergoes a Medical Evaluation Board (MEB), then an Informal Physical Evaluation Board (PEB) to determine whether he or she should be retained on active duty or separated from the service because he or she is "unfit" for continued service

  -- The member has appeal rights to appear personally before a Formal PEB and also to appeal to the Air Force Personnel Council

- If deemed unfit, the member may be simply separated with a medical severance lump sum payment or temporarily or permanently medically retired with monthly medical retirement pay depending on the Board's recommendations and the final action by the Secretary of the Air Force (SecAF)

- Placement on the Temporary Disability Retirement List (TDRL) is termed a temporary retirement because the member is reevaluated every 18 months to determine if fit for return to active duty or unfit and to be separated or retired. Maximum time on TDRL is 5 years.

- The member may voluntarily separate upon request

Military Justice/Policy Issues

- A service member who knows he or she is HIV positive, but engages in sexual intercourse with another can be punished under the UCMJ for:

  -- Engaging in unprotected sexual intercourse with another without the individual's knowledge of HIV status

  -- Violating a "safe sex" order

  -- Failing to warn a sexual partner about their HIV status, despite wearing a condom (merely taking "safe sex" precautions won't remove the duty to warn)

  -- Having unprotected sexual intercourse even though the partner is aware of the member's HIV status, and consents

AIDS and Air Force Civilian Employees

- The Air Force does not test Air Force civilian employees for HIV, except for those civilian employees (appropriated or nonappropriated) selected for assignment overseas who will be screened for HIV infection pursuant to host nation requirements. Civilian employees are also tested for occupational exposures.

- AIDS is a disability under federal civil rights laws, and these laws prohibit discrimination on the basis of physical or mental disability. Under these laws, disabled employees could recover back pay, compensatory damages, attorney fees, costs, and expert fees against liable employers.

- In March 1988, the U.S. Office of Personnel Management issued the following guidelines in the Federal Personnel Manual Bulletin 792-42, for federal agencies on handling AIDS in the federal workplace:

  -- Extensive AIDS Information and Education Programs must exist

  -- HIV-positive employees may not be denied employment or fired provided they are able to continue working (their privacy and confidentiality must be protected)

  -- Employees should be granted the same sick, annual leave, or leave without pay as other employees with medical conditions (accommodation of handicap)

  -- Employees are eligible to receive disability retirement if medical condition warrants and they have the required number of years

  -- If an employee refuses to work with infected employees, he will receive information and counseling, and if he still refuses may be disciplined

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References

DoDI 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members* (7 June 2013)

DoDD 6485.02E, *DoD Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS) Prevention Program (DHAPP) to Support Foreign Militaries* (6 December 2013)

AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (2 February 2006), incorporating through Change 2, 27 November 2009

AFI 44-102, *Medical Care Management* (17 March 2015)

AFI 44-178, *Human Immunodeficiency Virus Program* (4 March 2014), certified current 30 November 2015

Federal Personnel Manual Bulletin 792-42, AIDS in the Workplace (24 March 1988)

ANTHRAX IMMUNIZATIONS

AFI 48-110, *Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases*, sets forth general requirements and procedures for the immunization program. Commanders are responsible for ensuring that all military and nonmilitary personnel under their jurisdiction receive all required immunizations. However, anthrax immunizations are controlled by the Department of Defense Anthrax Vaccine Immunization Program (AVIP).

Background

- Anthrax is a bacterium that infects people when spores are inhaled, ingested, or enter the body through a break in the skin. Proteins produced by anthrax spores cause tissue damage, shock and death. Inhaled anthrax is fatal in up to 75 percent of cases even with antibiotic therapy.

- Immunization consists of an initial dose, followed by four additional doses given at 4 weeks, 6 months, 12 months, and 18 months; thereafter a booster dose should be administered every 12 months to those who remain at risk

- On 15 December 2005, after reviewing extensive scientific evidence and carefully considering comments from the public, the FDA determined that anthrax vaccine adsorbed is licensed for the prevention of anthrax infection

- On 12 October 2006, the Deputy Secretary of Defense directed resumption of a mandatory AVIP for military and civilian personnel in higher risk areas or with special mission roles

Mandatory Immunization

- On 12 November 2015, the Deputy Secretary of Defense issued clarifying guidance for anthrax immunizations. The mandatory requirements are based on information from Combatant Commands.

- For purposes of the mandatory requirements, "Department of Defense personnel" includes all military service members of the Regular or Reserve Components (including the National Guard) but only emergency-essential and non-combat-essential, or equivalent, Department of Defense (DoD) civilian employees

- DoD contractor personnel includes only those contractor personnel performing services that support mission-essential functions

- Under current guidance, the only mandatory requirements for anthrax vaccinations are as follows:

  -- DoD personnel and DoD contractor personnel assigned to or deploying to the U.S. Central Command area of responsibility for 15 consecutive days or longer

  -- DoD personnel and DoD contractor personnel assigned to or deploying to the Korean peninsula for 15 consecutive days or longer, to include forward-deployed naval forces

  -- DoD personnel and DoD contractor personnel with designated rapid response or support missions in the U.S. Central Command area of responsibility or the Korean peninsula ***as required by the supported command***

  -- DoD personnel and DoD contractor personnel performing duties or services that support the Chemical, Biological, Radiological and Nuclear Response Enterprise

- Individuals in the designated mandatory population cannot decline the vaccination

- Voluntary anthrax vaccinations will be available for those who already started the vaccine series but are no longer deployed to a higher threat area or no longer assigned designated special mission roles

- Voluntary anthrax vaccinations will be offered to all other DoD civilian employees and DoD contractor personnel not covered by the mandatory requirements listed above when assigned or deployed to the U.S. Central Command area of responsibility or the Korean peninsula, as well as to family members accompanying DoD personnel to the U.S. Central Command area of responsibility or the Korean peninsula

Enforcement

- Requirement for military members to take the anthrax vaccine is a lawful order

- If a member indicates they will refuse or has refused the vaccine

  -- Determine why member is reluctant

  -- Provide member with appropriate education

    --- Concerns about vaccine safety should be referred to the supporting medical organization

--- Concerns about the threat should be addressed by intelligence personnel

--- If the member is still reluctant after additional education, send the member to the area defense counsel (ADC) for an explanation of the potential consequences of their refusal

-- Following appropriate counseling, commanders should again order the individual to take the vaccine

-- If the member continues to refuse, consult with the staff judge advocate for appropriate action

-- Full information on AVIP can be found at www.anthrax.mil

References

Memorandum, Deputy Secretary of Defense, *Clarifying Guidance for Smallpox and Anthrax Vaccine Immunization* Programs (12 November 2015)

Department of the Air Force, *Plan for Implementing the Anthrax Vaccine Immunization Program (AVIP)* (18 January 2007)

AFI 48-110, *Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases* (7 October 2013)

The Military Vaccine Agency–Vaccine Healthcare Centers Network Web site on Anthrax, http://www.vaccines.mil/Anthrax

COMMANDER-DIRECTED MENTAL HEALTH EVALUATIONS

Purpose

Commanders or supervisors who have concerns that a member under their command or supervision may be suffering from a legitimate mental health problem that may affect that member's ability to carry out the mission, may direct the member to the mental health clinic for a mental health evaluation, called a Commander-Directed Evaluation (CDE). Commanders and supervisors may make informal, non-mandatory recommendations for service members to seek care from a Mental Health Provider when circumstances do not require a CDE based on safety or mission concerns.

- DoDI 6490.04, *Mental Health Evaluations of Members of the Military Services,* establishes policy on the uses of, and procedures for, CDEs
    - -- Provides commanders and supervisors guidance on making non-mandatory recommendations to seek mental health care
    - -- Establishes the requirements for directing service members for mental health evaluations
    - -- Establishes procedures for outpatient and inpatient mental health evaluations and member rights associated with such evaluations
- AFI 44-172, *Mental Health*, also provides guidance on mental health issues, including CDEs
    - -- Establishes the Limited Privilege Suicide Prevention (LPSP) Program for members facing potential disciplinary action who may be at risk of suicide
    - -- Provides guidance on the Psychotherapist-Patient Privilege under Military Rule of Evidence 513 and other rules/policies governing confidentiality of mental health records

Commander/Supervisor Responsibilities

- The responsibility for determining whether or not to refer a service member for a CDE rests with the commander or supervisor
- Commanders or supervisors may request a CDE for a variety of concerns, including fitness for duty, occupational requirements, safety concerns, or significant changes in performance or behavioral changes that may be attributable to possible mental status changes

- When possible, mental health providers will assist the commander or supervisor in determining whether or not to direct a CDE

- A supervisor is a commissioned officer in or out of a member's official chain of command, or a civilian employee in a grade level comparable to a commissioned officer who exercises supervisory authority over a service member owing to the member's current or temporary duty assignment and is authorized due to the impracticality of involving an actual commanding officer in the member's chain of command

- Non-emergent: When the commander or supervisor determines a non-emergency CDE is required, they must:

  -- Advise the member there is no stigma associated with seeking mental health services

  -- Refer the member to a mental health provider, with name and contact information

  -- Tell the member the date, time and place of the scheduled CDE

- Emergent: A commander or supervisor must refer a member for an emergency CDE as soon as practicable when:

  -- The member, by actions or words, such as actual, attempted or threatened violence, intends or is likely to cause serious injury to himself or others

  -- The facts and circumstances indicate the member's intent to cause such injury is likely

  -- The commander or supervisor believes the member may be suffering from a severe mental disorder

Involuntary Inpatient Admissions

- A member is involuntarily admitted for inpatient evaluation and/or treatment only when a qualified provider determines the member has, or likely has, a severe mental disorder or poses imminent or potential danger to self or others and outpatient treatment is not appropriate

  -- The member must be admitted by a psychiatrist, or when a psychiatrist is not available, a physician or other mental health provider (MHP) with admitting privileges

  - A qualified reviewing official (normally a neutral and detached MHP) must review the admission within 72 hours to determine whether continued involuntary hospitalization is clinically appropriate

- In addition, members involuntarily admitted for treatment are afforded the following rights:

  - To be notified of the purpose and nature of the review and the right to legal representation during the review by a judge advocate or an attorney of the member's choosing at the member's expense

  - To contact a friend, relative, chaplain, attorney, or anyone else the member wishes to as soon as the member's condition permits after admission to the hospital

- In the case of referral for an involuntary admission to a civilian facility, the process established under state law as applicable to the civilian facility will be followed

  - In a foreign country, applicable host nation laws will be followed

Command Notification Provisions

- Healthcare providers are required to follow a presumption that they are not to notify a service member's commander when the service member obtains mental health care or substance abuse education services

- Healthcare providers are required to notify the commander when certain criteria are met, including, but not limited to:

  - Serious risk of self-harm

  - Harm to others or harm to a specific military operational mission

  - Member is in the Personal Reliability Program (PRP)

  - Member is admitted or discharged from inpatient care

  - Member is experiencing an acute mental health condition that impairs their ability to perform assigned duties

  - Services are obtained as a result of a CDE

- In making a disclosure pursuant to the notification standards, providers are required to provide only the minimum amount of information to satisfy the purpose of the disclosure

Prohibited Practices

- The commander or supervisor **MAY NOT**:

  -- Refer a member for a CDE as a reprisal for making a protected communication

  -- Restrict the member from lawfully communicating with his/her attorney, the Inspector General (IG), or other authority about the referral

- Either act by the commander could constitute a violation of Article 92, UCMJ, and result in disciplinary action

- CDEs should not be confused with referrals under AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program,* AFI 40-301, *Family Advocacy Program*, or those referrals made pursuant to a ruling from a military judge concerning the administration of a sanity board

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References

UCMJ Art. 92
Military Rule of Evidence 513 (2015)
Rule for Courts-Martial 706 (2015)
DoDI 6490.04, *Mental Health Evaluations of Members of the Military Services* (4 March 2013)
DoDI 6490.08, *Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members* (17 August 2011)
AFI 40-301, *Family Advocacy Program* (16 November 2015)
AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (8 July 2014)
AFI 44-172, *Mental Health* (13 November 2015)

LIMITED PRIVILEGE SUICIDE PREVENTION (LPSP) PROGRAM

Purpose

- Commanders who have concerns that a member under their command who is facing disciplinary action may be at risk of suicide, can refer the member to the mental health clinic for a mental health evaluation (MHE). Under limited circumstances, confidences revealed during such consultations may be kept confidential between the patient and the mental health provider.

  -- The objective of the LPSP program is to identify and treat those members who, because of the stress of impending action under the UCMJ, pose a genuine risk of suicide by providing limited confidentiality with respect to their discussions with a mental health provider (MHP)

  -- AFI 44-172, *Mental Health,* is the governing instruction for the program. This instruction:

    --- Provides guidance for commanders who wish to make a referral for an MHE and consider for placement in the LPSP program

    --- Establishes the rights of Air Force members referred by commanders for MHEs

    --- Establishes a limited confidential privilege between the MHP and a patient enrolled in the LPSP program

    --- Provides guidance on the psychotherapist-patient privilege under Military Rule of Evidence (MRE) 513

- The LPSP program operates in conjunction with the guidance on commander directed MHEs and MRE 513

Application

- Eligible Members: The LPSP program applies to those military members who have been officially notified (written or oral) that they are under investigation or suspected of violating the UCMJ

Procedures

- Initiation:

  -- After official notification, if an individual involved in the processing of the disciplinary action has a good faith belief the member being disciplined may present a risk of suicide, the individual shall communicate that fact to the member's immediate commander along with a recommendation for a MHE and possible placement in the LPSP program

  -- Individuals involved in the processing of the disciplinary action include, but are not limited to, the defense counsel, the trial counsel, law enforcement officials, the SJA or any assistant SJA, the first sergeant, or the squadron executive officer

  -- Based on the information provided by such an individual or any other relevant information and after consultation with a mental health provider (MHP), the commander may refer the member for a MHE

  -- The procedures and rights associated with MHEs apply to such a referral

  -- The MHP conducting the evaluation determines if the member poses a risk of suicide and, if so, initiates treatment, explains the LPSP protections to the member, and places the member into the LPSP program

- Duration:

  -- The limited protections offered by the LPSP program last only so long as the MHP believes there is a continuing risk of suicide

  -- The MHP must notify the commander when the member no longer poses a risk of suicide

  -- The limited protections offered under the program cease at that time. However, matters disclosed while the member was in the LPSP program remain protected.

Limited Protection

- Members in the LPSP program are granted limited protection with respect to information revealed in, or generated by, their clinical relationship with MHPs. Any such information may not be used in any existing or future UCMJ action or when weighing the characterization of the member's service in an administrative separation.

- The limited protection **does not apply to**:

  -- The use of the information as evidence for impeachment or rebuttal purposes in any proceeding in which information generated by and during the LPSP relationship was first introduced by the member concerned

  -- Disciplinary or other action based on independently derived evidence

  -- Any information gathered by the MHP or other provider prior to placement in the program or after release from the program (except for later created summaries/documents which pertain to treatment under the LPSP program)

Psychotherapist Patient Privilege Under MRE 513

- Any confidential communication which a military member has with a psychotherapist may be privileged regardless of whether the member has been enrolled in the LPSP program according to MRE 513

  -- MRE 513 offers an evidentiary privilege in cases arising under the UCMJ

    --- A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition

  -- MRE 513 extends to all stages of a proceeding under the UCMJ, including law enforcement investigations into suspected offenses, proceedings for search authorizations, nonjudicial punishment proceedings, court-martial actions and other proceedings enumerated in MRE 1101

  -- MRE 513 has no application outside UCMJ proceedings

    --- However, disclosure should be limited to "persons or agencies with a proper and legitimate need for the information and authorized by law or regulation to receive them"

    --- SJAs resolve disputes and determine whether disclosure should be made

-- Privilege may be claimed by the patient or the guardian or conservator of the patient

--- A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his/her behalf

--- The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient

--- The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary

-- Exceptions:

--- Patient is dead

--- Communication is evidence of child abuse/neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse

--- When federal or state law, or service regulation, imposes a duty to report information contained in the communication

--- When the patient is a danger to any person, including the patient

--- If the communication contemplates, or the services of the psychotherapist are sought to commit, a future fraud/crime

--- When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission

--- When an accused offers evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by Rule for Courts-Martial (RCM) 706 or MRE 302

- In cases not arising under the UCMJ, psychotherapists may appeal requests for confidential information to the installation SJA

-- Confidential communications will be disclosed to persons or agencies with a proper and legitimate need for the information who are authorized by law to receive it

- In a case under the UCMJ where the production or admission of records or communications of a patient other than the accused are in dispute, a party may seek an interlocutory ruling by the military judge

- Before inquiring with MHPs, commanders should consult with their servicing SJA

References

Military Rule of Evidence 513 (2015)
DoDI 6490.04, *Mental Health Evaluations of Members of the Military Services* (4 March 2013)
AFI 44-172, *Mental Health* (13 November 2015)
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

HIPAA generally protects private health information from disclosure and permits disclosure only under specific circumstances.

Introduction

- In 1996, Congress enacted HIPAA to improve portability and continuity of health insurance coverage, to combat waste, fraud and abuse in health care delivery, and to improve access to long-term care services and coverage

- The statute has several components:

  -- Privacy Rule: Specifically provides for increased privacy protection of protected health information (PHI)

  -- HIPAA Security Rule: Addresses the use of technology and physical safeguards required to protect information

- The DoD has implemented the Privacy Rule through DoD 6025.18-R, *DoD Health Information Privacy Regulation,* and the HIPAA Security Rule in DoDI 8580.02, *Security of Individually Identifiable Health Information in DoD Health Care Programs*

- HIPAA's Privacy Rule applies to organizations that meet the definition of "covered entities." Covered entities include healthcare providers and healthcare facilities.

  -- This means that Air Force medical treatment facilities (MTFs) must comply with HIPAA when they use or disclose medical information

  -- Commanders are not considered "covered entities" under HIPAA, but medical information they receive from the covered entity is subject to the Privacy Act

- HIPAA does not create a private right of action for violations, but the Department of Health and Human Services has authority to impose civil money penalties on covered entities and to pursue criminal actions for individual violations of the Privacy Rule

- Air Force personnel in the covered entity are also subject to UCMJ or administrative actions for HIPAA violations

Privacy Rule

- The general prohibition under HIPAA is that the PHI of individuals, living or deceased, shall not be used or disclosed except for specifically permitted purposes. HIPAA's privacy provisions extend to deceased individuals for 50 years after death.

- PHI is information transmitted or maintained by electronic or any other form or medium, that relates:

  -- To past, present, or future physical or mental health of an individual;

  -- The provision of healthcare to an individual; or

  -- The past, present or future payment for the provision of healthcare to an individual when the information identifies the individual or there is a reasonable basis to believe the information can be used to identify the individual

- Health information is considered individually identifiable if it includes demographic information such as the patient's name, address, zip code, phone number, social security number, full face photographic image, finger or voice print, or other identifier

- HIPAA does allow PHI to be used for treatment, payment or healthcare operations. If the use of information is not for one of these purposes, the MTF generally needs the patient's written authorization, or the disclosure must fall into one of the "permissible disclosures" categories:

  -- <u>Treatment</u>: Generally means the provision, coordination, or management of health care and related services by or among health care providers

  -- <u>Payment</u>: Generally refers to billing and collection activities

    --- Includes Air Force third-party collection programs

  -- <u>Health Care Operations</u>: Certain administrative, financial, legal, and quality improvement activities that are conducted by the covered entity

    --- For example, the medical malpractice claims investigation process and the Surgeon General's Quality Assurance Program activities

  -- <u>Business Associates</u>: Individuals or entities who are not members of the MTF workforce, but who act on behalf of an MTF, performing, or assisting in the performance of a function or activity involving the use or disclosure of PHI

---- HIPAA also contains provisions for when providers and health plans give PHI to "business associates"

---- Business associates must give written assurance that they will comply with HIPAA (e.g., a business associate agreement (BAA)). There is no need for BAAs within the DoD, as DoD 6025.18-R establishes the HIPAA requirements for all DoD components.

-- Certain records that you might expect to be subject to HIPAA are not

---- For example, the DoD drug testing program is not subject to HIPAA

---- DoD 6025.18-R, para. C2.2 contains a comprehensive list of health-related records and activities in the DoD to which HIPAA does not apply

Permissible Disclosures

- Under HIPAA, even without the individual's authorization, an MTF may still disclose information for certain purposes, as summarized below. Note that most of these purposes have specific requirements that must be met prior to disclosure of PHI, as outlined in Chapter 7 of DoD 6025.18-R.

-- As required by any law (includes requirements in Air Force and DoD Regulations)

-- To avert serious threats to health or safety

-- For specialized governmental functions

---- This provision allows certain disclosures of the PHI of Armed Forces personnel for "activities deemed necessary" by appropriate military command authorities to assure the proper execution of the military mission (see further discussion below)

---- This provision also permits, among other things, disclosure of PHI to DoD or other Federal officials as described in Section C7.11 of DoD 6025.18-R

-- For judicial and administrative proceedings

-- For law enforcement purposes (which includes AFOSI, SF, and Judge Advocates when acting as prosecutors)

-- For organ, eye, or tissue donation purposes

- For certain research activities (subject to institutional review board (IRB) approval of a waiver)
- For issues related to victims of abuse, neglect or domestic violence
- For issues related to inmates in correctional institutions or in custody
- For workers' compensation
- For public health activities
- For health oversight activities
- About decedents (to a coroner, medical examiner, or funeral director)

- Accounting of Disclosures:
  - Most of these disclosures are accountable, which means the MTF must document who received the information, when, and for what purpose and provide the information upon the patient's request
  - Law enforcement personnel (to include judge advocates) may request a temporary suspension of the accounting for disclosures for law enforcement purposes if the MTF receives a written statement from law enforcement that accounting would be "reasonably likely" to impede the agency's activities and specifies the time that such a suspension would be required
    - If the request is oral, the MTF can only temporarily suspend the individual's right to an accounting for 30 days unless, in that time, they receive a written request

- Uses and disclosures incidental to a use or disclosure otherwise permitted under HIPAA are permissible as long as the covered entity has made reasonable efforts to limit the use or disclosure of the PHI to the minimum necessary and the covered entity has appropriate physical, administrative and technical safeguards in place to protect PHI
  - Some examples of incidental uses/disclosures are sign-in sheets in waiting rooms, calling patients by their name, and posting the patient's name outside the door of a hospital room

Minimum Necessary Standard

- When HIPAA allows disclosure of information, MTFs are required to provide only the minimum amount of information necessary to satisfy the intended purpose of the disclosure (similar to the Privacy Act's "need to know" standard)

- The minimum necessary rule does not apply to uses and disclosures for treatment purposes, disclosures directly to the patient, when the patient authorizes the disclosure, and when other laws require the use/disclosure

- It is possible the entire medical record is the "minimum necessary," but the requester will have to articulate why the entire record is the "minimum necessary"

Commanders' Access to Information

- Under the "specialized government functions" rule described above, commanders can access PHI of Armed Forces personnel (this does not include dependents or civilian employees) for activities deemed necessary to assure the proper execution of the military mission. This rule generally permits disclosures for fitness for duty purposes.

  -- For example, commanders may need PHI related to readiness (vaccination status; profile status; etc.). Commanders may also require information related to medical conditions impacting members' abilities to perform their duties (profile information; etc.). Commanders may even need PHI to verify the whereabouts of subordinates.

- However, under the "minimum necessary" standard stated above, any release of PHI must be limited in scope to what the commander actually needs to accomplish his/her mission:

  -- For example, if a member has a foot injury that precludes prolonged standing, the MTF may disclose PHI to the commander related to the foot injury because it impacts the type of day-to-day duties that the member can be assigned (i.e., it impacts mission accomplishment). The MTF would not necessarily disclose the member's dental records, mammograms, or other medical information unrelated to the foot injury, though, because that PHI may exceed the minimum necessary.

  -- These disclosures are subject to accounting (these disclosures must be tracked, and the member can find out what information the commander accessed)

- There is no "blanket rule" concerning release of PHI to commanders. In each case, the nature and extent of PHI released must be determined by evaluating the commander's need and applying the minimum necessary standard.

- Only commanders and their designees can access PHI under these rules. AFI 41-210 provides that a commander's designee includes vice commander, deputy commander, first sergeant or commander's support staff. If the commander wishes to designate any other individual as an authorized recipient of PHI, the commander must do so in writing.

- Also, note that a commander's access to information may be further limited by DoD policy such as confidentiality for sexual assault victims, DoD policies on reducing the stigma of mental health treatment, or other applicable policy

Miscellaneous

- All Tricare beneficiaries receive a Notice of Privacy Practice (NOPP), created by DoD for use by all the services. The NOPP puts patients on notice of how their PHI will be used or disclosed, and provides information on how to request certain actions such as restrictions and amendments to PHI, as well as the process to file complaints under HIPAA.

- Any time a patient signs an authorization to release PHI, the authorization must be HIPAA compliant by containing certain elements described in DoD 6025.18-R. DD Form 2870, *Authorization for Disclosure of Medical or Dental Information* was created for that purpose and is considered a HIPAA compliant authorization.

- Amendments to HIPAA dictate requirements for reporting breaches of PHI and notifying affected individuals of breaches involving unsecured PHI

References

Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 300gg, *et seq.*, 29 U.S.C. § 1181 *et seq.*, and 42 U.S.C. § 1320d *et seq.*

45 C.F.R. Parts 160, 162, 164

DoD 6025.18-R, *DoD Health Information Privacy Regulation* (24 January 2003)

DoDI 6025.18, *Privacy of Individually Identifiable Health Information in DoD Health Care Programs* (2 December 2009)

DoDI 8580.02, *Security of Individually Identifiable Health Information in DoD Health Care Programs* (12 August 2015)

AFI 41-210, *Tricare Operations and Patient Administration Functions* (6 June 2012)

DD Form 2870, *Authorization for Disclosure of Medical or Dental Information* (December 2003)

PERSONNEL RELIABILITY PROGRAM

The Personnel Reliability Program (PRP) is a program designed to ensure the highest possible standards of individual reliability in personnel performing duties associated with nuclear weapons systems and critical components. It is intended to prevent the unauthorized launch of a missile or aircraft armed with a nuclear weapon, or the unauthorized detonation of a nuclear weapon. Personnel in the PRP must be certified.

Responsibilities

- Wing commanders are responsible for the wing PRP. They serve as the reviewing official for all permanent decertification case files started by subordinate units. They also ensure base PRP meetings are conducted quarterly at the wing level.

- Group and unit commanders who control or have access to nuclear weapons, weapon systems, or critical components, and perform the actual PRP certification are certifying officials (COs) who certify and initiate decertification for their personnel. They may delegate this duty to a deputy or assistant. Certifying officials and their delegates must be certified in a PRP category equal to, or higher than, the personnel they are certifying.

- Individuals in the PRP are subject to continuous evaluation of their reliability and are responsible for complying with the intent of PRP while away from their duty station (leave, TDY, etc.). Responsibility for ensuring continuous eligibility rests with each individual involved with PRP. Individuals in the PRP must monitor their own reliability. They must also notify the CO immediately of any potentially disqualifying information (PDI), either their own or that of co-workers.

Categories of PRP Positions

- Critical Position: Initial certification for critical positions must have Top Secret eligibility, favorably adjudicated within the last five years. These positions generally involve individuals assigned nuclear duties where they have access and technical knowledge or can either directly or indirectly cause the launch or use of a nuclear weapon.

- Controlled Position: Initial certification for a controlled position must have Secret eligibility or a higher investigation that was adjudicated within the last 5 years. These positions generally involve individuals assigned nuclear duties and have access but no technical knowledge, controls access into areas containing nuclear weapons, but does not have access or technical knowledge, or is armed and assigned duties to protect and/or guard nuclear weapons.

PRP Certification Requirements

- Individuals selected and certified for the PRP must meet the following minimum criteria at all times:
  - -- Dependable, mentally alert, and technically proficient commensurate with their respective duty requirements
  - -- Flexible in adjusting to changes in the working environment, including the ability to work in adverse emergency situations
  - -- Good social adjustment, emotional stability, personal integrity, sound judgment and allegiance to the United States
  - -- Medical evaluation
  - -- Personal file review
  - -- Personal interview
  - -- Position qualification

Potential Disqualifying Information (PDI)

- Any of the following traits or conduct is PDI:
  - -- Personal conduct involving questionable judgment
  - -- Emotional, mental, and personality disorders
  - -- Negative financial considerations
  - -- Criminal conduct
  - -- Substance or drug misuse and drug incidents
  - -- Alcohol use, disorder and alcohol-related incidents
  - -- Sexual harassment or assault
  - -- Security violations
  - -- Misuse of information technology systems

Certifications

- Formal: Validates that an individual has been screened, evaluated, and meets the standards for assignment to PRP duties

- Interim: Limits access when an individual is placed in PRP and does not currently possess the required security investigation for formal certification but does have a security investigation adequate for interim clearance

- Administrative: Granted when an individual does not currently hold a formal or interim certificate for PRP duties and is identified for an assignment to a PRP position

Removal from PRP

- Members may be removed from PRP duties in one of two ways: suspension or decertification

- Suspension:

  -- Suspension is used to immediately remove an individual from PRP related duties, initially up to three months, without starting decertification action. The CO may extend the suspension to one year, in three-month increments.

  -- After one year, if the reasons or conditions for suspension still exist and impact reliability, the individual will be decertified

  -- The CO makes the final decision and can return an individual to PRP duties at any point during the suspension timeframe

  -- A CO who is suspended may perform PRP administrative functions

- Mandatory Decertification or Disqualification:

  -- Any of the following conditions will result in decertification or disqualification for a PRP position:

    --- The individual is diagnosed as alcohol-dependent and subsequently fails required after-care program or fails to participate in the prescribed rehabilitation program or treatment

    --- The individual is involved in trafficking, cultivation, processing, manufacture, or sale of any controlled drug

--- The individual has ever used a drug that could cause flashbacks

--- The individual is diagnosed with a severe substance use disorder

--- Loss of confidence by the certifying official in the reliability of the individual

--- The individual's security clearance eligibility has been revoked

-- Within 15 workdays of the decertification, the CO will advise the individual in writing of the reasons for decertification and of the requirement for review by the reviewing official

-- A decertification or disqualification may be reinstated provided there is documented evidence that clearly demonstrates the disqualifying reason no longer exists and the individual concerned is otherwise qualified

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References

DoD Manual 5210.42, *Nuclear Weapons Personnel Reliability Program (PRP)* (13 January 2015)

DoD Manual 5210.42 AFMAN 13-501, *Nuclear Weapons Personnel Reliability (PRP)* (29 May 2015) including AFMAN13-501_AFGM2016-01, 10 March 2016

AFI 31-501, *Personnel Security Program Management* (27 January 2005), incorporating through Change 2, 29 November 2012

AFI 91-101, *Air Force Nuclear Weapons Surety Program* (15 August 2014), incorporating through Change 3, 27 April 2016

LAUTENBERG AMENDMENT

The 1996 Domestic Violence Amendment to the Gun Control Act (referred to as the Lautenberg Amendment) makes it a federal offense for anyone convicted of a misdemeanor crime of domestic violence to ship, transport, possess, or receive firearms or ammunition. The Department of Defense (DoD) policy for implementing this law to military personnel and DoD civilian personnel is found in DoDI 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel*.

Definition of Crime of Domestic Violence

- An offense that has as its factual basis the use or attempted use of physical force, or threatened use of a deadly weapon committed by:
  - -- A current or former spouse of the victim
  - -- A parent or guardian of the victim
  - -- Someone who has a child in common with the victim
  - -- Someone who is cohabitating with the victim or who has cohabitated with the victim as a spouse, parent or guardian
  - -- Someone similarly situated as a spouse, parent, or guardian (such as a girlfriend/boyfriend relationship)
- The title of the crime does not have to be "domestic violence" if the underlying facts fit within the DoD definition

Qualifying Convictions

- Any state or federal conviction for a crime of domestic violence (misdemeanor or felony), or an action qualifying as a conviction, prohibits the possession of a firearm under the Lautenberg Amendment
- Charges that are reduced or negotiated to a crime not entitled "domestic violence" may still qualify, if the factual basis fits within the DoD definition
- A general or special court-martial conviction for a UCMJ offense meeting the DoD definition
- To qualify as a "conviction", the person convicted must have been represented by an attorney or affirmatively waived such right

- The following do not qualify as a conviction:
  - -- Convictions that are expunged or set aside
  - -- Convictions that are pardoned
  - -- Summary court-martial convictions
  - -- Nonjudicial punishment
  - -- Deferred prosecutions or similar alternate dispositions in civilian courts
- Local staff judge advocates (SJA) will assist commanders in determining if there is a qualifying conviction
- The DoD does not construe the amendment to apply to major military weapons systems, or "crew served" weapons and ammunition (including aircraft)

Air Force Implementation

- Commanders are required to give annual briefings regarding the Lautenberg Amendment
- Notices regarding the Lautenberg Amendment must be posted at all facilities where government firearms are stored, issued, disposed of, or transported
- Air Force members must complete a DD Form 2760, *Qualification to Possess Firearms or Ammunition*, **under the following circumstances:**
  - -- Annually for all personnel who work with or are required to qualify on firearm, destructive device, or ammunition
  - -- At the time of permanent change of station (PCS), permanent change of assignment (PCA), or temporary duty assignment (TDY), or other change in assignment
  - -- Prior to any weapons training
- Members with a qualifying conviction
  - -- Must lawfully dispose of all privately owned firearms and ammunition
  - -- Have 30 days to dispose of all firearms stored in the armory

-- Must immediately be denied access to all government firearms and ammunition, including Morale, Welfare, and Recreation (MWR) facilities (i.e., trap/skeet). Commanders must immediately retrieve any government-issued firearms and ammunition.

-- Are ineligible for all weapons training

-- May be subject to discharge for the underlying act of domestic violence or the underlying conviction but not simply because he/she is unable to possess a firearm

-- Members in career fields requiring firearms may be cross-flowed or retrained into an Air Force Specialty Code (AFSC) not requiring firearms

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References

18 U.S.C. §§ 921-22

DoDI 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel* (21 August 2007), incorporating through Change 2, 9 July 2015

AFI 31-117, *Arming and Use of Force by Air Force Personnel* (2 February 2016)

DD Form 2760, *Qualification to Possess Firearms or Ammunition* (December 2002)

CONSCIENTIOUS OBJECTION TO MILITARY SERVICE

Although military service is an obligation of citizenship, Congress recognized early that certain individuals and groups hold convictions against the use of force in any form.

General Policies

- A conscientious objector (CO) is a person who is opposed to participation in war ***in any form***, or the bearing of arms, based on a firm, fixed and sincere belief as a result of religious training or similar belief system
  - -- Moral or ethical beliefs, even if not characterized by the holder as "religious," may provide sufficient grounds for CO status
- The objection to war must be all-inclusive, not to specific wars or conflicts
- COs are classified as either Class 1-0 (a person who sincerely objects to participation in war in any form), or as Class 1-A-0 (a person who sincerely objects to participation as a combatant in war in any form, but whose convictions will permit him or her to serve in noncombatant status)
- Administrative discharge by the Secretary of the Air Force (SecAF) prior to completion of term of service is discretionary based on the facts of each case
- Applicants for CO status who are awaiting disposition of their case should be assigned to duties that conflict as little as possible with their beliefs
  - -- Applicants must comply with the normal requirements of military service and perform duties they are assigned
  - -- Applicants must comply with active duty or transfer orders in effect at the time of the application or subsequently issued

Application Procedures

- Applicants have the burden of proof to show they meet CO status
- Applicants must establish, by clear and convincing evidence, the following:
  - -- They oppose participation in war in any form or the bearing of arms
  - -- Their belief is honest, sincere, and deeply held

  - Their belief is by virtue of religious training or other belief system akin to religion

  - The nature or basis of their claim falls under the definition of conscientious objection in AFI 36-3204 *Procedures for Applying as a Conscientious Objector*, Attachment 1

- Clear and Convincing Evidence: A standard of proof that does not require proof beyond a reasonable doubt, but does require proof more substantial than a mere preponderance of the evidence

- The applicant submits the application to the servicing military personnel flight (MPF) personnel relocation element, or to the immediate commander if the applicant is in the USAFR or ANG and is not serving on extended active duty

- The application will contain personal information required by AFI 36-3204, Attachment 2, and any other information deemed relevant by the applicant

- The information includes an extensive description of the individual's personal background, a thorough description of the individual's beliefs, and a listing of the private organizations to which the individual belongs

- MPF notifies the unit commander, reviews the personnel records of the applicant for pertinent information, and counsels the member about the effect of a CO determination on VA entitlements. MPF also schedules a chaplain and psychiatrist interview.

  - The chaplain personally interviews the applicant to determine sincerity and depth of conviction against war

  - The chaplain must submit a written report detailing conclusions and the reasons therefor, but does not make any recommendation concerning the application

  - A psychiatrist interviews the applicant to determine the presence of any mental disorder warranting medical or administrative disposition. Again, no recommendation on the application is made.

- The Special Court-Martial Convening Authority (SPCMA) for active duty members and Air Force Reserve (AFR) non-extended Active duty (EAD) members and USAFR Non-EAD members appoints a judge advocate as an investigating officer (IO) to interview the applicant under oath, assemble all the relevant material and interview other witnesses

- For Air National Guard (ANG) Non-EAD members, the wing or group commander appoints the investigating officer

  -- The instruction contains procedures for the IO to hold a hearing on the matter, which the applicant may attend with an attorney at their own expense

  -- The hearing is informal and not governed by the courts-martial rules of evidence except that all verbal testimony must be under oath or affirmation. Relevant evidence may be received, written statements from persons not present may be under oath or affirmation. The hearing is non-adversarial.

  -- The IO prepares a report that states their conclusions concerning the applicant's beliefs and the reasons therefore, and recommendations concerning disposition of the case

  -- The IO must give the applicant a copy of the final report and allow the applicant to submit rebuttal material within 15 calendar days after receiving the report

- Guidelines for approving or disapproving applications are found in Chapter 4 of AFI 36-3204, Chapter 4.

  -- Generally, the reviewing authorities must find that an applicant's moral and ethical beliefs oppose participation in war in any form and that the applicant holds these beliefs with the strength of traditional religious convictions

  -- Conscientious objection must be the primary controlling factor in the applicant's life

  -- A primary factor is the sincerity with which the applicant holds this belief. In evaluating applications, carefully examine and weigh the conduct of applicants, in particular their outward manifestation of their beliefs along with the applicant's thinking and lifestyle in its totality, past and present.

- The commander who appoints the IO makes a recommendation before forwarding the file up the chain of command

- SecAF or a designated representative makes the decision regarding CO status for officer applicants

- The final approval decision for enlisted personnel is by HQ AFMPC/DPMARS2 (active duty Airmen), ANGRC/DPM (ANG Airmen), HQ AFRES/CV (reserve unit Airmen), or HQ ARPC/CC (all other reserve Airmen); SAF/MIB is the disapproval authority

- The applicant has 15 calendar days from receipt date of adverse information to comment on or refute the material before the Air Force makes a final decision

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References

DoDI 1300.06, *Conscientious Objectors* (31 May 2007)

AFI 36-3204, *Procedures for Applying as a Conscientious Objector* (15 July 1994)

AFI 36-3207, *Separating Commissioned Officers* (9 July 2004), incorporating through Change 6, 18 October 2011

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

FITNESS PROGRAM

The goal of the Fitness Program is to motivate all members to participate in a year-round physical conditioning program that emphasizes total fitness, to include proper aerobic conditioning, strength/flexibility training, and healthy eating. The Air Force uses an overall composite fitness score and minimum scores per component based on aerobic fitness, body composition, and muscular fitness components to determine overall fitness. The Fitness Program applies to all Active Duty, Air Force Reserve and Air National Guard members.

Unit/Squadron Commander's Duties

- The unit/squadron commander's duties include, but are not limited to, the following:

  -- Executing and enforcing the unit's fitness program and ensuring appropriate administrative action is taken in cases of non-compliance

  -- Implementing and maintaining a unit/squadron physical training (PT) program, in accordance with applicable guidelines

  -- Encouraging members to participate in physical training of up to 90 minutes three to five times weekly

  -- Appoints individuals to conduct fitness assessments in support of the Fitness Assessment Cell (FAC), appoints Physical Training Leaders (PTLs) and appoints a Unit Fitness Program Manager (UFPM)

Physical Fitness Standard

- Members will receive a composite score on a 0 to 100 scale based on the following maximum component scores:

  -- 60 points for aerobic fitness assessment

  -- 20 points for body composition

  -- 10 points for push-ups

  -- 10 points for sit-ups

- The following fitness levels are determined by a member's composite score:

  -- Excellent: All component minimums met and the member receives a 90 or above total score

  -- Good: All component minimums met and the member receives a 75 to 89.99 total score

  -- Unsatisfactory: One or more component minimums not met and/or under 75 total score

    --- However, if an Airman fails the abdominal circumference measurement of the fitness assessment (FA) yet takes and passes the other three components with a score of at least 75 points of the remaining 80 points, the FAC will administer the Department of Defense (DoD) prescribed body mass index (BMI) screen. If the Airman passes the BMI screen, the Airman passes the body composition component of the fitness assessment.

- Commanders may grant exemptions from the various components of the FA in accordance with AFI 36-2905, *Fitness Program*. Airmen with exemptions prohibiting them from performing one or more components of the FA will be assessed on the remaining components.

- Airmen will be exempt from the FA during pregnancy. Airman with pregnancies lasting 20 weeks or more are also exempt from the FA for 12 months after discharge from the hospital upon completion of pregnancy.

- Members will usually complete their fitness testing according to the following timelines:

  -- Excellent Score: Member must test within 12 months

  -- Good Score: Members are mandated to complete an official FA at a minimum of twice yearly

  -- Unsatisfactory Score: Member must retest within 90 days

    --- Unit commanders may not mandate Airmen to retest any sooner than the end of the 90-day reconditioning period

    --- Retesting is not recommended during the first 42 days after an unsatisfactory test

-- Commanders may direct unofficial practice tests

Administrative and Personnel Actions

- Members are expected to be in compliance with Air Force fitness standards at all times. When members fail to comply with those standards (receive an unsatisfactory FA score), they render themselves potentially subject to adverse action. Commanders should consult with their servicing staff judge advocate before taking such action.

- Prohibited Actions:

  -- Commanders may not impose nonjudicial punishment solely for failing to achieve a satisfactory fitness score

  -- While units may perform unofficial practice tests for diagnostic purposes, commanders will refrain from taking adverse action based solely on the results of these tests

  -- A member is not subject to adverse personnel action for inability to take the FA if the member is on a 365-day FA exemption that has been validated by the military treatment facility

- Authorized Actions:

  -- Unit commanders will consider adverse administrative action upon a member's unsatisfactory fitness score on an official FA

  -- If adverse administrative action is not taken in response to an unsatisfactory fitness score on an official FA, unit commanders will document in the member's fitness case file as to why no action is being taken

    --- The lack of such commander documentation does not discount the testing failure as a basis in support of administrative discharge action

  -- As appropriate, unit commanders will document and take corrective action for members' unexcused failures to participate in the fitness program such as failing to accomplish a scheduled FA, failing to attend a scheduled fitness appointment, failing to complete mandatory educational intervention or failing to maintain the required documentation of exercise while on the fitness improvement program

  -- Enlisted Airmen failing to have a current/passing FA score at the Promotion Eligibility Cut-Off Date are ineligible for promotion

-- Commanders should consider delaying the promotion of officers failing to have a current/passing FA at the Projected Date of Promotion

-- It is within a commander's discretion to document within an EPR/OPR a referral for a non-current/failing FA at the evaluation close-out date, or EPR Static Close-Out Date

-- Unit commanders **MUST** make a discharge or retention recommendation to the separation authority (enlisted Airmen), show cause authority (officers), or appropriate discharge authority for Air Force Reserve and Air National Guard members when an individual remains in the Unsatisfactory fitness category for a continuous 12-month period or receives four unsatisfactory FA scores in a 24-month period

--- Prior to initiation of discharge action, a military medical provider must have ruled out medical conditions precluding the member from achieving a passing score

Failing to Present a Professional Military Image

- Commanders must ensure members present a professional military image while they are in uniform

- Commanders may require individuals who do not present a professional military appearance (regardless of overall fitness assessment composite score) to enter the Fitness Improvement Program (FIP) and/or otherwise schedule individuals for fitness education/intervention

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References

AFI 36-2905, *Fitness Program* (21 October 2013), incorporating Change 1, 27 August 2015

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), incorporating through Change 7, 2 July 2013, including AFI36-3206_AFGM2016-01, 24 June 2016

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

Attachment

Administrative and Personnel Actions for Failing to Attain Physical Fitness Standards

ADMINISTRATIVE AND PERSONNEL ACTIONS FOR FAILING TO ATTAIN PHYSICAL FITNESS STANDARDS

***OPTIONAL** Administrative and Personnel Actions for Failing to Attain Physical Fitness Standards (within a 24-month period in accordance with AFI 36-2905, *Fitness Program,* para. 10.1.5.3. and 36-month period in accordance with AFI 36-2905, *Fitness Program,* para. 10.1.5.3.1.).

Unsatisfactory Fitness Score Options	1st Fail	2nd Fail	3rd Fail	4th+ Fail
Verbal Counseling	Use anytime and as often as needed and in conjunction with other options below			
Letter of Counseling	X	X		
Letter of Admonition	X	X		
Limit Supervisory Responsibilities	X	X	X	X
Letter of Reprimand	X	X	X	X
Referral Evaluation	X	X	X	X
Delay Promotion (Officer), see AFI 36-250,1 Chapter 5	X	X	X	X
Establish Unfavorable Information File (UIF)		X	X	X
Reenlistment Ineligibility (see Note 1)		X	X	X
Remove Supervisory Responsibilities			X	X
Deny Voluntary Retraining			X	X
Deny Formal Training			X	X
Placement on Control Roster			X	X
Reenlistment Non-selection (see Note 1 – 2)			X	X
Remove Promotion (Officer)			X	X
Administrative Demotion (Enlisted)			X	X
Administrative Separation				X
(ARC only) Transfer to Obligated Reserve Section or Non-obligated, Non-participating Ready Personnel Section				X

MANDATORY Administrative and Personnel Actions for Failing to Attain Physical Fitness Standards (within a 24-month period in accordance with AFI 36-2905, *Fitness Program,* para. 10.1.5.3. and 36-month period in accordance with AFI 36-2905, *Fitness Program,* para. 10.1.5.3.1.).

Unsatisfactory Fitness Score by PECD/SCOD (Enlisted)	1st Fail	2nd Fail	3rd Fail	4th+ Fail
Defer or Withhold Promotion or Not Recommend (Enlisted)	X	X	X	X

***This is illustrative and not binding.** Unit commanders exercise discretion when selecting OPTIONAL command action(s) keeping in consideration the need for progressive discipline and the requirement for a separation package to be processed after the fourth failure in 24 months (or 36 months, when applicable in accordance with AFI 36-2905, *Fitness Program,* 10.1.5.3.1.). Commanders may use more than one action per failure. Recommend commanders consult with their local staff judge advocate (SJA). Refer to the governing instructions to determine the correct form and procedures for each action.

Notes:

1. Commanders may render an Airman ineligible for reenlistment rather than denying reenlistment by specifying ineligibility versus non-selection on the AF Form 418, *Selective Reenlistment Program Consideration*. This allows the flexibility of authorizing Airmen to extend their reenlistment for either 4 or 7 months (7 or 12 for ARC) to improve their fitness level. Airmen non-selected for reenlistment are not allowed to extend for any reason and will separate on the date of separation (DOS). Commanders may complete a second AF Form 418 changing the Airman's ineligibility or non-selection status at any time.

2. For ARC, the use of this option should be weighed against use of administrative separation and is applicable where recall of this member would not jeopardize mission readiness.

3. If an Airman has a history of FA failures, then passes, only to fail again—commanders should consider a more aggressive approach for OPTIONAL actions.

Reference

AFI 36-2905, *Fitness Program* (21 October 2013), incorporating Change 1, 27 August 2015

THE AIR RESERVE COMPONENT (ARC) FITNESS PROGRAM

The goal of the ARC Fitness Program is to motivate all members to participate in a year-round physical conditioning program that emphasizes total fitness, to include proper aerobic conditioning, strength/flexibility training, and healthy eating.

Unit/Squadron Commander's Duties

- The unit/squadron commander's duties include, but are not limited to, the following:

  -- Determine frequency of physical training (PT) programs during unit training assemblies (UTA) and annual tour (AT) duty-time based on mission requirements

  -- Encourages Air Reserve Technician and Air National Guard (ANG) Full-Time Technicians to participate in duty-time PT according to ARC policy for civilian employees and develop plans for their participation

  -- May authorize points and pay to accomplish mandatory fitness improvement programs (FIP) and to receive counseling from Health Promotion staff. This does not include authorization of points or pay for the sole purpose of performing a fitness assessment (FA).

  -- Executing and enforcing the unit's fitness program

  -- Ensures appropriate administrative action is taken in cases of non-compliance

  -- Implementing and maintaining a unit/squadron PT program, in accordance with applicable guidelines

  -- Encourage members to participate in PT of up to 90 minutes three to five times weekly

    --- Air Reserve Component (ARC) caveat: The commander can only encourage this but the member cannot be put into status if they are: traditional reservervists (TRs), Air Reserve Technicians (ARTs), and similar status, to accomplish this

    --- It is ultimately the member's responsibility to stay fit on their own time

Physical Fitness Standard

- Members will receive a composite score on a 0 to 100 scale based on the following maximum component scores:
  - -- 60 points for aerobic fitness assessment
  - -- 20 points for body composition
  - -- 10 points for push-ups
  - -- 10 points for sit-ups
- The following fitness levels are determined by a member's composite score:
  - -- Excellent: (90 or above) and all component minimums met;
  - -- Satisfactory: (75 to 89.99) and all component minimums met;
  - -- Unsatisfactory: (under 75) and/or one or more component minimums not met;
- Members will usually complete their fitness testing according to the following timelines:
  - -- Excellent Score: Member must test within 12 months
  - -- Satisfactory Score: Members are mandated to complete an official FA at a minimum of twice yearly
  - -- Unsatisfactory Score: Must retest within 90 days (180 days for ANG (Title 32)). Retesting is not recommended during the first 42 days after an unsatisfactory test.
    - --- Commanders **MAY** direct unofficial practice tests but the member must be in status (ARC caveat)
    - --- ARC Active Guard/Reserve (AGR) members must participate in a unit FIP and start FIP (if co-located, otherwise online) within 10 days of the failed FA
    - --- Non-AGR ARC (AFR and ANG) must accomplish FIP within 60 days of Unsatisfactory FA

--- Members in the Unsatisfactory fitness category will remain in the FIP/SFIP until they achieve a Satisfactory or Excellent FA score

- ARC members who commute from a lower altitude to perform duty at their assigned/attached unit at a location where the altitude ≥ 5250 feet, may perform FA with an Air Force unit at or near their home altitude, with commander's approval

  -- The Unit Fitness Program Manager (UFPM) at the unit of assessment will forward a copy of FA results to ARC member's assigned/attached UFPM for Air Force Fitness Management System (AFFMS) II update and tracking purposes

  -- This variation is only for ARC members who are not afforded the 42-day acclimatization period at the assessment site

- ARC medical unit providers will advise members to consult their Personal Care Provider (PCP) to recommend specific PT appropriate for medical condition or may refer the member to the FIP if available

  -- MTFs can provide space available evaluation as required for eligible ARC members

  -- To obtain an exemption based on evaluation and recommendation of PCP, the member must provide the ARC medical unit with medical documentation to include diagnosis, treatment, prognosis, and period and type of physical limitations or restrictions

  -- Individual Reservists (IR) may be referred by the military treatment facility (MTF) to their PCP

Administrative and Personnel Actions

- Members are expected to be in compliance with Air Force fitness standards at all times. When members fail to comply with those standards (receive an Unsatisfactory FA score), they render themselves potentially subject to adverse action. Commanders should consult with their servicing staff judge advocate before taking such action.

- Prohibited Actions:

  -- Commanders may not impose nonjudicial punishment (Article 15) solely for failing to achieve a satisfactory fitness score

  -- A member is not subject to adverse personnel action for inability to take the FA if the member is on a 365-day (per permanent) FA exemption

- While units may perform unofficial practice tests for diagnostic purposes, commanders will refrain from taking adverse action based solely on the results of these tests

- Unit commanders will consider adverse administrative action upon a member's unsatisfactory fitness score on an official FA

  - If adverse administrative action is not taken in response to an unsatisfactory fitness score on an official FA, unit commanders will document in the member's fitness case file as to why no action is being taken

  - The unit commander must make a discharge or retention recommendation to the appropriate discharge authority once a member receives four unsatisfactory FA scores in a 24-month period

    - A decision to retain the member does not remove or discount previous FA Unsatisfactory assessments

- As appropriate, unit commanders will document and take corrective action for members' unexcused failures to participate in the FP such as failing to accomplish a scheduled FA, failing to attend a scheduled fitness appointment, or failing to complete mandatory educational intervention

- ARC members can be involuntarily reassigned to non-participating status for unsatisfactory progress in the PT program according to AFI 36-2115, *Assignments within the Reserve Components*

References

AFI 36-2905, *Fitness Program* (21 October 2013), incorporating Change 1, 27 August 2015

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), incorporating through Change 7, 2 July 2013, including AFI36-3206_AFGM2016-01, 24 June 2016

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

UNAUTHORIZED ABSENCE

Most forms of unauthorized absence, from simply being late for work (failure to go) to an extended absence without leave, are punishable under Article 86, UCMJ. Airmen who intend to abandon their military duties permanently are deserters and are subject to prosecution under Article 85, UCMJ. Aside from disciplinary actions, there are certain requirements and considerations a unit must satisfy when handling cases involving an unauthorized absence.

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

  -- Failure To Go: An absence of less than 24 hours is classified as a failure to go, for administrative purposes

  -- Absence Without Leave: When the absence continues longer than 24 hours, the member's unit must change the member's administrative status to absence without leave (AWOL)

  -- Deserter: On the 31st day of continuous absence, the member's unit must change the member's administrative status to deserter

  -- Taking these administrative steps **WILL NOT**, standing alone, prove that the member has committed an unauthorized absence

  -- The administrative steps will affect pay and allowances and put the service member's name in a database civilian law enforcement can access during routine stops

- Duty Status Whereabouts Unknown: Regardless of the reason for the absence, if the commander's initial investigation reveals any indication that the absence results from an involuntary casualty rather than desertion or unauthorized absence, a status of Duty Status Whereabouts Unknown (DUSTWUN) may be appropriate. Consult AFI 36-3002, *Casualty Services*, the Military Personnel Flight (MPF) and the servicing staff judge advocate (SJA) for advice in such cases.

Commander Responsibilities:

- Under AFI 36-2911, *Desertion and Unauthorized Absence*, Chapter 2 and Table 1.1, if the member reasonably appears to be absent without authority, the commander must:

  -- Immediate Actions:

    --- Contact the MPF and inform them of the member's status

    --- Consult with the servicing SJA to determine if the member meets any of the criteria under AFI 36-2911, para. 1.5. If so, **immediately** change the member's status to "deserter".

      ---- Criteria include duty or travel restrictions, access to top secret or other qualifying classified documents, request for asylum or residence in a foreign country, uncompleted action for a previous AWOL, escaped prisoner, wanted for a serious UCMJ violation, or evidence of intent to remain away permanently

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

    --- Notify Security Forces (SF) if necessary

  -- After 24 Hours of Absence: Prepare an AF Form 2098, *Duty Status Change*, changing the absentee's status to either AWOL or deserter as appropriate, and forward it to the MPF, with a copy to the local Finance Office. Consult your SJA.

  -- On the Third Day of Absence: Prepare and forward a 72-hour inquiry (in accordance with AFI 36-2911, para. 2.2.3) to SF and MPF and re-evaluate whether AFI 36-3002 applies

    --- If the member is administratively classified as a deserter, the commander prepares, signs and distributes the DD Form 553, *Deserter/Absentee Wanted by the Armed Forces*, and changes the member's duty status within 24 hours of the decision to place the member in deserter status

  -- On the 10th Day of Absence: Prepare and forward letters to the next of kin and allotment payees, and provide copies of these letters to MPF

-- On the 31st Day of Absence:

--- Ensure processing of DD Form 553 (MPF will assist in preparation) and decide (with SF and MPF help) to whom DD Form 553 should be sent

--- Initiate AF IMT 2098 changing status from AWOL to deserter

--- Notify MPF of the member's continued absence; retrieve dependent ID cards as required by AFI 36-3026_IP, *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel,* Table 8.3 when member is placed in deserter status. Dependents lose medical benefits and shopping privileges in accordance with AFI 36-3026_IP, Volume 1, Table 9.2.

--- Consult with SJA about filing court-martial charges

--- Prepare 31st day status report in accordance with AFI 36-2911, para. 2.2.5

-- On the 60th Day of Absence: Notify SF and MPF of the member's continued absence, obtain updated input from SF and prepare and forward the 60-day status report in accordance with AFI 36-2911, para. 2.2.5

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

- Military law enforcement personnel and commissioned, warrant, petty, and non-commissioned officers may apprehend absentees and deserters. Civil officers authorized to arrest offenders under federal and state laws may arrest a deserter and deliver the offender into the custody of the Armed Forces. These civil officers may also arrest absentees at the request of military and federal authorities.

- United States authorities may apprehend absentees and deserters in foreign countries only when an international agreement with the country authorizes it or under an agreement with proper local authorities that does not violate an existing international agreement. Always consult the SJA in these cases.

References

AFI 36-2911, *Desertion and Unauthorized Absence* (15 October 2009)

AFI 36-3002, *Casualty Services* (22 February 2010), certified current 8 February 2012

AFI 36-3026_IP, *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel* (17 June 2009), including administrative change 2 November 2009

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

DD Form 553, *Deserter/Absentee Wanted by the Armed Force*s (March 2015)

AF IMT 2098, *Duty Status Change* (2003)

UNAUTHORIZED ABSENCE FOR AN AIR RESERVE COMPONENT (ARC) MEMBER

Unauthorized absences for ARC members are handled very similarly as unauthorized absences for Active Duty (AD) members. There are a few distinctions in processing requirements.

General Policies

- When an Extended Active Duty (EAD) order calls an ARC member to active duty (AD), the AD unit the member is temporarily assigned to processes the absence only after coordination with the home unit

- An ARC member voluntarily or involuntarily called or recalled to AD or active duty for training (ADT) who fails to report is an absentee if strong evidence exists that the member received the orders (Title 10 orders)

Reporting Unauthorized Absences

- The unit to which the member is attached for AD must coordinate with the home unit before processing the Absence without Leave (AWOL)/deserter action

  -- If Special Activities Branch (AFPC/DPSOA) or Headquarters USAF Academy, Cadet Accessions (HQ USAFA/DPYQD) ordered the member to EAD, contact the appropriate office within 1 duty day to determine if substantial proof of delivery of orders exist before taking any unauthorized absence action

  -- The unit of assignment completes appropriate actions outlined in AFI 36-2911, *Desertion and Unauthorized Absence,* Chapter 2

  -- Include the Military Personnel Division, Air National Guard, ANG/DPP, 1411 Jefferson Davis Highway, Arlington, Virginia 22202-3231 (for ANGUS members) and the Personnel Employment Branch, Air Force Reserve Command, HQ AFRC/DPMF, 155 Richard Ray Blvd, Robins Air Force Base, Georgia 31098-1635 (for USAFR members) on the distribution of all reports and the DD Form 553, *Deserter/ Absentee Wanted by the Armed Forces,* when classifying a member ordered to AD or ADT as a deserter

  -- If questions arise, contact AFPC/DPWCM (DSN 665-3727 or 1-800-531-5501)

- The commander of the disposition unit takes the actions outlined in Chapter 4 of AFI 36-2911

  -- Include ANG/DPP and HQ AFRC/DPMF as information addressees on the DD Form 616, *Report of Return of Absentee*

Disposition

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

- When a Guard or Reserve member ordered to ADT returns to military control, actions in outlined in Chapter 4 apply, except para. 4.4

- The detaining unit sends an e-mail notifying the return of a deserter to military control to ANG/DPP and AFPC/DPWCM

  -- The detaining unit gives the member a non-chargeable transportation request if no escort is used

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References

AFI 36-2911, *Desertion and Unauthorized Absence* (15 October 2009)
AFI 36-3002, *Casualty Services* (22 February 2010), certified current 8 February 2012
AFI 36-3026(I), Volume 1, *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel* (17 June 2009), including administrative change 2 November 2009
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016
DD Form 553, *Deserter/Absentee Wanted by the Armed Forces* (March 2015)
DD Form 616, *Report of Return of Absentee* (December 1999)

LINE OF DUTY DETERMINATIONS

A Line of Duty (LOD) determination is a finding made after an investigation into the circumstances of a member's injury, illness, disease, or death. The finding determines: (1) whether or not the illness, injury or disease existed prior to service (EPTS) and if so, whether an EPTS condition was aggravated by military service; (2) whether or not the illness, injury, disease or death occurred while the member was absent without authority and (3) whether or not the illness, injury, disease or death was due to the member's misconduct. On the basis of the LOD determination, the member or their next of kin may be entitled to benefits administered by the Air Force, or exposed to liabilities.

Use of the LOD Determination

- An LOD determination may impact the following:
  - -- Disability, retirement and severance pay
  - -- Forfeiture of pay
  - -- Extension of enlistment
  - -- Veteran benefits
  - -- Survivor Benefit Plan
  - -- Medical benefits and incapacitation pay for members of the Air Reserve Component (ARC)
  - -- Basic Educational Assistance Death Benefit

Limits on Use of an LOD Determination

- An LOD determination shall not be used as a basis for disciplinary actions
- An active duty member cannot be denied medical treatment based on an LOD determination. Furthermore, an LOD determination does not authorize recoupment of the cost of medical care from the member.

When an LOD Determination is Required

- An LOD determination must be initiated, whether the member is hospitalized or not, when the following occurs:

  -- Death of a member: An AF Form 348, *Line of Duty Determination*, must be completed in every case involving the death of a member in any duty status, to include travel to and from a duty station

  -- A RegAF member is unable to perform military duties for more than 24 hours due to an injury

  -- An injury involving likelihood of a permanent disability

  -- An injury or disease involving the abuse of alcohol or other drugs

  -- A self-inflicted injury

  -- An injury or disease possibly incurred during a period of unauthorized absence

  -- An injury or disease possibly incurred during a course of conduct for which charges have been preferred under the UCMJ

  -- For ARC, in addition to the situations listed above, an LOD determination must be made when:

    --- The member incurs or aggravates an illness, injury or disease, or receives any medical treatment while serving in any duty status, regardless of the member's ability to perform military duties

    --- The member dies, or incurs, or aggravates an illness, injury or disease while traveling directly to or from the place at which duty is performed

    --- The member dies, or incurs, or aggravates an illness, injury or disease while remaining overnight immediately before or between successive periods of inactive duty training (IDT), at or in the vicinity of the site of the IDT, if the site is outside reasonable commuting distance from the member's residence

Possible LOD Determinations

- In Line of Duty (ILOD): A determination of ILOD is made when the illness, injury, disease or death was not due to the member's misconduct and was incurred when the member was present for duty or absent with authority when the illness, injury or disease was service aggravated

  -- An illness, injury, disease or death sustained by a member in any duty status is presumed to be ILOD. This presumption may be rebutted when evidence shows the member was not in the line of duty (NILOD).

- Not in Line of Duty (NILOD) – Not Due To Member's Misconduct:

  -- A determination of NILOD-Not Due to Member's Misconduct is made when a formal investigation determined the member's illness, injury, disease or death occurred while the member was absent without authority

  -- A determination of NILOD-Not Due to Member's Misconduct is also made when an investigation determined, by clear and unmistakable evidence, the member's illness, injury, disease or the underlying condition causing it, existed prior to the member's entry into military service with any branch or component of the Armed Forces or between periods of such service, and was not service aggravated

- NILOD – Due to Member's Misconduct: This determination is made following a formal investigation that has determined the member's illness, injury, disease or death was proximately caused by the member's misconduct. If the member's illness, injury, disease or death occurred prior to service, in a non-duty status, or while the member was absent without authority and was proximately caused by the member's misconduct, the case should be finalized as NILOD-Due to Member's Misconduct.

Standard of Proof for LOD Determinations

- Except when otherwise noted in AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay,* the standard of evidentiary proof used in making an LOD determination is a preponderance of the evidence. A preponderance of the evidence is defined as the greater weight of credible evidence.

- When determining whether a preponderance of evidence exists, all available evidence must be considered, including:

  -- Direct evidence based on actual knowledge or observation of witnesses

-- Indirect evidence, such as facts or statements from which reasonable inferences, deductions and conclusions may be drawn to establish an unobserved fact, knowledge or state of mind

-- Accepted medical principles, based on fundamental deductions, consistent with medical facts that are so reasonable and logical as to create a virtual certainty that they are correct

- Preponderance of evidence is not determined by the number of witnesses or exhibits, but by all the evidence and evaluating factors such as a witness' behavior, opportunity for knowledge, information possessed, ability to recall, as well as related events and relationship to the matter being considered. In otherwords, a fact-finder may choose to believe a single credible witness over several witnesses the fact-finder does not find credible.

Types of Processing of LOD Determinations

- Administrative LOD:

  -- When a military medical provider sees a member under any of the below circumstances, he or she makes an administrative determination that the member's condition is ILOD. This determination is final and no further action is required.

    --- As a hostile casualty (other than death)

    --- As a passenger in a common carrier or military aircraft

    --- The injury, illness or disease clearly did not involve misconduct, abuse of drugs or alcohol or self-injurious behavior

    --- The injury or illness is simple, such as a sprain, contusion or minor fracture, and is not likely to result in permanent disability

    --- For ARC, the medical provider may make an administrative determination to document a minor condition as ILOD if there is no likelihood of permanent disability, hospitalization or requirement for continuing medical treatment

- Informal LOD:

  -- When an administrative determination is not appropriate, the commander investigates the circumstances of the case to determine if the member's illness, injury, disease, or death occurred while the member was absent without authority, is due to the member's own misconduct or EPTS

- Formal LOD:

  -- Made by higher authorities based upon a thorough investigation conducted by a specially appointed Investigating Officer (IO)

  -- Required to support a determination of NILOD unless the condition EPTS and was not service aggravated

  -- The immediate commander may also recommend a Formal LOD determination when the member's illness, injury, disease or death occurred:

    --- Under strange or doubtful circumstances

    --- Under circumstances the commander believes should be fully investigated

LOD Determination Processing for Sexual Assault Cases

- A member who has incurred an injury, illness or disease as a result of sexual assault while performing active duty service or inactive duty training must have his or her LOD processed in accordance with DoDI 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures*

- The LOD determination process will vary depending on whether the member elects unrestricted or restricted reporting

LOD Determinations for Specific Situations

- See AFI 36-2910, Attachment 2 for guidance on common LOD situations

---

References

DoDI 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures* (28 March 2013), incorporating Change 2, 7 July 2015

AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay* (8 October 2015)

AF Form 348, *Line of Duty Determination* (2002)

DISABILITY EVALUATION SYSTEM

Commanders must constantly balance their concern for mission accomplishment with their concern for service members' health and safety. Challenges can arise when service members develop injuries, illnesses, and/or physical disabilities/limitations that impact their ability to perform their duties and/or to deploy. To resolve these cases, the DoD has developed the Disability Evaluation System (DES).

The purpose of the DES is to maintain a fit and vital force. To achieve that end, disability law allows the Secretary of the Air Force (SecAF) to remove from active duty those who can no longer perform the duties of their office, grade, rank or rating and ensure fair compensation to members whose military careers are cut short due to service-incurred or service-aggravated medical conditions.

Profiles and Duty Limitations

- Service members may develop health problems that degrade their ability to perform military duties. In such cases, healthcare providers should communicate appropriate medical recommendations regarding fitness for duty and/or duty limitations to commanders so commanders are able to determine the optimum, yet safe, utilization of members in their charge.

- Healthcare providers should promptly notify commanders when a service member's health and/or ability to accomplish the mission is at risk due to health problems. The AF IMT 469, *Duty Limiting Condition Report,* is used to accomplish this task. The AF IMT 469 includes, among other things, information concerning the health care provider's recommendations regarding specific duty limitations for service members.

  -- Because commanders are ultimately responsible for their personnel, profiles must be timely, accurate, and unambiguous to help commanders make the best decisions for their personnel and their mission

  -- When a healthcare provider determines that a service member's physical condition warrants a profile, one copy of the AF IMT 469 should be given to the service member when he/she leaves the medical treatment facility and another copy must be sent to the individual's unit commander

  -- Because commanders must know the fitness for duty status of their members, the Health Insurance Portability and Accountability Act (HIPAA) allows for disclosures of health information to commanders in limited circumstances including fitness for duty determinations

    - Information pertaining to fitness for duty may be released to commanders even without the service member's authorization, however, when the patient has not authorized the release, the release must be properly tracked by medical personnel

- The mere presence of a physical defect or condition does not qualify a member for disability retirement or discharge

  - Disability evaluation begins only when examination, treatment, hospitalization, or substandard performance results in referral to a Medical Evaluation Board (MEB) by a military healthcare provider after a determination that the members' condition is potentially unfitting

Conflict Resolution

- Commanders may consult with the medical unit's Senior Profiling Officer (SPO) to maximize use of personnel with Duty Limiting Conditions (DLCs). An assessment based on operational risk to personnel assigned to a unit is critical to maintaining unit readiness at the highest degree possible.

  - In some situations, a commander may disagree with a health care provider regarding a service member's profile and/or recommended duty limitations or mobility restrictions (MR)

- A commander who non-concurs with a MR must contact the MTF/SGP within 7 duty days of receipt of the mobility restricting AF Form 469 (no contact from the commander will be considered concurrence)

- If the MTF/SGP and unit commander disagree, the Airman can be placed on mobility status with the concurrence of the commander's next reporting official (normally the Airman's group commander)

- If the second level commander non-concurs as well, the final commander acting on the AF Form 469 issues a completed copy to the Airman after the MTF/SGP notifies Medical Standards Management Element (MSME) of the action and MSME generates a new AF Form 469

  - The new AF Form 469 will still reflect the MR and initial assignment availability code (AAC) but will include a statement indicating the Airman's squadron/group commander non-concurred and the Airman will be considered available for mobility/deployment

-- A specified deployment may have medical requirements determined by the combatant commander (COCOM). Thus, while a commander may place an individual on mobility regardless of medical recommendations, the gaining COCOM may decline to accept the Airman for deployment.

--- For a defined deployment, the medical treatment facility (MTF) will coordinate through its MAJCOM to the gaining COCOM regarding waiver of defined medical requirements

- Permanent MRs (i.e., Assignment Limitation Code-C (ALC-C)) may only be determined by DPANM or ARC SGP. These mobility limitations will be displayed on the AF Form 469 permanently at the bottom of the physical limitations/restrictions portion and once assigned, will not be changed, removed, or overridden by any local DLC or profile action (additional restrictions may be added as appropriate)

  -- Only waiver authorities as described in AFI 41-210 may authorize deployment for individuals placed on ALC restrictions. Unit commanders may not non-concur with MRs directed by DPANM or ARC SGP (i.e., ALCs)

Airmen's Rights

- The law requires government legal representation for all Airmen in the DES and for any subsequent appeals to the Secretary of the Air Force (SecAF)

- The right to representation begins upon an Airmen's receipt of results from the informal physical evaluation board (IPEB)

- These rights ensure no member may be retired or separated for physical disability without a full and fair hearing, and the award of fair compensation to those whose military careers are cut short due to a disability incurred during or permanently aggravated by military service

Office of Airmen's Counsel

- The Office of Airmen's Counsel (OAC) is comprised of active duty, reserve, and national guard judge advocates, civilian attorneys, and paralegals

- The OAC's mission is to represent Airmen throughout DES processing. OAC staff can answer questions concerning the member's legal rights during the DES process.

- An Airman who is pending a MEB or Physical Evaluation Board (PEB) may contact the OAC by telephone or e-mail for consultation concerning the member's rights and elections at any stage of the process and should do so as early as possible

  - At initial stages, OAC Disability Counsel can provide general information to assist Airmen in understanding their rights and responsibilities

  - As Airmen progress through the system, Disability Counsel can provide more specific advice aimed at developing strategy to reach desired outcomes

  - Disability Counsel provide representation at the Formal Physical Evaluation Board (FPEB), assistance with appeal of FPEB results, and appeals of Veteran's Affairs (VA) ratings for conditions determined unfitting by the Air Force

- The OAC staff reports directly to an independent chain of command in order to allow for zealous advocacy on behalf of the individual Airmen undergoing DES processing, within ethical boundaries

- To contact the OAC telephonically, call DSN 665-0739; commercial 210-565-0739; or toll free 1-855-MEB-JAGS (632-5247)

- The OAC e-mail address is: afloaja.disabilitycounsel@us.af.mil

DES Stages

- The MEB is the first step for assessing members whose retention is questionable due to health concerns/reasons

  - The MEB consists of three physicians appointed by the MTF/CC to determine whether the member has any medical issues that could make the member unfit for continued military service. In all mental health cases one of the three physicians must be a psychiatrist.

  - The MEB may result in either the member's Return to Duty (with or without an Assignment Limitation Code "C") or referral to the IPEB

- The IPEB consists of three board members and adjudicates cases based on a records-only review

  - The service member's immediate commander must provide a statement describing the impact of the medical condition upon the member's ability to perform his/her normal military duties and deploy. In most cases, the commander's letter is accorded great weight by the IPEB.

- Airmen have the right to appeal the results of the IPEB to the FPEB and must make their appeal elections within 10 days of receiving the IPEB results

- The FPEB consists of three board members: one physician and two personnel officers, one of whom serves as Board president. The Formal hearing convenes in a closed door session with only the board members, the Airman whose case is under appeal, and his or her assigned counsel.

  -- The Airman may elect to present witnesses to testify on his or her behalf. Witnesses may appear in person, telephonically, or via video-teleconference.

  -- At an Airman's request, the FPEB is another area where a commander may play a persuasive role in the Airman's disability processing. While an Airman may not be forced to submit derogatory information, a commander in support of a member may provide testimony or statements in support of the member's goal.

- The IPEB and FPEB may recommend the following:

  -- Return to duty (with or without assignment limiting code)

  -- Separation/retirement (with or without severance pay)

Relationship to Line of Duty Determinations

- DES procedures should not be confused with Line of Duty (LOD) determinations

- Whereas DES procedures are used to determine whether health problems limit a service member's ability to perform his/her duties (and, ultimately, to remain in the Air Force), an LOD determination is an administrative tool for determining a service member's duty status at the time an injury, illness, disability, or death is incurred

- An LOD determination may impact the member's entitlement to benefits administered by the Air Force, or Department of Veteran's Affairs

- In many cases, LOD and DES procedures are warranted

  -- For example, if a service member sustains a serious neck injury during an off-duty sporting event, a LOD determination may be required to determine whether the service member was in the line of duty at the time of the injury (the results will impact the service member's benefits and/or obligations). Similarly, a profile may be required restricting the service member from deploying and/or participating in the physical fitness program (PEB/ MEB may be warranted as well).

- LODs play a significant role in the DES process for Air Reserve Component members

Dual Processing and Special Cases

- Commanders must inform the Physical Evaluation Board Liaison Officer (PEBLO) of any pending administrative or unfavorable action arising before or during the member's integrated disability evaluation system (IDES) process

- Disability cases on members with an unfit finding who are also pending administrative, or who apply for non-disability retirement or discharge in lieu of court-martial action are processed as dual-action

  -- SAFPC makes the final disposition. If SAFPC does not accept the retirement or discharge in lieu of court-martial action, the court-martial will proceed.

  -- If the sentence does not result in punitive discharge, then the disability case can be processed

  -- Administrative action continues in any disability case that results in a fit determination

- Members who are in military confinement are not eligible for processing until sentence is completed and they are placed in a returned to duty status

- HQ AFPC/DPPD and the PEBLO stop processing a case when a member is absent without leave (AWOL), in deserter status, or in the hands of civil authorities and do not resume processing until the member returns to military control and HQ AFPC/DPPD determines the member is eligible for disability processing

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References

DoDI 1332.18, *Disability Evaluation System* (5 August 2014)
AFI 10-203, *Duty Limiting Conditions* (20 November 2014)
AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay* (8 October 2015)
AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (2 February 2006), incorporating through Change 2, 27 November 2009
AFI 41-210, *Tricare Operations and Patient Administration Functions* (6 June 2012)
AFI 48-123, *Medical Examinations and Standards* (5 November 2013), including AFI48-123_AFGM2015-01, 27 August 2015
AF IMT 469, *Duty Limiting Condition Report* (October 2007)

OFFICER GRADE DETERMINATIONS

While the grade at which an officer retires after serving at least twenty years is normally the highest grade held, federal law permits the Secretary of the Air Force to retire both active and reserve officers in a lower grade if their service has not been "satisfactory." This authority has been delegated to the Director, Air Force Review Boards Agency. In those cases where an officer's conduct or record raises questions as to the quality of his/her service in a particular grade, an officer grade determination (OGD) is required.

Process

- When an officer applies for retirement, any commander in the officer's chain may initiate an OGD if there is evidence the officer's service in their current grade has been less than satisfactory

- A commander **MUST** submit an OGD through the MAJCOM if the officer has:

  -- Applied for retirement in lieu of judicial or administrative separation

  -- A conviction by court-martial

  -- A conviction by a civilian court for misconduct which did (or would) result in a mandatory comment and referral in the member's next OPR, training report, or Performance Recommendation Form, in accordance with AFI 36-2406

  -- Been the subject of any substantiated adverse finding from an officially documented investigation, proceeding, or inquiry (except minor traffic infractions)

    --- Such cases include, but are not limited to, nonjudicial punishment, UCMJ punishment, reprimand, or admonition within four years of the application for retirement

- A commander **MAY** submit an OGD through the MAJCOM in other cases if he or she believes an OGD is appropriate

- At the time an officer applies for retirement, the commander will review the officer's record to determine if any of the above conditions exist. If, based on that review, one of the conditions is met, the commander initiates an OGD.

  -- The commander must notify the officer the OGD is being initiated and why

  -- The officer is given 10 calendar days to respond

- The commander then will make a recommendation regarding the officer's retirement grade. That recommendation must accompany the retirement application as it is forwarded to the MPF.

- For retirement in lieu of administrative or punitive action, notification must indicate the grade determination may result in retirement in a lower grade

- OGD packages, including matters and documents submitted by the member, are forwarded through command channels to AFPC, which sends the case file to the Air Force Review Boards Agency. It is reviewed by the Air Force Personnel Board, which makes a recommendation to the Air Force Review Boards Agency Director.

- Any questions concerning officer misconduct, reporting requirements, or the appropriate administrative or judicial response to misconduct should be addressed through the servicing staff judge advocate or MPF

References

10 U.S.C. § 1370

10 U.S.C. § 12771

AFI 36-2023, *The Secretary of the Air Force Personnel Council and the Air Force Personnel Board* (8 March 2007), certified current, 11 April 2011

AFI 36-3203, *Service Retirements* (18 September 2015)

AFI 36-2406, *Officer and Enlisted Evaluation Systems* (2 January 2013), with corrective actions applied, 5 April 2013, incorporating through Change 3, 30 November 2015

TATTOOS/BRANDS, BODY PIERCING, AND BODY ALTERATION

Dress and personal appearance regulations govern the use of tattoos, body piercing, and body alterations.

Tattoos and Brands

- The following tattoos or brands are prohibited:
  - -- Unauthorized, including those that are:
    - --- Obscene
    - --- Advocate sexual, racial, ethnic, or religious discrimination
    - --- Commonly associated with gangs, extremist and/or supremacist organizations
      - ---- AFOSI maintains information regarding gang/hate groups on tattoos/brands/body markings
  - -- Excessive:
    - --- Exceed one-fourth of the exposed body part
    - --- Are above the collarbone and readily visible when wearing an open collar uniform

Tattoo Removal

- Members with an unauthorized tattoo/brand will have the tattoo removed at the member's expense. Covering the tattoo is not an option.
- Depending on DoD medical resource availability, commanders may seek Air Force Medical support for voluntary removal of inappropriate tattoos
- Excessive tattoos or brands must be covered using current uniform items (e.g. long-sleeved shirt/blouse, pants/slacks, dark hosiery, etc.) or removed

Determinations

- The member's commander determines on a case-by-case basis whether or not a tattoo or brand is unauthorized or excessive

  -- MAJCOM commanders may impose more restrictive standards for tattoos or brands and body ornaments, on or off-duty, in those locations where Air Force-wide standards may not be adequate because of cultural sensitivities or mission requirements

  -- For example, in a foreign country where tattoos, brands or body ornaments are objectionable to host country citizens or at installations where members are undergoing basic military training, a commander may impose more restrictive rules for military members, even off-duty and off the installation

Body Piercing

- Members are prohibited from attaching, affixing, or displaying objects, articles, jewelry, or ornamentation through the ear, nose, tongue, eyebrows, lips, or any other exposed body part (which includes visible through the uniform), when:

  -- Wearing military uniform

  -- Performing official duty in civilian attire

  -- Wearing civilian attire on a military installation (not including areas around family and privatized housing)

- Females in uniform or in civilian clothes while on duty may wear one small spherical, conservative white diamond, gold, white pearl, silver pierced or clip earring per earlobe; the earrings in both earlobes must match and the earrings must fit tightly without extending below the earlobes unless the piece extending is the connecting band on clip earrings

- On an installation, except in areas around and in military housing and with the exception of females wearing earrings, Airmen in civilian clothes while off-duty are not permitted to wear jewelry through piercings

- While on official duty, except for females wearing earrings in accordance with regulations, Airmen are not authorized to wear earrings or other piercing jewelry on a military installation

- Situations may arise where a commander may restrict the wear of even non-visible body ornaments
    - These situations include any ornamentation that may interfere with the performance of the member's military duties
    - Factors to consider when making this determination include (but are not limited to) impairing the safe and effective operation of weapons, military equipment, or machinery; posing a health or safety hazard to the wearer or others; and interfering with the proper wear of special or protective clothing or equipment
- Commanders should consult with their servicing staff judge advocate prior to taking action

Body Alteration/Modification

- Members are prohibited from altering or modifying their bodies if the alteration:
    - Is intentional and
    - Results in a visible, physical effect that disfigures, deforms or otherwise detracts from a professional military image
- Examples include, but are not limited to, tongue splitting or forking; tooth filing; and acquiring visible, disfiguring skin implants, and gouging (piercing holes large enough to permit light to shine through)

References

AFI 36-2002, *Regular Air Force and Special Category Accessions* (7 April 1999), incorporating through Change 4, 2 June 2014

AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel* (18 July 2011), incorporating through Change 4, 28 May 2015

RETALIATION

AFI 36-2909, *Professional and Unprofessional Relationships*, establishes command, supervisory and personal responsibilities in prohibiting retaliation against an alleged victim or other member of the Armed Forces for reporting a criminal offense.

- Retaliation against individuals who report criminal offenses is unlawful and erodes good order, discipline, respect for authority, unit cohesion and ultimately mission accomplishment

- It is the responsibility of commanders and supervisors at all levels to ensure compliance

- Generally, the policy applies to all active duty members and to members of the United States Air Force Reserve (AFR) and Air National Guard (ANG)

- Military members shall not retaliate against an alleged victim or other military member who reports a criminal offense

Definitions

- The term retaliation includes retaliation, ostracism, and maltreatment

  -- Retaliation: Taking or threatening to take an adverse personnel action, or withholding or threatening to withhold a favorable personnel action, with respect to a military member because the member reported a criminal offense (investigated by IG only)

  -- Ostracism: Excluding from social acceptance, privilege, or friendship with the intent to discourage reporting of a criminal offense or discouraging due administration of justice (investigated by command)

  -- Maltreatment: Treatment by peers or other persons viewed objectively that is abusive or otherwise unnecessary for any lawful purpose to discourage reporting a criminal offense or the due administration of justice that results in physical or mental harm or suffering or reasonably could have caused physical or mental harm or suffering (investigated by command)

Actions in Response to Retaliation

- A commander or supervisor must take appropriate action if it is reasonable to believe retaliation has occurred. At a minimum, the member or members suspected of engaging in retaliation will be ordered to cease from engaging in any further retaliation.

- As soon as practicable, the alleged victim, or other military member who is believed to have been retaliated against, will be informed that command is aware of the suspected act or acts of retaliation, and that the alleged offenders have been ordered to cease from engaging in any further retaliation

- The individual retaliated against will be advised to report any further acts of retaliation

- Military members, including Reserve members on active duty or inactive duty for training and ANG members in Federal service, who violate the specific prohibitions contained in paragraph 11 of this instruction can be prosecuted under either Article 92 or Article 134 of the UCMJ, or both, as well as any other applicable Article of the UCMJ, as appropriate

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References

National Defense Authorization Act of Fiscal Year 2014, Section 1709(b)

DoDD 7050.06, *Military Whistleblower Protection* (17 April 2015)

Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints (29 June 2015)

AFI 36-2909, *Professional and Unprofessional Relationships* (1 May 1999), including AFI36-2909_AFGM2016-01, 15 June 2016

AFI 90-301, *Inspector General Complaints Resolution* (27 August 2015)

AFPD 90-3, *Inspector General—The Complaints Resolution Program* (18 August 2009), certified current 24 October 2013

SAF/IGQ *Investigating Officer's Guide* (February 2012)

SAF/IGQ *Commander Directed Investigations Guide* (18 February 2016)

SAF/IGQ *JAG Guide to IG Investigations* (14 April 10)

NO CONTACT ORDERS

Commanders may issue "no contact orders" to personnel under their command when the commander deems it reasonably necessary in order to protect third parties from physical harm (most frequently spousal, intimate partner, or child abuse) or to prevent a UCMJ violation. No contact orders issued for the purposes of preventing spousal/child/or intimate partner abuse are known as "military protective orders" and should be completed on a DD Form 2873, *Military Protective Order*. Commanders should issue no contact orders only after consultation with their staff judge advocate (SJA).

Definition

- No contact orders are similar to civilian temporary restraining orders. They are orders directed to military personnel, prohibiting them from having communication or physical contact with a particular person or persons.

Authority to Issue No Contact Orders

- May be issued by the commander of the person concerned

- Standard: Reasonably necessary to ensure the safety and security of persons within their commands or to protect other individuals from persons within the command

Purpose

- The lawful purpose of a no contact order is to the protection of others and the prevention of misconduct punishable by the UCMJ

  -- Protect: Most often used to protect victims of domestic violence; child abuse; or crime victims from contact with the accused pending court-martial

  -- Prevent: Common types of no contact orders to prevent future UCMJ misconduct include no contact orders to prevent, for example, furtherance of unprofessional relationships (in violation of AFI 36-2909, *Professional and Unprofessional Relationships*) or fraternization (Article 134, UCMJ)

Scope of No Contact Orders

- No contact orders may limit communication and physical interactions between a military member over whom the commander exercises authority and a third party. Limitations may include, but are not limited to:
  - -- Direction to refrain from contacting, harassing, or touching certain named persons
  - -- Direction to remain away from specific areas, such as home, schools, and public facilities
  - -- Direction to do, or refrain from doing, certain acts or activities
- No contact orders **MAY NOT** preclude the defense counsel of a member from contacting a potential witness as part of counsel's investigation in a pending case

Duration

- No contact orders should be limited in duration. Duration should be listed in no contact orders. No contact orders may be renewed as circumstances warrant.

Form of No Contact Orders

- No contact orders should be in writing and receipt confirmed in writing by the recipient
  - -- Oral no contact orders should only be issued under exigent circumstances
  - -- Oral no contact orders should be placed in writing as soon as possible after issuance
- Commanders should use the DD Form 2873 when issuing a no contact order to prevent potential spousal, intimate partner, or child abuse

Relationship of Military Protective Orders to Civilian Restraining Orders

- Military Protective Orders (MPO) can be issued in conjunction with, or in addition to Civilian Protective Orders (CPO) issued by civilian courts. They each have their own independent source of authority.

- By federal law, civilian court issued restraining orders dealing with domestic violence incidents "shall have the same force and effect on a military installation as such order has within the jurisdiction of the court that issued such order." 10 U.S.C. 1561(a)

- A commander may issue an MPO with terms that are **more restrictive** than those in the CPO to which the member is subject

- Violations of CPOs are enforceable in the civilian court which issued the order

  -- If the civilian court takes no action to punish violations of the order, the military could pursue administrative or disciplinary action. Before doing so, **ALWAYS** consult your SJA.

Enforceability

- Depending upon the circumstances, violation of a MPO is enforceable via Article 90, UCMJ—Willfully Disobeying a Superior Commissioned Officer; or Article 92, UCMJ—Failure to Obey Order or Regulation

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References

10 U.S.C. 1561(a)

DoDI 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel* (21 August 2007), incorporating Change 2, 9 July 2015

DD Form 2873, *Military Protective Order* (July 2004)

Attachment

Template No Contact Order

TEMPLATE NO CONTACT ORDER

(Date)

MEMORANDUM FOR XXXXXXX

FROM: [Squadron]/CC

SUBJECT: No Contact Order

1. Order. It has come to my attention that you are under investigation for violations of the Uniform Code of Military Justice (UCMJ) Article ###, [Article Name]. To ensure the good order and discipline of this unit, you are hereby ordered:

Not to have *any contact* with [RANK/FULL NAME]. "Any contact" means just that—physical, verbal, telephonic, text message, e-mail, social media, etc. Additionally, you are ordered not to use another person to contact [RANK/FULL NAME] on your behalf. This order is not intended to prevent any counsel who may represent you in the future from preparing a defense, however, you are not to use any counsel as a means of contacting [RANK/FULL NAME] for personal communications on your behalf.

You are further ordered not to come within 100 feet of [RANK/FULL NAME] unless required by military duties and previously approved by me. Should you inadvertently encounter [RANK/FULL NAME] at any other location, you will immediately distance yourself by 100 feet and report the inadvertent contact to your immediate supervisor.

2. Duration of Order. This order will remain in effect until _____, unless this order is otherwise modified, extended or rescinded by me.

3. Relief from/Questions about Order. If you feel you need relief from this order at any time or if you have any questions regarding its provisions, call _____ at _____ (DP) _____, (HP) _____, (Cell/Pager #). If you are unable to reach _____, you may contact me at my office or through the Command Post at _____.

4. Consequences of Violating Order. Take note that violations of this order may result in adverse administrative action or punishment under the UCMJ, to include trial by court-martial.

5. Receipt/Understanding of Order. Acknowledge receipt and understanding below.

I.M. JUSTICE, Lt Col, USAF
Commander

1st Ind to [Squadron]/CC, _____ (date), No Contact Order

MEMORANDUM FOR [Squadron]/CC

I understand and acknowledge receipt of this order on _____.

XXXXX, [rank], USAF

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CHAPTER EIGHT: PERSONNEL ISSUES FOR THE COMMANDER—FAMILY AND NEXT OF KIN

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CHILD ABUSE, CHILD NEGLECT, AND SPOUSAL ABUSE

It is Air Force policy to prevent or minimize the impact of child abuse, child neglect, and spousal abuse and their associated problems. To further this policy, the Air Force attempts to identify abuse and neglect, document such cases, assess the situation, and assist the family. Commanders should take administrative or judicial action in appropriate cases.

The Family Advocacy Program (FAP) is responsible for implementing this policy. The FAP enhances Air Force readiness by promoting family and community health and resilience. The FAP consists of prevention services, maltreatment intervention, and research and evaluation.

Reporting Maltreatment

- Notice of suspected abuse cases come from many sources: security forces blotter, commanders, co-workers, medical care providers, childcare providers, anonymous tips, etc.

- All Air Force personnel, military or civilian, have a duty to report all incidents of suspected family maltreatment to FAP. The identity of the person making the notification is kept confidential and is not released to the family allegedly involved.

- Report suspected cases to FAP and military law enforcement

- Adult victims of domestic abuse have two reporting options:

  -- Unrestricted Reporting: Allows the victim to report an incident using the chain of command, law enforcement or AFOSI, and family advocacy for clinical intervention. Victims who choose to pursue an official command or criminal investigation of an incident should use these reporting channels.

  -- Restricted Reporting: Allows the victim, who is eligible to receive military medical care, the option of reporting an incident of domestic abuse to specified individuals for the purpose of receiving medical care and other services without initiating the investigative process or notification to the victim's or alleged offender's commander

The Family Advocacy Committee

- The ultimate responsibility to implement the FAP rests with the installation commander. The medical treatment facility (MTF) commander is responsible for each of the three FAP components and chairs the family advocacy committee (FAC).

- Members of the FAC normally include: installation commander (or designee), MTF commander, the family advocacy officer (FAO), family advocacy outreach manager, Airmen and Family Readiness director, staff judge advocate (SJA) (or designee), security forces commander (or designee)(SFS), AFOSI detachment commander (or designee), chaplain, command chief master sergeant(CCC), Department of Defense Education Activity (DoDEA) representative, and representatives of local child protection agencies (optional)

Family Advocacy Officer

- The FAO manages the installation FAP and is a clinical social worker

- The FAO coordinates the central registry board (CRB) and chairs the clinical case staffing (CCS), outreach management prevention council (OPMC), child sexual maltreatment response team (CSMRT), high risk for violence response team (HRVRT), and the new parent support program (NPSP) case-staffing

The Central Registry Board

- The CRB is a multidisciplinary team that makes administrative determinations for suspected family maltreatment, to include which incidents require entry into the Air Force Central Registry database

- CRB meets at the call of the FAO, normally monthly. Membership is determined by the FAC, but should include: the chair (Installation Vice Commander), staff judge advocate (SJA), CCC, SFS, AFOSI, FAO, and other relevant agencies.

- <u>Duties of the CRB Include</u>:

  -- Make incident status determinations (ISDs) on each allegation of maltreatment within 60 days of referral

  -- Ensure involved adult family members, adult victims, and adult offenders receive notification of CRB ISDs

  -- CRB discussions are confidential

- The unit commander of any member whose case will be discussed at the CRB should attend the CRB meeting for their member

Child Sexual Maltreatment Response Team

- Membership includes the FAO, AFOSI representative, legal office representative, and other members appointed by the unit commander and approved by the FAC

- Goal of the team is to minimize risk and trauma to the victim and family and ensure coordinated decision making and case management

- The team is activated by the FAO immediately upon receipt of child sexual abuse allegations. The team coordinates a course of action by determining how organizations will proceed in making notifications, conducting interviews, scheduling medical exams, arranging for safety of the victim and family members, and conducting psychosocial assessments

High Risk For Violence Response Team

- Members include the FAO, FAP clinician working with the family, sponsor's squadron commander, SJA, security forces representative, mental health clinic provider, AFOSI, victim advocate, and other agencies as appropriate

- The team is activated when there is a threat of immediate and serious harm to family members, unmarried intimate partners or FAP staff. The team addresses safety issues, risk factors, and develops and implements a management and tracking mechanism for high-risk individuals.

Child Neglect and Abandonment

- Most Air Force installations will have several cases each year of alleged child abuse or neglect through parental abandonment (i.e., leaving children alone in military family housing without adult supervision)

- Some installations have addressed this issue by having the FAC draft guidelines to assist parents in assessing whether a child is mature enough to be left unattended

- The FAC only *proposes* guidelines. Situations must be evaluated individually.

References

AFPD 40-3, *Family Advocacy Program* (6 December 2011)
AFI 40-301, *Family Advocacy Program* (16 November 2015)

CHILD CUSTODY AND THE MILITARY

Child custody laws vary from state to state, but generally employ a "best interest of the child" standard. Courts will usually look at many factors in determining the child's best interests; rarely will one single variable be determinative. Military members who are faced with child custody disputes may be emotional and under substantial stress. They will likely need assistance in navigating state laws and court proceedings. In particular, they should know that both state and federal laws have been enacted to protect a service member's custodial interests and ensure that absences dictated by military service will not be a sole factor in withholding custody.

State Jurisdiction

- The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which has been enacted by nearly all states and U.S. territories, limits jurisdiction in child custody cases to one state—the "home state." As of January 22, 2016, the only state that has not adopted the UCCJEA is Massachusetts. Puerto Rico has also not adopted the Act.

  -- The "home state" is defined as the state where the child has lived for 6 consecutive months (or since birth if the child is less than 6 months old) prior to the commencement of the custody proceedings

  -- If the child has not lived in one state for at least 6 consecutive months, then jurisdiction lies with the state that has (1) "significant connections" with the child and at least one parent; *and* (2) "substantial evidence concerning the child's care, protection, training and personal relationships." If more than one state meets this criteria then the states must agree on the state that will assume jurisdiction.

    --- <u>Continuing Exclusive Jurisdiction</u>: The state that makes the initial custody determination will maintain jurisdiction for modifications. If another state later has more "significant connections" with the child, the original state may relinquish jurisdiction.

    --- <u>Emergency Jurisdiction</u>: A court in a state other than the "home state" may assume temporary jurisdiction when a child is (1) present in the state; and (2) has been abandoned or subjected to or threatened with mistreatment or abuse

    --- <u>Enforcement of Final Custody Orders:</u> Prosecutors and law enforcement in any state, not just the "home state," may utilize civil proceedings to enforce a custody order

Best Interest of the Child Standard

- Courts will usually make custody decisions based primarily on the child's and not the parents' best interest. Factors the court may consider include, but are not limited to, the:
  - -- Degree of emotional attachment of the child to each parent
  - -- Child's age, gender, and mental/emotional/social development
  - -- Child's preference (for children ages 12-14 in most states)
  - -- Child's comfort in his home, school, and community
  - -- Involvement of each parent
  - -- Physical, emotional, social, and financial stability of each parent
  - -- Willingness of each parent to cooperate with the other
  - -- History of domestic violence or child abuse

Deployment as a Factor in Determining Custody Arrangements

- A recent review of military child custody cases failed to reveal any instances where custody was determined solely based on the issue of deployment or the threat of deployment. Several laws were enacted that help ensure this remains the case:
  - -- Forty-eight (48) states have such laws, including ten (10) that have adopted the Uniform Law Commission's Deployed Parents' Visitation and Custody Act
  - -- The Servicemembers Civil Relief Act (SCRA) was also recently amended to limit a state court's consideration of a member's deployment as the sole factor in determining the best interest of the child, though it does not create a federal right of action
- The **effects** of deployment are often considered by the courts as one of the factors in determining the best interest of the child

Mobility as a Factor in Determining Custody Arrangements

- The impact that a change to a child's environment (e.g., frequent PCS moves) has on a child's well-being is also likely to be considered by individual judges and guardians ad litem in determining the best interest of the child

- Although each child will handle these disruptions differently and will need to be considered on an individual basis, a recent study concluded that frequent military moves do not typically have a negative impact on a child's overall well-being

- Commanders should encourage members to take advantage of the many resources available to support military families, to include: child development centers, outdoor recreation and recreational sports leagues, religious services, Airman and Family Readiness Centers, military treatment facilities, and other base activities

  -- Members may be able to point to the unique sub-culture and community support that can be found in the military when presenting their interests in a child custody proceeding

  -- Members should also establish and keep current an effective Family Care Plan

Child Support

- Child support issues also fall under state law and are determined by state courts

- Each military service has regulations to require members to provide support to their dependents

  -- AFI 36-2906, *Personal Financial Responsibility*, does not set forth a specific monetary guideline, but requires that military members "[p]rovide adequate financial support" for dependents for whom the member receives additional allowances

    --- "Adequate financial support" includes in-kind support such as payment of rent, insurance, childcare, or subsistence

    --- Military members who are going through a divorce or custody determination should document the support believed to be provided

    --- Spouses may seek assistance from a member's commander, IG, or legal office if the member is not providing adequate support

References

Servicemembers Civil Relief Act, 50 U.S.C. §§ 3938, *et seq.*
Uniform Child Custody Jurisdiction and Enforcement Act (citation varies by state)
AFI 36-2906, *Personal Financial Responsibility* (30 May 2013)

FAMILY MEMBER MISCONDUCT

Installation commanders are often called upon to resolve difficult problems arising from family member misconduct. The installation commander is responsible for maintaining good order and discipline and protecting Air Force resources, yet has little authority when it comes to punishing civilians in general, and family members in particular. Nonetheless, there are certain actions available to address family member misconduct.

Commander Responsibilities and Options

- Administrative Actions:
  - -- Suspend or revoke privileges
    - --- Driving suspension may be mandatory in certain circumstances (e.g., drunk driving)
    - --- Base Exchange (BX)/Commissary
    - --- Morale, Welfare, and Recreation (MWR) facilities
    - --- Commercial solicitation
  - -- Terminate military family housing
    - --- Requires 30-days written notice
    - --- Air Force pays for the move, but partial dislocation allowance is not payable
  - -- Debarment
    - --- 18 U.S.C. § 1382 makes it a crime to enter the installation after previously being debarred
    - --- Debarment should be in writing, setting forth the specific reasons for debarment. Debarment may be indefinite, but set time limits are recommended.
    - --- Must still provide access to medical treatment if authorized and available

- Criminal Actions:

  -- Criminal actions depend upon the jurisdiction of the base

  -- If the base is under exclusive federal jurisdiction, family members may be prosecuted in federal magistrate court. This is a federal prosecution and potential conviction.

  -- If the base has concurrent jurisdiction, either federal court or state court may be the proper forum for prosecuting family members. Several states are very possessive of their jurisdiction over juveniles. Refer this issue to your staff judge advocate. Some bases have negotiated memoranda of understanding with state juvenile authorities to determine prosecution of such cases.

  -- If the base has only proprietary jurisdiction, the state retains the authority to prosecute family member misconduct (involving only state crimes) occurring on the installation. Any family member misconduct should be referred to the local authorities for prosecution.

  -- Some installations have established programs for handling juvenile misconduct. Often called Juvenile Correction Boards, these boards consider juvenile cases and recommend to the commander how to handle the matter.

References

18 U.S.C. § 1382

DoDI 6055.04, *DoD Traffic Safety Program* (20 April 2009), incorporating through Change 2, 23 January 2013

AFI 31-218(IP), *Motor Vehicle Traffic Supervision* (22 May 2006)

AFI 32-6001, *Family Housing Management* (21 August 2006), incorporating through Change 5, 3 September 2015

AFI 36-3026(IP), *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel* (17 June 2009), administrative changes 2 November 2009

AFI 51-905, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians* (30 September 2014)

REMOVAL FROM BASE HOUSING

The Air Force prefers that military personnel retain their assigned family housing for the duration of their tour at the installation unless there are reasons that justify termination.

Termination from Base Housing

- Military personnel may be required to terminate occupancy of family housing when:
  - The conduct or behavior of the member or dependent family member is contrary to accepted standards or is adverse to military discipline
  - The member or dependent family members are responsible for willful, malicious, or negligent abuse or destruction of property
  - The member fails to comply with the Air Force family child care program
- Cases involving early termination must be fully documented and should be retained on file for a minimum of 1 year
- An involuntary move from military family housing is at government expense; however, partial dislocation allowance is not payable
- Commanders are authorized to terminate housing for the above reasons with 30-days written notice to the member. Basic due process probably requires allowing the member the right to respond (orally or in writing) before the commander makes his/her decision.

Reference

AFI 32-6001, *Family Housing Management* (21 August 2006), incorporating through Change 5, 3 September 2015

AIR FORCE CHILD AND YOUTH PROGRAMS (CYP)

Installation commanders are required to mandate appropriate facilities, funding, and manpower to operate the CYP on their installation. The goal of the CYP is to assist DoD personnel in balancing duty and family life obligations by providing family services for youths from birth to 18 years of age. These services take the form of child development centers (CDC), family child care (FCC) homes, school age care (SAC), and youth programs.

Eligibility

- CYP services are available to youths whose sponsor qualifies as:
  - -- Active duty military and Coast Guard members
  - -- DoD civilian employee
  - -- Air National Guard or Reserve member on active duty orders or inactive duty training status
  - -- Certain combat related wounded warriors, surviving spouses, and loco parentis guardians of youths that would otherwise be eligible
  - -- DoD contractors with specific contractual eligibility
- CYP services may be available to those who do not qualify for the above categories on a case-by-case and space-available basis
  - -- Space-available patrons must make way when space is needed for the above listed groups

CYP Child Care Options

- CDC: Provides care to children from 6 weeks to 5 years of age within an on-base facility
- SAC: Provides care to children from 5 through 12 years of age within an on-base facility (sometimes housed in the CDC facility)
- FCC: Provides care to children from 2 weeks to 12 years of age in private, FCC certified and regulated home-care facilities

-- All on-installation childcare is subject to regulation by AFI 34-144, *Child and Youth Programs*, and must be certified by the installation MSG commander

-- Uncertified, regular (more than 10 hours per week), on-installation childcare will be investigated by the installation Force Support Squadron (FSS) and may be subject to revocation of on-base housing rights, debarment, and/or criminal prosecution

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Reference

AFI 34-144, *Child and Youth Programs* (2 March 2016)

SUMMARY COURT OFFICERS

For deceased active duty Air Force members (and other entitled individuals), the Air Force collects, safeguards, and promptly disposes of their personal property and personal effects. The installation commander appoints a summary court officer (SCO) to perform these duties in accordance with AFI 34-511, *Disposition of Personal Property and Effects*. For deceased DoD civilians, see AFI 34-511, para. 4.4, and AFI 36-809, *Civilian Survivor Assistance*.

Definitions

- Personal Effects: Any personal item, organizational clothing, or equipment physically located on or with the remains. Some examples of personal effects include eyeglasses, jewelry, wallets, insignia, and clothing.

- Personal Property: All of the other personal possessions of the decedent. Some examples of personal property include household goods, mail, personal papers, and privately owned vehicles. Personal property does not include real property except for any debts associated with real property.

Prioritized List of Recipients to Receive Personal Property and Personal Effects

- Surviving spouse or person designated by spouse

- Children in order of age. If the recipient is a minor, forward the property as instructed by the minor's surviving parent, guardian or adopting parent.

- Parents in order of age. If parents divorced or legally separated while the deceased was a minor, then the recipient is the custodial parent.

- Siblings in order of age

- Next of kin of the deceased

- A beneficiary named in the will of the deceased

Handling and Disposing

- Personal Effects:

    -- Mortuary officer (MO) inventories, cleans, and secures the personal effects

- -- SCO collects and disposes of any organizational clothing and equipment

- -- Once the MO ensures the authorized recipient has been officially notified of the death, the MO asks the authorized recipient to provide instructions for disposing of the personal effects

- -- MO may only destroy personal effects after receiving written authorization by the authorized recipient

- Personal Property – the SCO:

  - -- Obtains property disposition instructions and the name and contact information of the authorized recipient from the MO

  - -- Corresponds with the authorized recipient

  - -- Places at least two death announcements in the base bulletin and/or newspaper asking anyone with a claim for or against the estate to step forward

  - -- Inventories all property on DD Form 1076, *Record of Personal Effects of Deceased Personnel*

  - -- Promptly gathers the uniform/clothes needed for burial and gives to the MO

  - -- Removes any questionable items and determines the disposition of this property based on criteria in AFI 34-511, para. 3.2.4

  - -- Properly disposes of military ID cards, documents, mail, and personal papers

  - -- Properly disposes of funds and negotiable instruments

  - -- Properly ships and stores items

  - -- Properly disposes of property in situations when an authorized recipient is not found

  - -- Closes the summary court file

- The legal office provides guidance to the SCO on disposition of personal property and reviews the summary court file for legal sufficiency

References

10 U.S.C. § 9712
DoDD 1300.22, *Mortuary Affairs Policy* (30 October 2015)
AFI 34-511, *Disposition of Personal Property and Effects* (21 April 2016)
AFI 36-809, *Civilian Survivor Assistance* (15 April 2015)
AFI 36-3002, *Casualty Services* (22 February 2010), certified current 8 February 2012
DD Form 1076, *Record of Personal Effects of Deceased* (August 2015)

DISPOSAL OF PERSONAL PROPERTY

Personal property of Air Force members and employees, as well as residents and visitors on Air Force installations, can come into the custody or control of the Air Force for a variety of reasons: death, capture, missing in action, incompetency, absence without leave, desertion, medical evacuation, loss, abandonment, or a failure to claim. The Secretary of the Air Force (SecAF) is authorized to dispose of such property pursuant to 10 U.S.C. sections 2575 and 9712.

Special procedures are established in AFI 34-501, *Mortuary Affairs Program* for the disposition of property of deceased, missing, captured, or detained members, including a detailed method for determining the next of kin entitled to receive the property.

For Deceased Members

- A base mortuary officer (MO) is responsible for collecting, cleaning, inventorying, and safeguarding property until the appointment of the summary court officer (SCO)

- An SCO is normally appointed by the installation commander to continue to collect, inventory, and safeguard the property. The SCO will also dispose of the property.

For Missing, Detained, and Captured Persons

- MO secures and holds the property for 30 days or until the member's status is changed from missing to detained or captured

- If either (1) the missing member's status is changed to detained or captured, or (2) there is no change in status after 30 days, then the property is released to the SCO

- If the missing member returns, the property is released to the member

- SCO secures, inventories, and disposes of the property to those authorized to receive it in the event of the member's death

References

10 U.S.C. § 2575
10 U.S.C. § 9712
AFI 34-501, *Mortuary Affairs Program* (18 August 2015)
AFI 34-511, *Disposition of Personal Property and Effects* (21 April 2016)
AFI 34-1101, *Warrior and Survivor Care* (6 May 2015), including AFI34-1101_AFGM2015-01, 27 August 2015

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CHAPTER NINE: LEGAL ASSISTANCE

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OVERVIEW OF LEGAL ASSISTANCE PROGRAM

The armed services may, in accordance with 10 U.S.C. § 1044, provide legal assistance to eligible beneficiaries concerning personal, civil legal problems. The Air Force's Legal Assistance Program is governed by AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, which directs local staff judge advocates (SJAs) to make every effort to satisfy all legal assistance needs, within the scope of the program and contingent on available resources and expertise. A priority is given to solving mobilization/deployment related legal issues–that is, a member's legal issues, regardless of the subject, that could negatively affect command readiness.

Eligibility for Legal Assistance

- The following individuals are eligible for legal assistance services:

  -- Active duty members, including reservists and guardsmen on federal active duty under Title 10 of the U.S. Code, and their dependents who are entitled to an ID card

  -- Air Reserve component members performing Active Guard/Reserve (AGR) tours

  -- Members of reserve components (not otherwise covered following release from active duty) under a call or order to active duty for more than 30 days for a period of time equal to twice the length of order to active duty. Dependents entitled to an ID card are eligible during the same time period.

  -- Officers of the commissioned corps of the Public Health Service

  -- Retirees and their dependents entitled to an ID card

  -- Civilian employees stationed outside the United States and its territories and their family members who are entitled to an ID card and reside with them outside the continental United States (OCONUS)

  -- Reservists and National Guard not on Title 10 status, but subject to federal mobilization in an inactive status, are eligible for only mobility/deployment related legal assistance

  -- DoD civilian employees and contractors deploying to or in a theater of operations for contingencies or emergencies shall be furnished assistance with wills and powers of attorney in accordance with DoDI 1400.32, *DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures*

- -- DoD civilian employees assigned OCONUS and their dependents
- -- Foreign military personnel may be provided legal assistance in limited circumstances for specific matters
- -- Matters relating to the settlement of estates of service members who die on active duty or as a result of an injury or disability that resulted in retirement from active duty; or to the primary next of kin

Legal Assistance Services Provided

- The following legal services may be provided as resources and expertise permit:
  - -- Wills, living wills, powers of attorney, and notary services
  - -- Adoptions
  - -- Domestic relations
  - -- Servicemembers Civil Relief Act (SCRA) and veterans' reemployment rights issues
  - -- Casualty affairs
  - -- Dependent care issues, including family care plans
  - -- Financial responsibilities
  - -- Landlord-tenant and lease issues, including privatized housing
  - -- Consumer affairs
  - -- Immigration/citizenship issues
  - -- Tax assistance
  - -- Victims of crime
  - -- Other issues deemed connected with personal, civil legal affairs by The Judge Advocate General (TJAG), the MAJCOM SJA, the NAF SJA, the base SJA, or the commander

- Referral: Due to the scope and limitations of the program, as well as the particular needs of the client, the legal office may refer clients to other sources, such as a civilian attorney (through the local bar referral service), the area defense counsel, chaplain, equal opportunity (EO) counselor, military personnel flight, family advocacy, the family support center, or available free or "pro bono" legal services

Preventive Law

- Each base will have a program to educate members on legal issues, with a focus on educating members on preparing for mobilization, seeking timely legal advice, the consequences of signing legal documents, and maintaining vigilance to identify and avoid legal scams

- Education programs are designed to allow Airmen to focus on mission requirements and reduce the time and resources needed to correct legal problems that occur

Matters Specifically Outside the Scope of the Program

- The following are specifically outside the scope of legal assistance:

  -- Business or commercial enterprises, except in relation to the SCRA

  -- Criminal issues

  -- Standards of ethical conduct issues

  -- Law of armed conflict issues

  -- Official matters in which the Air Force has an interest, e.g., reports of survey

  -- Legal issues raised on behalf of another person

  -- Private organizations

  -- Representation in a civilian court or administrative proceeding

  -- Drafting or reviewing real estate sales or closing documents, separation agreements, divorce decrees, or *inter vivos* trusts unless the SJA determines an individual attorney within the office has the expertise to do so

Attorney-Client Relationship

- Legal assistance establishes an attorney-client relationship and, as such, any information or documents received from or relating to a client are considered privileged and confidential

  -- Privileged information may be released only with the client's express permission, pursuant to a court order, or as otherwise permitted by the Air Force Rules of Professional Responsibility

  -- Disclosure may not be lawfully ordered by any superior military authority

- If a commander is contacted by a legal assistance attorney on behalf of a client, e.g., regarding a member's failure to provide financial support to family members, the commander should understand the attorney is representing the interests of that particular client

  -- The commander should contact the SJA, who represents the interests of the Air Force, for advice concerning the matter

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References

The Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901, *et seq*.
10 U.S.C. §§ 1044, 1044e
DoDI 1400.32, *DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures* (24 April 1995)
AFPD 51-5, *Military Legal Affairs* (27 September 1993)
AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (27 October 2003), incorporating through Change 3, 24 May 2012

NOTARIES

Many important documents are required by law to be notarized. Notarization demonstrates that a person with notary authority—that is, a notary public—confirmed the identity of the person signing the document and witnessed the signature. It can also confirm, if required, that the person made an oath as part of executing the document. Notary services are available to eligible personnel, under Title 10 of the U.S. Code, as part of the military legal assistance program.

Eligibility for Air Force Notary Service

- Personnel eligible for military notary services are:
  - -- Members of the armed forces
  - -- Other persons eligible for legal assistance under 10 U.S.C. § 1044 or other regulations of the DoD, to include AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*
  - -- Persons serving with, employed by, or accompanying the armed forces outside the United States, Puerto Rico, Guam, and the Virgin Islands
  - -- Other persons subject to the UCMJ outside the United States

Persons with Notary Authority

- Under 10 U.S.C. § 1044a and AFI 51-504, the following individuals have the general powers of a notary public and of a consul of the United States in the performance of all notary acts:
  - -- Judge advocates on active duty
  - -- Reserve judge advocates at all times, not just when in a duty status
  - -- Civilian attorneys serving as legal assistance attorneys; although other civilian employees may be designated to serve as a notary public, 10 U.S.C. § 1044a does not cover such designations and these employees must be qualified under state law
  - -- Adjutants, assistant adjutants, and personnel adjutants, including reserve members when not in a duty status

-- Enlisted paralegals on active duty or those reserve component members performing inactive duty training, who have received proper training

-- Commissioned officers or master sergeant and above stationed at geographically separated units (GSUs) or remote locations where no judge advocate or paralegal notary is assigned, and who have been designated in writing by the GSU's servicing general court-martial convening authority's staff judge advocate and received proper training

Special Rules for Certain Military Instruments

- 10 U.S.C. §§ 1044b, 1044c, and 1044d provide for the execution of military powers of attorney, military advance medical directives (commonly referred to as a "living will"), and military testamentary instruments (commonly referred to as a "will"). These documents:

  -- Are exempt from any requirement of form, formality, or recording that is required under the laws of a state

    --- Military powers of attorney and advance medical directives, but not wills, are also exempt from any state requirements of substance

  -- Shall be given the same legal effect as powers of attorney, living wills, and wills prepared and executed in accordance with the laws of the state concerned. Military advance medical directives are not enforceable in states that otherwise do not recognize living wills.

- All other documents, notarized under the authority of 10 U.S.C. § 1044a, are subject to state law as to form, substance, formality or recording

Notary Procedures and Guidelines

- Personnel signing documents as a notary public under 10 U.S.C. § 1044a must:

  -- Specify date, location, title, and office

  -- Use an inked stamp or a raised seal that contains a cite to 10 U.S.C. § 1044a and the identifiers "U.S. Air Force" and "Judge Advocate"

  -- Verify the identity of each person whose signature is to be notarized, usually with a military ID card

- -- Administer an oath, in accordance with the rules of AFI 51-504 and Title 10 for any "sworn" document

- -- Maintain a personal notary log as proof of each notarial act performed, to include each signer's name and signature, type of document, date, and location. These logs will be maintained according to AFI 51-504 and/or applicable state law.

- Personnel signing documents as a notary under 10 U.S.C. § 1044a must **NOT**:

  - -- Notarize incomplete documents

  - -- Accept any fee for the performance of a notarial act

  - -- Certify a document as a "true and accurate copy" unless they are the custodian of the original. To certify a document as a "true and accurate copy" is to verify the document's authenticity and carries specific legal effect that only the creator or the custodian of the original document can provide.

References

10 U.S.C. §§ 1044, 1044a-d

AFI 51-504, *Legal Assistance, Notary and Preventative Law Programs* (27 October 2003), incorporating through Change 3, 24 May 2012

WILLS AND POWERS OF ATTORNEY

Wills and powers of attorney (POAs) are useful legal documents for members to manage their personal and financial affairs. A will is an instrument by which a person, known as a "testator," makes a disposition of his property to take effect after his death. A POA is a document by which a person conveys to another person the authority to handle specified affairs. Commanders should emphasize the importance of preparing wills and POAs, especially prior to deployment.

Wills

- Though it must be a free and voluntary act by the service member, **ALL** Airmen should be encouraged to make a will

- Even if a testator has little property, settling affairs with a will is often easier for the family. For instance, many states have "family probate" laws that allow a spouse to probate a valid will without a lawyer and with minimal expense.

- A will is particularly important for the following:

  -- Personnel with minor children

    --- The court will generally follow the designation of a guardian for the children in a will, which often prevents indecision and family disputes about who will care for orphaned children

    --- Personnel with special needs children require expert estate planning advice to ensure the children are properly cared for and do not get removed from government programs

  -- Personnel with extensive or certain valuable property

  -- Personnel in a subsequent marriage or with blended families where either spouse comes to the marriage with children from a prior relationship

- State law dictates the requirements for making a valid will; these laws vary widely from state to state. For this reason, members should seek the services of the base legal office and avoid "do-it-yourself" wills. In some cases, the member may even be referred to an outside expert.

- If a member dies without a will, his property will be distributed according to state law

  - Under most state laws, property will only pass to blood relatives and not to in-laws or stepchildren

  - Property is generally transferred in the following order of precedence: surviving spouse, children, parents, and then siblings

  - Some states divide property between the surviving spouse and children, and some states allow minor children to receive property

  - Normally, a state will only receive the property if there are no surviving relatives

  - Members, rather than state law, can determine what happens to their estate by creating a valid will

- A will remains in effect until changed or revoked by the testator

- Certain life events may impact provisions in a testator's will, such that it would be advisable to amend the will. A testator should review his will periodically and consider updating it, especially with:

  - The birth or death of any person affected by the will

  - The marriage or divorce of the testator

  - A substantial change in the testator's estate

Powers of Attorney

- A POA is a document that allows someone else to act as your legal agent, or "attorney-in-fact." These documents are available at all base legal offices and can be particularly important for mobilizing personnel.

- POAs are only useful, though, if third parties, e.g., banks and businesses, are willing to accept the authority granted therein; third parties may or may not accept a POA at their discretion. Therefore, it is usually best to tailor the POA to the given situation.

- In order to perform the requested actions, the attorney-in-fact will hold the original, executed POA, which inherently creates some risk of abuse. Personnel should carefully choose the person to whom they grant authority.

- To revoke a POA before its expiration, personnel may retrieve the original document and destroy it, or execute a revocation of POA and give a copy to any person that might deal with the person who has the original POA

- There are several types of POAs, as described below:

  -- General POA:

    --- Gives comprehensive authority over virtually all legal and some non-legal affairs. Basically, the attorney-in-fact can do any and all things the grantor could do.

    --- Because the authority granted is so expansive, this type of POA should only be used if a special POA will not suffice and if the agent is *completely trustworthy*

    --- A person with a general POA, who is not trustworthy, has the ability to cause serious financial or legal problems for the grantor

    --- Many banks and realtors will not accept a general POA for the purchase or sale of real estate and instead require a special POA containing the legal description of the property and the actions authorized

  -- Special POA:

    --- Grants limited authority to accomplish specific transactions, such as buying/selling real estate or a car, usually for a limited time period

  -- Durable POA:

    --- Takes effect upon, or is still effective notwithstanding, a person's medical incapacity and designates another person to make decisions on behalf of the incapacitated person

    --- A general or special POA may be made "durable" with appropriate language

    --- Allows the attorney-in-fact to make decisions and manage the affairs for the incapacitated person for the duration of the incapacity

    --- The authority may extend to decisions for medical purposes, including a decision regarding terminating or limiting medical care in appropriate cases

    --- Generally eliminates the need for a court to establish a guardian and conservator for the incapacitated person

Military POAs and Wills

- 10 U.S.C. §§ 1044b, 1044c, and 1044d, respectively, provide for the execution of military POAs, military advance medical directives, known as "living wills," and military testamentary instruments or "wills." These documents, though executed by the military, will be given the same legal effect as documents prepared and executed in accordance with the laws of the state concerned. These military documents:

  -- Are exempt from any requirement of form, formality, or recording that is required under the laws of a state

  -- Military POAs and living wills, but not wills, are exempt from any state requirements of substance

  -- Military living wills are not enforceable in states that do not recognize living wills

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References

10 U.S.C. §§ 1044b-d

DoDD 1350.4, *Legal Assistance Matters* (28 April 2001), incorporating Change 1, 13 June 2001, certified current 1 December 2003

AFI 51-504, *Legal Assistance, Notary and Preventive Law Programs* (27 October 2003), incorporating through Change 3, 24 May 2012

TAX ASSISTANCE PROGRAM

Air Force Tax Assistance programs are command programs designed, in compliance with Internal Revenue Service (IRS) Standards of Conduct, to provide free tax assistance and filing services to eligible beneficiaries. Resourced and managed properly, a healthy program will enhance morale and help beneficiaries address some of the unique income tax aspects associated with military service. The size and scope of each program may vary from base to base, depending on mission requirements, geographical location, availability of resources, and the unique needs of the local community.

Scope

- The installation commander, in consultation with the staff judge advocate (SJA), has the flexibility to decide, based on the needs of the installation and available resources, which of the following programs is best, including a "hybrid" approach. This also includes the option not to have an installation tax program, if circumstances warrant.

  -- Traditional On-Base Tax Assistance Program:

    --- These "full service" programs are supervised by the SJA and staffed by legal office personnel, as well as base volunteers, under the IRS' Volunteer Income Tax Assistance (VITA) program

    --- Tax assistance personnel are trained by and use the IRS' electronic filing resources

    --- Tax Assistance programs are separate and distinct from the Legal Assistance program; attorney-client privilege does not apply to the preparation of income tax returns

  -- Self-Service Kiosks:

    --- If resources are limited, a smaller team of volunteers can be trained to assist personnel in filing their taxes with the Military One Source (MOS) web site at available kiosks

  -- Referrals to Other Free Tax Preparation Services:

    --- Without endorsing any one non-federal service, the base legal office will take the lead in publicizing off-base and electronic tax assistance options, such as the IRS Free File Alliance

Decisional Factors

- When deciding which program to support—or not to host a tax program—commanders and their SJAs should consider the following factors which may impact the availability of the program, such as:

  -- Competing mission requirements

  -- Availability of local volunteer support

  -- Availability of IRS software and training support

  -- The negative impacts to program continuity (e.g., loss of future IRS support, loss of future volunteer support, loss of institutional knowledge) should the installation want to continue the program at a later date

  -- Budgetary constraints

  -- Impact on morale

  -- Demand for tax services

  -- Availability of free online filing services and other nearby VITA programs accessible for all beneficiaries

  -- Availability of other professional filing services near the installation

  -- Additionally, commanders and SJAs for commands serving in a host or supporting role on joint bases are advised to review support agreements for any provisions regarding the tax program

Eligible Beneficiaries

- Eligible beneficiaries are those entitled to legal assistance under 10 U.S.C. § 1044 and AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*. However, in consultation with commanders, SJAs can further limit eligible beneficiaries for the tax program (e.g., personnel E-6 and below).

- SJAs may also extend services, as resources allow, to federal civilian employees. Federal civilian employees must adhere to applicable rules concerning use and allotting of their time when they seek tax assistance services.

References

10 U.S.C. § 1044

AFI 51-504, *Legal Assistance, Notary and Preventative Law Programs* (27 October 2003), incorporating through Change 3, 24 May 2012

10

CHAPTER TEN: CIVIL LAW RIGHTS AND PROTECTIONS OF MILITARY PERSONNEL

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EQUAL OPPORTUNITY AND TREATMENT

The federal government has enacted many statutes to ensure equal opportunity (EO). Almost all of these statutes apply exclusively to civilian employees as victims; they do not cover military members as victims. However, the DoD and Air Force anti-discriminatory policies protect both military members and civilian employees through a bifurcated system. The primary difference in this bifurcated system is that military members are limited to presenting their complaints to forums within the executive department. Civilian employees, on the other hand, have the right to file a complaint before an independent federal court after exhausting administrative remedies within the executive department.

- The following are key EO statutes:
  - -- Title VII of the Civil Rights Act of 1964
  - -- Equal Employment Opportunity Act of 1972
  - -- The Rehabilitation Act of 1973
  - -- The 1978 Amendments to the Age Discrimination in Employment Act
  - -- The Civil Rights Act of 1991

Civil Rights Act of 1964

- The Civil Rights Act of 1964 is the most important single source of anti-discrimination law in this country
- Title VII of the act forbids illegal employment discrimination on the basis of race, creed, color, religion, national origin, and gender

Equal Employment Opportunity Act of 1972

- The Equal Employment Opportunity Act of 1972 made Title VII of the Civil Rights Act of 1964 applicable to the federal work force; however, the term "employee" only applies to federal civilian employees as victims
- The law does not apply to military members as victims

Rehabilitation Act of 1973

- The Rehabilitation Act of 1973 prohibits employment discrimination against handicapped individuals within the federal government

- The law does not apply to military members as victims

- The Americans With Disabilities Act (ADA) of 1990 is the private sector counterpart to the Rehabilitation Act, but it does not apply to the federal government

1978 Amendments to the Age Discrimination in Employment Act

- The 1978 Amendments to the Age Discrimination in Employment Act forbids illegal discrimination on the basis of age for people over 40 years old

- The law applies to civilian employees as victims

- The law does not apply to military members as victims

Civil Rights Act of 1991

- The Civil Rights Act of 1991 amended Title VII of the Civil Rights Act of 1964 to expand remedies available to victims of discrimination

- Compensatory damages (e.g., pain and suffering, emotional distress) awards up to $300,000 are allowed for a violation of Title VII

- The law does not apply to military members as victims

- Monetary judgments or settlements made during the "administrative phase" are payable from the local base operations and maintenance (O&M) funds

Air Force Policy

- Air Force policy is to conduct its affairs free from unlawful, arbitrary discrimination or sexual harassment, and to provide equal opportunity and treatment irrespective of race, color, religion, national origin, or sex

- Commanders are required to immediately conduct a commander-directed investigation (CDI) when an employee files a complaint of discrimination based on sexual harassment. This applies equally to both military members and civilians.

- Commanders must take appropriate administrative or disciplinary action to eliminate or neutralize discrimination and its effects

Air Force Equal Opportunity Program

- AFI 36-2706, *Equal Opportunity Program Military and Civilian,* chs. 4 and 5, set out the Air Force Military Equal Opportunity program for processing both informal and formal discrimination complaints made by military members

  -- Military members are limited to presenting administrative complaints of discrimination, which when substantiated are addressed through command action; they cannot bring a civil action against the government for employment discrimination and they cannot receive any kind of monetary damages normally available for civilians in the same situation

  -- Air Force policy is clear: "Zero tolerance" of any kind of unlawful discrimination against military members on the basis of race, creed, color, religion, national origin or gender

  -- Discrimination can be generally defined as any action that unlawfully or unjustly results in unequal treatment on the basis of race, creed, color, religion, national origin or gender, and the distinctions are not supported by legal or rational considerations

  -- Such discrimination includes, but is not limited to:

    --- Insults, printed materials, visual materials, signs, symbols, posters, or insignias that infer negative statements pertaining to protected status (e.g., race, religion)

    --- Personal discrimination to bar or deprive a person of a right or benefit

    --- Sexual harassment

    --- Institutional practices that deprive a person or group of a right or benefit

  -- The military equal opportunity (MEO) office is the office of primary responsibility (OPR) for the Air Force EO program and handles almost all informal and formal complaints of discrimination brought by military members

  -- Exceptions include instances involving criminal misconduct investigated by base law enforcement authorities, and military EO complaints against senior officials, consisting of officers in the grade of O-7 select and above, Air National Guard colonels with a certificate of eligibility, and members of the senior executive service, which are investigated by the inspector general (IG)

Installation Commander's Responsibilities

- Provide an environment free from unlawful discrimination and sexual harassment
- Develop policies to prevent unlawful discrimination and sexual harassment and ensure those policies are prominently posted in locations and areas frequented by the base population
- Communicate the importance of the relationship of unlawful discrimination and sexual harassment prevention to readiness and a professional climate
- Ensure military and civilian personnel attend human relations education as required
- Direct the assessment of the installation human relations climate through the installation climate assessment committee
- Ensure appropriate disciplinary and corrective actions are taken if unlawful discrimination or reprisal is substantiated
- Review all closed EO cases on a monthly basis
- Ensure rating and reviewing officials evaluate compliance with directives prohibiting unlawful discrimination and sexual harassment and document serious or repeated deviations
- Decide first-level appeals of formal complaints of discrimination

Unit Commander's Responsibilities

- Inform unit members of the right to file EO complaints without fear of reprisal
- Inform members through briefings and EO policy memoranda that unlawful discrimination and sexual harassment will not be tolerated and that appropriate disciplinary and corrective action will be taken if unlawful discrimination or reprisal is substantiated
- At a minimum, provide MEO the demographics of participants and action taken on all EO allegations investigated within the unit
- Investigate allegations of unlawful discrimination or sexual harassment when the complainant has elected not to file with the MEO office

-- Appoint an EO specialist to serve as a subject matter expert (SME) and be consulted on any report per AFI 36-2706, para. 1.23.14

- Take action to end unlawful discrimination or sexual harassment when a formal MEO complaint/incident is substantiated

- Enforce EO policy in a fair, impartial, and prompt manner

- Ensure rating and evaluating officials evaluate compliance with EO directives and document repeated or serious violations

- Inform alleged offender(s) they are the subject of a formal MEO complaint, ensure they are cautioned against taking reprisal or other retaliatory actions, and ensure they are briefed on the outcome of the MEO case when it is closed and advise on their right to appeal

- Accomplish unit climate assessments

Complaint Processing Procedures

- MEO serves as the focal point for complaints of discrimination brought by military members, but the nature of the complaint will determine which agency conducts the investigation

  -- Military EO complaints against senior officials, consisting of officers in the grade of O-7 select and above, Air National Guard colonels with a certificate of eligibility, and members of the senior executive service, must be immediately referred to SAF/IGS

    --- EO must notify the installation commander and local IG when there is a military EO complaint against an officer in the grade of O-6, an officer who has been selected for O-6, or a civil service employee in the grade of GS-15, and the installation commander must notify MAJCOM/IGQ and SAF/IGQ of such complaints

- Complaints involving criminal activity such as assault, rape, or child abuse must be immediately referred to the Air Force Office of Special Investigations (AFOSI) or Security Forces Squadron. In cases of sexual assault, the EO specialist will also notify the Sexual Assault Response Coordinator (SARC).

- Complainants may elect to use informal complaint process, which may include alternate dispute resolution (ADR)

-- When MEO investigates a complaint of discrimination, it is called a clarification and the allegation is documented on AF IMT 1587, *Military Equal Opportunity Formal Complaint Summary*

-- Base-level MEO personnel conduct clarifications of formal complaints

--- The purpose of clarification is to determine whether a formal complaint is sup- ported by a preponderance of the credible evidence

--- A preponderance of the credible evidence means more likely than not

--- If a clarification results in a determination that an alleged violation has occurred, the case **MUST** be forwarded through the servicing staff judge advocate (SJA) to the offender's and the complainant's commander for appropriate action

-- Both the complainant and the subject of a formal EO complaint may appeal the findings upon completion of complaint clarification

-- All appeals must be in writing

-- There is no right to a personal hearing

-- Commanders are not required to withhold command action pending an appeal

-- Installation commanders, MAJCOM/CVs, and SAF/MRB are authorized to decide appeals of formal complaints of discrimination

--- First level of appeal is to the lowest level of command authorized to decide the appeal, usually the installation commander

--- The appellate authorities may sustain or overrule any finding rendered below or remand the matter for further fact finding

--- SAF/MRB is the final review and appeal level for findings of formal complaints of unlawful discrimination

- Findings rendered pursuant to command action under the UCMJ are not subject to appeal through MEO channels

- EO must forward closure documents, as set forth in AFI 90-301, *Inspector General Complaints Resolution*, to SAF/IGQ in all completed EO cases with complaints against officers in the grade of O-6, officers who have been selected for O-6, civil service employees in the grade of GS-15, and all completed EO cases with substantiated findings against officers in the grades of O-4 and O-5

Performance Evaluation Reports

- Rating and reviewing officials **MUST** consider membership in groups espousing supremacist causes or advocating unlawful discrimination in evaluating and assigning military members

- While mere membership in such groups is not prohibited, members who join groups espousing supremacist causes or advocating unlawful discrimination may not be suited to hold supervisory or other responsible positions if their personal views would be in conflict with Equal Opportunity and Treatment Program (EOT) guidelines they are required to support

- Rating and reviewing officials must document serious or repeated deviations from DoD and Air Force directives prohibiting discrimination

Reprisal/Whistleblower

- Air Force members are protected from reprisal for making, preparing, or attempting to make, a complaint of unlawful discrimination or sexual harassment to EO personnel, an IG or a member of the IG's investigative staff, members of Congress or a member of their staff, DoD law enforcement organizations, or any other person or organization in the member's chain of command designated pursuant to AFI 90-301 or other established administrative procedures to receive such communications

- Reprisal complaints are referred by EO to the installation IG

References

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*
EEO Act of 1972, Pub. L. 92-261, as amended 42 U.S.C. §§ 2000e *et seq.*
The Rehabilitation Act of 1973, 9 U.S.C. §§ 701 *et seq.*
1978 Amendments to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*
The Civil Rights Act of 1991, Pub. L. 102-166, as amended 42 U.S.C. § 2000e
AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011
AFI 90-301, *Inspector General Complaints Resolution* (27 August 2015)

PROHIBITION ON SEXUAL HARASSMENT

Historical Background

- No federal statute explicitly defines or outlaws sexual harassment in the workplace; however, several federal court decisions in the 1970s established sexual harassment as illegal sex discrimination in violation of Title VII of the Civil Rights Act of 1964

  -- Title VII's prohibitions were made applicable to federal civilian employees as victims through the Equal Employment Opportunity Act of 1972

  -- The protections of Title VII do not specifically apply to military members as victims

  -- The DoD's response to the issue of sexual harassment was the promulgation of DoDD 1350.2, *Department of Defense Military Equal Opportunity (MEO) Program*, which establishes policy for DoD and provides guidance to the military services for the implementation of their own equal opportunity and treatment programs to combat sexual harassment

  -- The Air Force's equal opportunity and treatment program is set forth in AFI 36-2706, *Equal Opportunity Program Military and Civilian*

- The Civil Rights Act of 1991 allows for recovery against an employer, which can include the Air Force, of compensatory damages (pain and suffering, emotional harm, etc.) up to $300,000 per individual in cases of intentional discrimination brought by civilian employees. Such damages would likely have to be paid out of local base operations and maintenance (O&M) funds.

Definitions

- The Air Force defines sexual harassment as a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

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

  -- Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person

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

- Workplace conduct may be actionable as "abusive work environment" harassment even if it does not result in concrete psychological harm to the victim; rather, it need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive. "Workplace" is an expansive term in the military context and may include conduct on- or off-duty, 24 hours a day.

- Any person in a supervisory or command position who uses or condones any form of sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment

- Any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature in the workplace is also engaging in sexual harassment

- Although sexual harassment is generally perpetrated by men against women, any form of unwelcome sexual advance against employees of either gender may constitute unlawful sexual harassment

Types of Sexual Harassment

- Judicial decisions have recognized two basic kinds of sexual harassment, both of which are reflected in the Air Force's definition:

  -- *Quid pro quo* (meaning "this for that")

  -- Hostile work environment

Quid Pro Quo Sexual Harassment

- Sexual harassment occurs when an employee suffers or is threatened with some kind of employment injury for refusing to grant sexual favors, or is promised some sort of tangible job benefit in exchange for sexual favors

  -- Generally, it involves a supervisor/subordinate relationship where the victim is told to submit to sexual requests or be fired, demoted, or denied a promotion, an award, training opportunity, objective appraisal, etc.

  -- A single incident may be enough to qualify as *quid pro quo* sexual harassment

  -- A threat to take action that changes a victim's employment situation in exchange for sexual favors without an actual job benefit or detriment is sufficient to constitute *quid pro quo* sexual harassment under Air Force regulations

Hostile Work Environment Sexual Harassment

- Occurs when a supervisor, co-worker, or someone else with whom the victim comes in contact on the job creates an abusive work environment or interferes with the employee's work performance through words, actions, or conduct that is perceived as sexual in nature
  - -- Some examples include:
    - --- Discussing sexual activities
    - --- Unnecessary touching
    - --- Commenting on physical attributes
    - --- Displaying sexually suggestive pictures or pornography
    - --- Using demeaning or inappropriate terms, such as "babe"
    - --- Using unseemly or profane gestures
    - --- Granting job favors to those who participate in consensual sexual activity
    - --- Using sexually crude, profane, or offensive language
  - -- A single act, if severe enough, may support a cause of action for hostile work environment sexual harassment
  - -- The nature, severity, frequency, and duration of the conduct are some factors the courts consider when evaluating whether certain conduct constitutes sexual harassment
  - -- How severe or pervasive the harassment must be to constitute sexual harassment depends upon the specific facts
    - --- Conduct that constitutes harassment in one situation may not in another; however, the commander who demands professional, civil conduct from members of the organization will prevent most of the problems that arise in this area
    - --- An isolated epithet does not usually support a cause of action for hostile work environment discrimination

---- That does not mean that commanders are in any way restricted from taking disciplinary action based upon a single incident

---- In fact, commanders are required to act to stop sexual harassment no matter how minor the conduct may be

--- Because the legal boundaries involved in this type of sexual harassment are unclear, supervisors and subordinates alike should avoid **any** sexual conduct in the workplace or any behavior that is in any way demeaning to members of the opposite or same sex

--- All complaints, regardless of whether they appear to meet the legal test of hostile work environment sexual harassment, should be quickly investigated and appropriate action taken to stop offensive conduct

--- Hostile work environment sexual harassment is the most difficult type to recognize, and the particular facts of each situation determine whether offensive conduct has crossed the line from simply inappropriate behavior to sexual harassment

- Under Title VII of the Civil Rights Act, civilian victims may sue the Air Force for monetary damages for sexual harassment in either form

  -- An employer (e.g., the Air Force) will almost always have no defense in a case of sexual harassment if the facts show conduct that resulted in an actual tangible employment action (firing, demotion, etc.)

  -- Provided no tangible employment action occurred, an employer (e.g., the Air Force) may be able to establish a defense to either *limit or avoid* liability if the employer has a formal, published policy against sexual harassment; provides training to its employees and supervisors about sexual harassment (and how to stop it); has a grievance and complaint system in place; and takes prompt effective corrective action to remedy a complaint of sexual harassment

  -- If a commander finds out about an incident of sexual harassment (or an incident that could be sexual harassment), the commander should not wait for a complaint to be filed; rather, the commander should use his/her inherent authority to begin an inquiry into the matter in an effort to determine whether the conduct constituted sexual harassment and to remedy the problem

- Command attention to sexual harassment must include the following actions:

  -- Publish clearly the Air Force's policy on sexual harassment, i.e., zero tolerance

  -- Ensure that civilian employee/military member avenues of communication and complaint are well publicized throughout the unit

  -- Provide appropriate training on sexual harassment

  -- Act quickly to investigate all complaints of sexual harassment in a fair and impartial manner

  -- Seek advice from the MEO office, the staff judge advocate (SJA), and the civilian personnel office, as appropriate, before taking action against offenders

Commander's Inquiry under 10 U.S.C. § 1561 (Sexual Harassment Investigations and Reports)—Military or Civilian Complainant

- 10 U.S.C. § 1561 was passed in 1998 by Congress to ensure that complainants in sexual harassment cases receive a timely investigation and response to their complaints

- It is important to remember that a complainant (either military or civilian) may elect the commander's inquiry and/or the equal opportunity (EO) process for military complainant/ equal employment opportunity (EEO) process for civilian complainant

- The process is dual-tracked in that the commander's inquiry, if elected by the complainant, is conducted even if the EO/EEO process has not been completed

- When the commander receives a complaint, 10 U.S.C. § 1561 requires several actions (commanders should consult the local SJA office for assistance). **Within 72 hours** after receipt of the complaint, the commander must:

  -- Forward the complaint or a detailed description of the allegation to the general court- martial convening authority (GCMCA)

  -- Begin the investigation

  -- Advise the complainant of the beginning of the investigation

- The commander is responsible for ensuring the investigation is completed no later than 14 days after it was commenced

- The commander shall also submit a report on the progress made in completing the investigation to the GCMCA within 20 days after the investigation began and every 14 days thereafter until the investigation is completed, and upon completion of the investigation, then submit a final report on the results of the investigation, including any action taken as a result of the investigation

Complaint Processing—Military Complainant

- The MEO office is the office of primary responsibility (OPR) for the Air Force EO program and has primary responsibility for the maintenance of the program and for handling complaints of sexual harassment

  -- If a complaint (formal or informal) is filed with MEO, it will be handled by the EO officer and the alleged occurrence of harassment will be called an EO incident

  -- Generally, a formal complaint filed with MEO will generate an investigation by MEO personnel called a clarification

  -- The clarification is designed to determine the facts and cause of the EO incident, assess the severity of the incident and the effect on morale and good order and discipline, and develop recommendations concerning the classification of the incident and appropriate corrective action

    --- A clarification will include witness interviews, taking statements, reviewing records and documents, and will ultimately conclude with a report by an investigating officer

    --- The standard of proof used in a clarification is a preponderance of the credible evidence (i.e., more likely than not)

    --- At the conclusion of the investigation, the EO incident will be either unsubstantiated or substantiated and therefore a recommendation will be made

    --- Strict time standards exist for completion of the clarification

  -- If the EO incident is substantiated, a legal review is required before the report is forwarded to the concerned commander for appropriate action

-- The complaint process allows for an appeal of the findings of the clarification of formal complaints of sexual harassment

--- Findings concerning an informal complaint may be appealed by filing a formal complaint

--- Either the complainant or the subject may appeal to the next higher commander

--- Command action may continue regardless of the existence of an appeal

--- The appropriate legal office will conduct a legal review if the matter is appealed to the next level of command

--- The Air Force Review Boards Agency is the final review and appeal level

- MEO will not investigate a complaint that involves criminal conduct

  -- Criminal conduct will be handled by the base law enforcement community

  -- Complaints against senior officials, colonels and colonel selects are investigated by the Inspector General (IG)

  -- If the result of a clarification is inconclusive, the IG may institute an investigation

- MEO will not investigate a complaint filed by a civil service employee, but rather will document the complaint and refer it to the EEO office regardless of the status of the alleged offender

- Complaints of sexual harassment against senior officials, consisting of officers in the grade of O-7 select and above, Air National Guard colonels with a certificate of eligibility, and members of the senior executive service, must be immediately referred to SAF/IGS

- EO must notify the installation commander and local IG when there is a sexual harassment complaint against an officer in the grade of O-6, an officer who has been selected for O-6, or a civil service employee in the grade of GS-15, and the installation commander must notify MAJCOM/IGQ and SAF/IGQ of such complaints

- EO must forward closure documents, as set forth in AFI 90-301, *Inspector General Complaints Resolution* to SAF/IGQ in all completed EO cases with complaints against officers in the grade of O-6, officers who have been selected for O-6, and civil service

employees in the grade of GS-15, and all completed EO cases with substantiated findings against officers in the grades of O-4 and O-5

Complaint Processing—Civilian Employee Complainant

- The EEO counselor is the OPR for complaints of sexual harassment brought by civilian employees

- Pre-Complaint: After a complainant has made initial contact with the EEO Office, an EEO counselor will advise the complainant of certain rights and obligations, place all allegations in the pre-complaint process regardless of merit or timeliness, and attempt to resolve the situation between the parties. The EEO counselor has 30 days to complete this process (60 days upon agreement by the complainant).

- If the EEO counselor is unable to resolve the situation during pre-complaint processing, the complainant is advised that he/she may file a formal complaint of discrimination

- Formal Complaint: The EEO counselor will, among other things, advise the complainant of further rights

  -- During this time, the complaint is evaluated by civilian personnel and the legal office for soundness and possible settlement

  -- The Installation EEO Manager requests a complaint investigator from the investigations and resolutions division (IRD) within 30 days of the date the formal complaint was filed

  -- IRD will investigate the complaint and send a copy of the report of investigation and complaint file to the Installation EEO Manager, Air Force Civilian Appellate Review Office (AFCARO), and the complainant or complainant's designated representative

  -- The complainant must then elect whether an Equal Employment Opportunity Commission (EEOC) hearing is desired or whether he or she prefers the Air Force to issue a final decision

  -- The complainant and the commander can meet and discuss possible resolution of the complaint during the period of time the complainant is deciding which route to pursue

  -- The complainant has 30 days from receipt of the report of investigation to request an EEOC hearing

- After the formal complaint process, it is possible for the complainant to make various appeals and eventually file suit in federal court; consult the legal office for further information

- SAF/MRBA is responsible for notifying SAF/IGS when an EEO complaint is made against a senior official, consisting of an officer in the grade of O-7 select and above, an Air National Guard colonel with a certificate of eligibility, or a member of the Senior Executive Service

- SAF/MRBA notifies SAF/IGQ when an EEO complaint is made against an officer in the grade of O-6, an officer who has been selected for O-6, or a civil service employee in the grade of GS-15

- EEO must forward closure documents, as set forth in AFI 90-301, to SAF/IGQ in all completed EEO cases with complaints against officers in the grade of O-6, officers who have been selected for O-6, and civil service employees in the grade of GS-15 and all completed EEO cases with substantiated findings against officers in the grades of O-4 and O-5

Command Options to Address Substantiated Complaints of Sexual Harassment

- Commanders who find military personnel to have engaged in sexual harassment have the usual disciplinary and administrative options, including counseling, admonishment, reprimand, nonjudicial punishment, administrative discharge, and court-martial

- Commanders who find civilian personnel to have engaged in sexual harassment should normally focus any disciplinary action on the offensive act or acts involved (e.g., unwelcome touching, offensive comments) rather than alleging sexual harassment, and may deal with the misconduct pursuant to AFI 36-704, *Discipline and Adverse Actions,* in the following manner:

  -- Any disciplinary action, which includes punishment greater than suspension for more than 14 days, can be appealed to the U.S. Merit Systems Protection Board (MSPB)

  -- At an MSPB proceeding, the Air Force must prove by a preponderance of the evidence that the misconduct (e.g., offensive touching, offensive comments) took place and that the punishment imposed serves to promote the efficiency of the service

References

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*

The Civil Rights Act of 1991, Pub. L. 102-166, as amended 42 U.S.C. § 2000e

10 U.S.C. § 1561

29 C.F.R. Part 1614

DoDD 1350.2, *Department of Defense Military Equal Opportunity (MEO) Program* (18 August 1995) certified current, 21 November 2003, incorporating through Change 2, 8 June 2015

AFI 36-701, *Labor Management Relations* (27 July 1994)

AFI 36-704, *Discipline and Adverse Actions* (22 July 1994)

AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011

AFI 90-301, *Inspector General Complaints Resolution* (27 August 2015)

THE INSPECTOR GENERAL COMPLAINTS RESOLUTION PROCESS

Overview

The inspector general (IG) is the "eyes and ears" of the commander. The IG complaints resolution program is a leadership tool to resolve problems affecting the Air Force mission promptly and objectively.

- The IG will encourage complainants to try to resolve their problem(s) at the lowest level first—this usually means the chain of command

- The IG has authority to process a variety of complaints related to violations of law, policy, procedures or regulations, abuse of authority, etc.

- **ONLY** the IG has the authority to process certain types of allegations: reprisal and restriction; if there is no evidence of reprisal and/or restriction, the IG will analyze for abuse of authority

- The IG **MAY NOT** be used for:

  -- Matters normally addressed through other channels unless there is evidence those channels mishandled the matter or process

  -- Matters listed in AFI 90-301, *Inspector General Complaints Resolution*, Table 3.6 (civilian reprisal complaints, civilian equal employment opportunity (EEO) complaints, military equal opportunity (MEO) complaints not involving a senior official, claims against the government, Article 138, UCMJ, etc.)

IG Investigations

- IG investigations are distinct from other investigations, such as commander directed investigations (CDIs)

- An investigating officer (IO) investigates pursuant to AFI 90-301 when properly authorized, in writing, by the appropriate appointing authority

- A complaint analysis may result in a referral, including referral to a commander to consider a CDI; a dismissal; or a recommendation to investigate

- The standard of proof to substantiate an allegation during an IG investigation is a preponderance of the evidence

-- The IO must be satisfied that the greater weight of the credible evidence supports the findings and conclusions

-- This means that it is ***more likely than not*** that the events occurred

Reprisal ("Whistleblower" Protection) Complaints

- Reprisal is a violation of federal law, 10 U.S.C. § 1034, and may result in disciplinary action under the UCMJ or applicable civilian directives or instructions

- Reprisal occurs when a responsible management official (RMO) takes (or threatens to take) an unfavorable personnel action (UPA) or withholds (or threatens to withhold) a favorable personnel action on a military member for making or preparing, or being perceived as making or preparing to make, a protected communication (PC)

  -- RMOs include three categories: (1) those who influenced/recommended the action; (2) those who took the action; and (3) those who approved/reviewed/endorsed the action

  -- Personnel actions include actions that affect OR have the potential to affect a military member's current position or career (e.g., promotion, disciplinary/corrective action, reassignment, performance report, a significant change in duties not commensurate with the member's grade)

  -- There are 3 types of PCs:

    --- Any lawful communication to a member of Congress or an IG

      ---- An unlawful communication is a communication that itself constitutes misconduct, a violation of the UCMJ, or a violation of other criminal statute (e.g., knowingly false statements, unauthorized disclosures of information, threatening statements)

    --- A communication of information reasonably believed to evidence a violation of law or regulation when made to any of the following (list is not all-inclusive):

      ---- A member of Congress or a member of their staff; IG or member of the IG's staff; personnel assigned to DoD audit, inspection, investigation, law enforcement, EO, safety, sexual assault prevention and response designees, or family advocacy organizations; chain of command; Chief Master Sergeant of the Air Force, command chiefs, or first sergeants; courts-martial proceeding

--- Testifying, or participating or assisting in an investigation/proceeding under (1) or (2) above, or filing, causing to be filed, participating or assisting in a reprisal and/or restriction action

--- Examples of PCs: a major tells his commander about what the major reasonably thinks is a threat to flight safety; a senior airman tells her civilian director about what the senior airman reasonably believes to be sexual harassment by her immediate supervisor against an airman basic; a technical sergeant walks into the IG's office and discusses the weather with the IG

- To analyze allegations of reprisal, IOs must use a four-part reprisal "acid test" (note: the IO should use the acid test from the version of AFI 90-301 in effect at the time of the alleged wrongdoing; the wording of the acid tests varies slightly in some of the versions):

  -- Did the military member make, prepare to make, or was perceived to make a PC?

  -- Was a UPA taken or threatened, or was a favorable action withheld or threatened to be withheld following the PC?

  -- Did the RMO(s) know about the PC?

  -- Does the preponderance of the evidence establish that the personnel action would have been taken/threatened or withheld/threatened to be withheld if the PC had not been made? To answer this question, IOs must address the following five factors:

    --- Reasons the RMO took/threatened, withheld/threatened to withhold, recommended/influenced, or approved/endorsed the action

    --- Reasonableness of the action given complainant's conduct/performance

    --- Consistency with the RMO's past practice (i.e., how the RMO handled the situation in the past under similar circumstances with similarly situated individuals)

    --- Motive of the RMO for the action

    --- Procedural correctness of the action (based on Air Force Instruction, law, etc., that pertains to the action)

- If the IO determines reprisal did not occur, the IO must conduct an analysis to determine if an abuse of authority occurred

  -- Abuse of authority is an arbitrary and capricious exercise of power that adversely affects any person OR results in personal gain or advantage to the abuser

  -- "Arbitrary and capricious" is defined as the absence of a rational connection between the facts found and the choice made, constituting a clear error of judgment

  -- To analyze whether an abuse of authority occurred, IOs must use the Acid Test for Abuse of Authority (note: the IO should use the acid test from the version of AFI 90-301 in effect at the time of the alleged wrongdoing and the wording of the acid test varies slightly in some of the versions):

    --- Did the RMO's actions either: (a) adversely affect any person; or (b) result in personal gain or advantage to the RMO?

      ---- If the answers to both subparts of the question are no, then it is not necessary to continue with the acid test; if the answer to either subpart of the question is yes, then the IO must continue with the acid test

    --- Was the RMO's action either: (a) outside the authority granted under applicable regulations, law, or policy; or (b) arbitrary and capricious? To answer this question, IOs must consider the following three factors (note: the IO should use the acid test from the version of AFI 90-301 in effect at the time of the alleged wrongdoing):

      ---- Reasons the RMO took/threatened, withheld/threatened to withhold, recommended/influenced, or approved/indorsed the action

      ---- Reasonableness of the action given complainant's performance/conduct

      ---- Consistency with the RMO's past practice (i.e., how the RMO handled the situation in the past under similar circumstances with similarly situated individuals)

- All reprisal investigations undergo IG and legal reviews at the major command (or Joint Force Headquarters), Secretary of the Air Force (SecAF), and DoD levels

- DoD IG renders final review/approval

Restriction Complaints

- 10 U.S.C. § 1034 and AFI 90-301 also state that no person may restrict a military member from communicating with a member of Congress or an IG as long as the communication is lawful

  -- An unlawful communication is a communication that itself constitutes misconduct, a violation of the UCMJ, or a violation of other applicable criminal statutes (e.g., knowingly false statements, unauthorized disclosure of information, threatening statements)

- Example of restriction: Commander says, "You will bring any problems you have to me before going outside the chain of command"

- Restriction is a violation of federal law, 10 U.S.C. § 1034, and may result in disciplinary action under the UCMJ (e.g., violation of Article 92 for not following the applicable Air Force Instruction) or applicable civilian directives or instructions

- To analyze restriction allegations, IOs answer the following three questions:

  -- (1) How did the subject limit or attempt to limit the member's access to an IG or a member of Congress?

  -- (2) What was the intent of the RMO? To answer this question, IOs must consider the following three factors:

    --- Reasons for restricting or taking actions that created barriers to making PC(s)

    --- Reasonableness of the RMO's actions

    --- Motive for the RMO's actions

  -- (3) Would a reasonable person, under similar circumstances, believe he/she was actually restricted from making a lawful communication with the IG or a Member of Congress based on the RMO's actions?

    --- Indicate whether or not the alleged restriction created a "chilling" effect—an action, through words or behavior that would tend to prevent an individual(s) from taking a proposed course of action

- If the IO determines restriction did not occur, the IO must conduct an analysis to determine if an abuse of authority occurred (see discussion of abuse of authority under "Reprisal ('Whistleblower' Protection) Complaints" section above

- All restriction investigations undergo IG and legal reviews at the major command (or Joint Force Headquarters), SecAF, and DoD levels

- DoD IG renders final review/approval

Special Processing Requirements

- Reprisal and restriction complaints have unique reporting requirements as set forth in AFI 90-301 and only the IG may investigate such allegations

- **ONLY** the Secretary of the Air Force, Office of the Inspector General, Senior Officials Directorate (SAF/IGS) handles complaints against senior officials, consisting of officers in the grade of O-7 select and above, Air National Guard colonels with a certificate of eligibility, and members of the senior executive service; complaints involving senior officials should be reported immediately to SAF/IGS

- All complaints, regardless of the nature of the allegation, alleging O-6 misconduct (even if handled by a CDI) must be reported to Secretary of the Air Force, Office of the Inspector General, Complaints Resolution Directorate (SAF/IGQ); all substantiated findings of wrongdoing resulting from any type of investigation or inquiry against O-6s and/or adverse information (e.g., Letter of Counseling (LOC), Letter of Admonishment (LOA), Letter of Reprimand (LOR), Article 15 punishment), regardless of whether or not there was a formal investigation or inquiry, against O-6s must be reported to SAF/IGQ

- All substantiated findings of wrongdoing resulting from any type of investigation or inquiry against O-4s and O-5s and/or adverse information against O-4s and O-5s (e.g., LOC, LOA, LOR, Article 15 punishment), regardless of whether or not there was a formal investigation or inquiry, must be reported to SAF/IGQ

Confidentiality

- Communications made to the IG are **NOT** privileged or confidential

- However, disclosure of these communications, and the identity of the communicant, will be strictly limited to an official need-to-know

Bottom Line

- The potential for an IG complaint should never dissuade a commander from taking timely and appropriate corrective and preventive actions for legitimate reasons

- Commanders should coordinate with the staff judge advocates for effective legal guidance on these issues

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References

5 U.S.C. § 2302
10 U.S.C. § 1034
10 U.S.C. § 1587
10 U.S.C. § 2409
DoDD 7050.06, *Military Whistleblower Protection* (17April 2015)
DoD Inspector General, *Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints* (29 June 2015)
AFI 90-301, *Inspector General Complaints Resolution* (27 August 2015)
AFPD 90-3, *Inspector General—The Complaints Resolution Program* (18 August 2009), certified current 24 October 13
SAF/IG web site: http://www.af.mil/InspectorGeneralComplaints.aspx
SAF/IGQ *Commander-Directed Investigations Guide* (18 February 2016)
SAF/IGQ *Investigating Officer's Guide* (February 2012)
SAF/IGQ *JAG Guide to IG Investigations* (14 April 10)

POLITICAL ACTIVITIES BY AIR FORCE MEMBERS

Political activities by Air Force members may be restricted in order to reach the goal of a politically neutral military establishment through avoidance of partisan politics. The Air Force provides guidance on permissible and impermissible political activities in AFI 51-902, *Political Activities by Members of the U.S. Air Force*. Violations of AFI 51-902 are punishable under UCMJ, Art. 92, *Failure to Obey a Lawful Regulation*.

Permitted Political Activities

- Air Force members **MAY**:

  -- Register to vote, vote, and express a personal opinion on political candidates and issues, but not as a representative of the Air Force

  -- Make monetary contributions to a political organization or political committee favoring a particular candidate or slate of candidates, subject to limitations under federal election laws

  -- Attend political meetings or rallies as a spectator when not in uniform and when no inference or appearance of official sponsorship, approval, or endorsement can reasonably be drawn

  -- Join a political club and attend its meetings when not in uniform

  -- Serve as an election official, if such service is not as a representative of a partisan political party, does not interfere with military duties, is performed while out of uniform, and has prior Secretary of the Air Force (SecAF) approval

  -- Sign a petition for specific legislative action or a petition to place a candidate's name on an official election ballot if the signing does not obligate the member to engage in partisan political activity and is done as a private citizen

  -- Write a letter to the editor of a newspaper expressing personal views of the member concerning public issues, if those views do not promote a partisan political cause

    --- If the letter or blog identifies the member as a member of the Armed Forces, it should clearly state that the views expressed are those of the individual only and not those of the Department of Defense

  -- Display a political bumper sticker (traditional size) on their private vehicle or wear a political button when not in uniform and not on duty

-- Write a personal letter, not for publication, expressing preference for a specific political candidate or cause, if the action is not part of an organized letter-writing campaign on behalf of a partisan political cause or candidate

Prohibited Political Activities

- Air Force members **MAY NOT**:

  -- Use official authority or influence to interfere with an election, to affect its course or outcome, to solicit votes for a particular candidate or issue, or to require or solicit political contributions from others

  -- Be a candidate for civil office or hold civil office, except as authorized by DoDD 1344.10, *Political Activities by Members of the Armed Forces on Active Duty,* paras. 4.2 and 4.3, and AFI 51-902, paras. 5 and 6

  -- Participate in partisan political management, campaigns, or conventions, or make public speeches in the course of such activity

  -- Allow, or cause to be published, partisan political articles signed or authorized by the member soliciting votes for or against a partisan political party or candidate

  -- Serve in any official capacity or be listed as a sponsor of a partisan political club

  -- Speak before a partisan political gathering of any kind for promoting a partisan political party, candidate, or cause

  -- Participate in any radio, television, or other program or group discussion as an advocate of a partisan political party, candidate, or cause

  -- Conduct a political opinion survey under the auspices of a partisan political group or distribute partisan political literature

  -- Perform clerical or other duties for a partisan political committee during a campaign, on election day, or after an election during the process of closing a campaign

  -- Solicit or otherwise engage in fund-raising activities in federal offices or facilities, including military reservations, for any political cause or candidate

  -- March or ride in a partisan political parade

- -- Participate in any organized effort to provide voters with transportation to the polls if the effort is organized by or associated with a partisan political party or candidate

- -- Attend, as an official representative of the Armed Forces, partisan political events, even without actively participating

- -- Engage in the public or organized recruitment of others to become partisan candidates for nomination or election to a civil office

- -- Make campaign contributions to another member of the armed forces or an officer or employee of the federal government for promoting a political objective or cause

- -- Solicit or receive a campaign contribution from another member of the armed forces or from a civilian officer or employee of the United States for promoting a political objective or cause

- -- Use contemptuous words against the office holders described in UCMJ, Art. 88 (for officers)

- -- Display a large political sign, banner, or poster on the top or side of a member's private vehicle (as distinguished from a political bumper sticker)

- -- Display a partisan political sign, poster, banner, or similar device visible to the public at their residence on a military installation, including privatized housing developments

- -- Sell tickets for, or otherwise actively promote, partisan political dinners and other such fund-raising events

Campaigning and Holding Public Office

- Air Force members **MAY NOT** be a candidate for nomination or as a nominee for civil office **EXCEPT**:

  - -- With proper approval from SecAF, a member may be permitted to file evidence of nomination or candidacy for nomination as required by law

  - -- A request for approval will normally not be granted unless the member is likely to separate from active duty/active duty training at least 30 days before the scheduled election

- Approved candidates for civil office may use biographical data from their military careers and photographs of themselves in uniform provided:

  -- Any images depicted are an accurate portrayal of their performance of duties; and

  -- They use a disclaimer that such information and images does not constitute endorsement by DoD or the Air Force

- Except as authorized by law, regular officers on the active duty list, and members on active or full-time National Guard duty under a call or order for a period of more than 270 days, may not hold or exercise the functions of a civil office, including:

  -- Federal elective, Presidential-appointed, or senior executive service offices

  -- Any office in the government of a state; the District of Columbia; a territory, possession, or commonwealth of the United States; or in any political subdivision of the foregoing

  -- Such members may hold or exercise the functions of other federal civil offices when assigned or detailed to that office to perform those functions

- Enlisted members may seek and hold nonpartisan civil office on a local school board, neighborhood planning commission, and similar agencies provided that the office is held in a private capacity and does not interfere with the performance of military duties

- Officers on active duty may seek and hold nonpartisan civil office on an independent school board that is located exclusively on a military reservation, but such offices must be held in a private capacity and may not interfere with military duties

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References

DoDD 1344.10, *Political Activities by Members of the Armed Forces on Active Duty* (19 February 2008)

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

AFI 51-902, *Political Activities by Members of the U.S. Air Force* (27 August 2014)

AFI 51-903, *Dissident and Protest Activities* (30 July 2015)

2016 Election Year Guidance (March 2016), http://www.dod.mil/dodgc/defense_ethics (select "Ethics Resource Library," then "DoD Guidance," and then scroll to "Political Activities")

FAQs Social Media and Political Activities—Guidance for Members of the Armed Forces (June 24, 2014), http://www.dod.mil/dodgc/defense_ethics/ (select "Ethics Resource Library," then "DoD Guidance," and then scroll to "Political Activities – Guidance for Active Duty Military")

MEMBERSHIP AND PARTICIPATION IN HATE GROUPS

Air Force members must reject participation in organizations that espouse supremacist, extremist, or criminal gang doctrine—ideology—or causes. This includes organizations that advance, encourage, or advocate illegal causes; attempt to create illegal discrimination based on race, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in the effort to deprive individuals of their civil rights. These groups are collectively referred to as "hate groups."

- Active participation in hate groups is prohibited. Active participation can include:
  - -- Publicly demonstrating or rallying
  - -- Fund-raising
  - -- Recruiting and training members
  - -- Knowingly wearing gang colors/clothing or having tattoos or body markings associated with such gangs or organizations
  - -- Organizing or leading such organizations
  - -- Otherwise engaging in activities or acting in furtherance of the objectives of such organizations that the commander finds to be detrimental to good order, discipline, or mission accomplishment
- Mere membership in these organizations is not prohibited, but must be considered in evaluating and assigning military members
- Members who violate this prohibition are subject to disciplinary action under UCMJ, Art. 92
- Commanders should intervene early, primarily through counseling, when observing such signs even though the signs may not rise to active advocacy or active participation or may not threaten good order and discipline, but only suggest such potential
- Commanders are authorized the full range of administrative and disciplinary actions, including separation, against those who actively participate in these organizations
- The military equal opportunity office (MEO) is responsible for assisting commanders in ensuring that the Air Force equal opportunity policy against discrimination and sexual harassment is fulfilled through the equal opportunity and treatment (EOT) program

- An EOT incident is an overt, adverse act, occurring on- or off-base, directed at an individual, group or institution, which is motivated by, or has overtones based on race, color, national origin, religion or sex, which has the potential to have a negative impact on the installation human relation climate

  -- Incidents may include slurs, vandalism, graffiti, discriminatory epithets, signs, or symbols

  -- MEO will classify the incident as minor, serious, or major depending upon the number of participants involved, the degree of any property damage, and the nature and extent of any physical injuries sustained as a result of the incident

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References

AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011

AFI 51-903, *Dissident and Protest Activities* (30 July 2015)

EXTREMIST ACTIVITIES

Air Force commanders have the inherent authority, and responsibility, to take action to ensure the mission is performed and to maintain good order and discipline. This includes placing lawful restriction, when appropriate, on dissident and protest activities. At the same time, commanders balance this responsibility with service members right of expression consistent with law and impact on the overall command climate and unit cohesion. In assessing a situation involving extremism, commanders should consult with their staff judge advocates and other staff members in order to respond in an appropriate and prudent manner.

General Restrictions

- Participation in extremist organizations is incompatible with Air Force standards. Air Force Core values serve to promote unit morale and, among other things, emphasize the right of all Airmen to live and work in an environment free of harassment, unlawful discrimination, and illegal treatment. In supporting these core values, Airmen are expected to avoid the following:

  -- Membership in groups that advocate supremacist causes; encourage racial, gender, or ethnic hatred or intolerance; advocate or engage in illegal discrimination or the use of force and violence to unlawfully deprive individuals of their rights

  -- Participation in public demonstrations or rallies of such groups

  -- Attending a meeting or activity with the knowledge the event involves an extremist cause; when it constitutes a breach of law and order; when violence is likely to occur; or when in violation of off-limits sanctions or an order by a commander

  -- Participation in fund-raising activities on behalf of an extremist group

  -- Recruiting or encouraging others to join an extremist organization

  -- Distribution of hate or extremist literature on- or off-base to include use of electronic media such as e-mail, Facebook, etc.

Commander Responsibilities

- Commanders should ensure Airmen are fully aware of the Air Force position when it comes to participation in, or support of, extremist groups or causes. At the same time, commanders must be vigilant and alert for possible indicators of extremist group activity. Extremist activity usually has an immediate impact on a unit, eroding the

team concept as members divide into opposing factions. Early evidence of affiliation or involvement in extremist activities may come to command attention in a number of ways including personal observation, reports through the chain of command, or anonymous calls or letters.

- The following activities, *in isolation*, may not be indicators of potential violence or terrorist activity. However, they are likely to be detrimental to good order and discipline. In addition, taken in conjunction with significant contextual factors, they may indicate an individual at risk of developing into an insider threat:

  -- Encouraging disruptive/disobedient behavior

  -- Expressing hatred or intolerance of American society and culture

  -- Expressing sympathy for violence-promoting organizations

  -- Refusing to deploy for political reasons

  -- Associating with or expressing support for terrorists

  -- Browsing or visiting Internet web sites, without official sanction in the performance of duty, that promote or advocate violence directed against the United States or U.S. forces, or that promote international terrorism or terrorist themes

  -- Expressing outrage against U.S. military operations

  -- Expressing a "duty" to protect a foreign community, when the expressed "duty" conflicts with the current mission of the service member and/or U.S. national interests

  -- Possessing or seeking items that would be useful to terrorists but are not required for the performance of normal duties (e.g., night vision goggles or military GPS devices that might provide terrorists with capabilities that would otherwise be difficult to obtain)

  -- Advocating unlawful violence, the threat of unlawful violence, or the unlawful use of force to achieve goals that are political, religious, or ideological in nature

  -- Seeking spiritual sanctioning for unlawful violence

- The following activities may be indicators of potential violence or terrorist activity and commanders should ensure their subordinates immediately report such indicia through command channels or to DoD law enforcement:

  -- Display of symbols through flags, patches or posters which reflect causes presenting a clear danger to the loyalty, discipline or morale of Air Force personnel

  -- Tattoos and other body markings which identify an Airman as a member of an extremist group or promote the cause of such an organization

  -- Providing financial or other material support to a terrorist organization or to someone suspected of being a terrorist

  -- Expressing an obligation to engage in violence in support of terrorism/violent extremist groups, advocating extremist views or inciting others to do the same

  -- Purchasing bomb making materials, or obtaining information about their construction

  -- Engaging in para-military training with anti-U.S. individuals

  -- Distributing terrorist literature via the Internet

  -- Applying for membership in a violent/terrorist group

  -- Adopting a violent extremist ideology

  -- Expressing loyalty to terrorists

  -- Collecting intelligence for terrorists

  -- Talking knowingly about future terrorist events

  -- Expressing intent to commit a terrorist act

  -- Traveling overseas for terrorist training

- Department of Army Pamphlet 600-15, *Extremist Activities*, provides additional guidance that commanders may find useful in identifying other signs or indicia of extremist activity by Airmen

Command Options

- Command options in responding to extremist activities include:

  -- Counseling and education; ensure Airmen under their command understand the impact of extremist activity upon the unit as well as the fact there will be vigorous enforcement of Air Force policies prohibiting such activity

  -- Disciplinary action; military and civilian employees may be disciplined for engaging in prohibited activity that adversely impacts the mission and creates workplace disruptions

  -- Involuntary separation when warranted by the circumstances

  -- Other administrative or disciplinary action based on the circumstances of the misconduct

  -- Use the Armed Forces Disciplinary Control Board process to declare off limits businesses, establishments, or events that promote or cater to extremist activities or positions. See AFJI 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations*.

- Extremist activities are extremely corrosive to unit cohesion and morale and, if unchecked, can result in loss of unit effectiveness and capability to accomplish its mission. Commanders need to lead by example and take immediate, vigorous action to promote Air Force Core Values and ensure extremism finds no ground to take root within their organizations.

References

UCMJ Arts. 92, 116, 117, and 134

DoDI 1325.06, *Handling Dissident and Protest Activities among Members of the Armed Forces* (27 November 2009), incorporating Change 1, 22 February 2012

AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

AFI 51-903, *Dissident and Protest Activities*, (30 July 2015)

AFJI 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations* (27 July 2006), certified current 2 January 2014

DA Pam 600-15, *Extremist Activities* (1 June 2000)

SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

SCRA provides a wide range of protections for military members whose duties might interfere with certain civil obligations and proceedings. The Act (previously called the Soldiers and Sailors Civil Relief Act) was enacted in 1940. In 2003, the Act was revised to be called the Servicemembers Civil Relief Act. It is regularly amended by Congress with the goal of allowing military members to focus on the military mission first.

- The Act applies to active duty members in civil matters, **NOT** criminal matters

- SCRA generally covers the time period on active duty, however some provisions apply to pre-service obligations (e.g., vehicle leases entered into prior to entry on active duty) and some provisions apply to a period following active service; some provisions also apply to dependents

Most Common and Relevant Provisions

- Eviction: The SCRA prohibits eviction of a service member and dependents from rented housing, without a court order, where the rent (as of 2016) does not exceed $3,451.20 per month. This amount is adjusted every February using a cost-of-living formula found in the Act and posted in the Federal Register. A court may delay eviction proceedings for up to 3 months, unless, in the opinion of the court, the ability of the tenant to pay the agreed rent is not materially affected by the tenant's military service.

- Landlord-Tenant Lease Termination: A military member may unilaterally cancel a landlord-tenant lease, without fees, if they receive orders (permanent change of station (PCS) or deployment for more than 90 days)

- Vehicle Lease Termination:

  -- A military member may cancel a **pre-service** lease for a motor vehicle if they receive orders bringing them onto active duty

  -- A military member may cancel **any** motor vehicle lease (pre-service or signed during service) for deployment orders for more than 180 days, or PCS orders to a location outside of the continental United States (CONUS), or PCS orders from Alaska or Hawaii to any location outside of those states

  -- Early termination fees are prohibited

- Installment Contracts: A service member who enters into an installment contract before entering active duty is protected if a deposit or installment has been paid before entering military service. The creditor cannot exercise rights of rescission, termination, or repossession without a court order.

- Cellular Phones: A cellular phone service contract may be terminated or suspended if the service member receives military orders or relocates for a period of not less than 90 days to a location that does not support the contract. This includes deployment or temporary duty assignment (TDY) orders for 90 days or longer and PCS orders. Cancellation or suspension is without penalties or extra fees, and the service provider must refund any payments that were made in advance for services that were not provided.

- Maximum Rates of Interest: The interest rate on a member's **pre-service** consumer debt or mortgage obligation must be capped at 6 percent unless the creditor shows that the ability of the service member to pay interest above 6 percent is **not materially affected** by reason of their military service. This relief applies during the entire period of active duty service, plus one year after duty, and must be applied retroactively if not requested at the outset of military service.

- Stay of Proceedings: Courts have the discretion to delay a civil court proceeding when the requirements of military service prevent the member from either asserting or protecting a legal right. The courts will look to whether military service **materially affected** the service member's ability to take or defend an action in court. If the service member submits communication to the court showing: (1) how military requirements materially affect the ability to appear, (2) the date when the service member will be available to appear, and (3) communication from the commanding officer stating that the duty prevents appearance and leave is not authorized; the court must grant a stay of at least 90 days.

- Default Judgments: Before a court can enter a default judgment (for failure to respond to a lawsuit or failure to appear at trial) against a military member, the person suing the member must provide the court with an affidavit stating the defendant is not in the military. If the defendant is in the military, the court will appoint an attorney to represent the defendant's interests (usually be seeking a delay of proceedings). If a default judgment is entered against a service member, the judgment may be reopened if the member makes an application within 90 days after leaving active duty, shows he was prejudiced, and shows he had a legal defense.

- Insurance:

  -- Life Insurance: A service member's private life insurance policy is protected against lapse, termination, or forfeiture for nonpayment of premiums for a period of military service plus 2 years. The insured or beneficiary must apply to the Veterans' Administration (VA) for protection.

  -- Professional Liability Insurance: Malpractice insurance must "freeze" when the member enters military service and then resume (exactly where it left off) after release from military service

  -- Health Insurance: Pre-service health insurance plans must be reinstated upon termination or release from active duty, if the member applies within 120 days. Coverage will not be subject to any new exclusions or waiting periods that were not included in the original coverage, as long as the condition was not determined by the VA to be a disability incurred during or aggravated by military service.

- Taxation: A service member's state of legal residence may tax military income. A member does not lose legal residence solely because of a transfer pursuant to military orders. For example, if a member is a Virginia resident and is moved to a base in California, the member does not lose Virginia residency nor will he be subject to pay California state income tax on his military pay. Also, a non-resident service member's pay may not be used to "lift" a spouse's pay into a higher tax bracket (the so-called "Kansas rule").

- Military Spouses Residency Relief Act (MSRRA): In 2009, Congress substantially changed the legal framework regarding spouse residency for tax purposes. The MSRRA revised the SCRA to provide that military spouses do not lose nor acquire a residence for tax purposes solely because of a military move. Furthermore, while only military income is protected from non-resident income tax for the service member, the MSRRA exempts all income for the non-resident spouse. In order to receive this protection, the statute's language requires that the spouse's residence be the same as the service member, although some states do not appear to be enforcing this requirement.

- Pre-Service Mortgages: Significant protections exist against foreclosure regarding mortgages obtained before a service member was called to active duty service. If foreclosure is initiated during active duty service, or within 90 days following active service, foreclosure can only be obtained with a court order and the court should stay the proceedings or adjust the obligation if the ability to pay is materially affected by service.

- Adverse Actions: Creditors and insurers may not use a service member's exercise of rights under the SCRA as the sole basis for taking an adverse action (e.g., denial of credit, refusal of insurance) against the service member

- Child Custody: Based on a 2015 amendment, a state court is prohibited from considering a service member's deployment as the sole factor in determining the best interests of the child, though this provision does not create a federal right of action

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References

Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901– 4043
Military Spouses Residency Relief Act, Pub. L. 111-97

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

USERRA encourages non-career military service by minimizing civilian employment problems resulting from such service. USERRA prohibits discrimination and acts of reprisal against members who serve in the uniformed services.

Overview

- An employer including any government or private entity, regardless of size, may not deny a person initial employment, promotion, or any benefit of employment because the person performed or is obliged to perform service in a uniformed service

  -- Uniformed services means the Air Force, Army, Navy, Coast Guard, Marine Corps, the commissioned corps of the Public Health Service, Army National Guard, and the Air National Guard

  -- Service in the uniformed services means performing duty on a voluntary or involuntary basis in a uniformed service. It includes active duty, active and inactive duty for training, initial active duty for training, full-time National Guard duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty.

Eligibility Criteria

- To have reemployment rights following a period of uniformed service, a person must meet all of the following eligibility criteria:

  -- Must have held a civilian job, which may include temporary jobs

  -- Must have given advance notice to the employer that they were leaving the job for service in a uniformed service, unless such notice is impossible or unreasonable

  -- The period of service does not exceed 5 years

    --- The period of service is cumulative as long as the person is employed by or seeking reemployment with the same employer. A person starting a new job with a new employer receives a new 5-year entitlement. For purposes of federal employment, the entire federal government is considered the employer, not any one individual agency.

--- Some categories of military service do not count toward the 5-year limit such as most periodic and special Reserve and National Guard training, most service in time of war or emergency, and involuntary extensions on active duty

-- Must have been released from service under honorable conditions

-- Must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment

Period of Military Employment	1-30 Days	31-180 Days	More than 180 Days
Application Requirements	Report next scheduled work period–***after*** sufficient time to allow safe transportation from military training site to the person's place of residence, plus 8 hours	Apply within 14 days following completion of service	Apply within 90 days following completion of service

Entitlements

- People who meet the eligibility criteria under USERRA have seven basic entitlements:

  -- Prompt reinstatement

  -- Accrued seniority, as if the person had been continuously employed

    --- This is the "escalator principle," meaning the returning veteran does not step back on the seniority escalator at the point he stepped off, but at the point he would have occupied had he kept his position continuously during his military service

    --- The "status" the person would have attained if continuously employed includes, for example, location, opportunity to work during the day instead of at night, and the opportunity to work in a department or at such times when there are better opportunities to earn commissions or to be promoted

  -- Immediate reinstatement of civilian health insurance coverage, if the member does not elect to continue it during service

-- Other non-seniority benefits, as if the person had been on a furlough or leave of absence, such as holiday pay or bonuses

-- Training or retraining and other accommodations

--- USERRA requires an employer to make reasonable efforts to qualify the returning person for work, including training on new equipment or methods

--- An employer must also make a reasonable effort to accommodate a returning disabled service member otherwise entitled to reemployment

---- A returning service member may have rights under USERRA based on a service-related disability that is not permanent. A service member who incurs a temporary disability may be entitled to interim reemployment in an alternate position provided he or she is qualified for the position and the disability will not affect his or her ability to perform the job. If no such alternate position exists, the disabled service member would be entitled to reinstatement under a "sick leave" or "light duty" status until he or she completely recovers.

---- If disability is such that it cannot be accommodated and disqualifies the person from their pre-service job, the employer is required to reemploy the person in some other position which is most similar to the position to which they are otherwise entitled in terms of seniority, status, and pay

-- A person reemployed by an employer shall not be discharged, except for cause:

--- Within 1 year from being reemployed, if continuous service in the uniformed services was more than 180 days

--- Within 180 days from being reemployed, if continuous service was 31-180 days

--- No special protection exists for service of 30 days or less

-- Prohibition of discrimination or reprisal

--- An employer cannot deny initial employment, reemployment, retention, promotion, or any benefit of employment because of a person's service or application to serve in the uniformed services

--- An employer also may not take adverse employment action against a person because they either take enforcement action under USERRA, testify or assist in an USERRA investigation, or exercise any right under USERRA

Assistance and Enforcement

- The Veterans' Employment and Training Service within the United States Department of Labor will assist persons claiming rights under USERRA, including persons claiming rights with respect to the federal government as a civilian employer

- The office of Employer Support for the Guard and Reserve (ESGR) will also assist service members in enforcing USERRA, 1-800-336-4590

References

Uniformed Services Employment and Reemployment Rights Act
38 U.S.C. §§ 4301–4335
32 C.F.R. Part 104
20 C.F.R. Part 1002
Veterans' Employment and Training Service, 70 Fed. Reg. 7224-01 (February 11, 2005)
DoDI 1205.12, *Civilian Employment and Reemployment Rights for Service Members, Former Service Members and Applicants of the Uniformed Services* (24 February 2016)
Memorandum from the Assistant Secretary of the Air Force, *Civilian Reemployment Protections for Air Force Military Personnel*, 25 October 2011

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (USFSPA)

In 1982, Congress passed the USFSPA to provide certain benefits to the former spouses of military members. Generally, the USFSPA allows courts to treat military retired pay as property subject to division in a divorce and provides certain additional benefits to former spouses.

What USFSPA Does

- Under USFSPA:

  -- State courts are allowed to divide disposable military retired pay between the member and spouse **if** the state court desires

  -- Former spouses, in some circumstances, are able to receive a portion of the member's retired pay directly from the government

  -- Some former spouses are entitled to care at military medical facilities and access to military exchanges and commissaries

  -- Former spouses may be beneficiaries under the survivor benefit plan (SBP)

  -- Some victims of spousal or child abuse are also eligible for benefits

What USFSPA Does Not Do

- USFSPA does **NOT**:

  -- Require courts to divide military retired pay

  -- Establish a formula or award a predetermined share of military retired pay to former spouses

  -- Place a ceiling on the percentage of disposable retired pay that may be awarded to a former spouse

  -- Require an overlap of military service and marriage as a prerequisite to division of military retired pay as property

Division of Retired Pay

- If a court apportions retired pay between member and spouse, only "disposable retired pay" (DRP) may be divided
  - -- DRP is defined as the member's monthly retired pay minus certain deductions, such as income tax withholdings, survivor benefit plan premiums, and, if the member is entitled to disability pay, the product of the member's monthly retired pay multiplied by the percentage of his disability (provided the disability rating is less than 50%)
- Compensation not included in DRP, including disability compensation, is not subject to division by state courts
- Amounts paid directly to a former spouse from the government cannot exceed 50 percent of member's DRP

Additional Retired Pay Considerations

- Concurrent Retirement and Disability Pay (CRDP):
  - -- CRDP is Veterans Affairs (VA) disability paid to the member in addition to full retirement pay
  - -- Members with 20 years of qualifying military service and a VA disability rating of at least 50% may apply for CRDP
  - -- CRDP can also be divisible with a former spouse under a military pension division order
- Combat-Related Special Compensation (CRSC):
  - -- CRSC is disability compensation, not retired pay. As a result, it is not divisible with a former spouse.
  - -- CRSC rates are based on the VA tables and increase with the number of retiree's dependents
  - -- A retiree cannot collect CRSC and CRDP at the same time; Defense Finance and Accounting Service (DFAS) makes the decision which is more beneficial to service member, regardless of whether there is a distribution to former spouse

Survivor's Benefit Plan (SBP)

- A state court can order the service member to designate the former spouse as SBP beneficiary

- Deemed election situation can occur if the member does not provide an agreement or court order to DFAS; the member could be deemed to have done so **IF** the spouse applies within 1 year of the court order

Jurisdiction under USFSPA

- USFSPA precludes a court from treating retired pay as the property of the member and their spouse unless the court has jurisdiction over the member based upon either:

  -- The member's residence, other than because of military assignment

  -- The member's domicile

  -- The member's consent to the court's jurisdiction

Direct Payment of Retired Pay

- Direct payment of retired pay may be made to a former spouse from the military pay centers if:

  -- There is a court order or a property settlement that has been ordered, ratified or approved by the court

  -- The final order specifically provides that payment is to be made from disposable retired pay and is for either:

    --- Child support

    --- Alimony

    --- Division of retired pay as property, if:

      ---- The former spouse was married to the member for 10 years or more, during which the member performed 10 years or more of creditable service, and

---- The order expresses payment in dollars or a percentage of the member's disposable retired pay

- Direct payments terminate upon the earliest of three events:

  -- Terms of court order satisfied

  -- Death of the retired member

  -- Death of the former spouse

Procedure to Request Direct Payment

- The former spouse must send the designated agent of the member's uniformed service (for Air Force members, DFAS-CL) the following items:

  -- A signed DD Form 2293, *Application for Former Spouse Payments from Retired Pay*; and

  -- A copy of the court order and other accompanying documents that provide for payment of child support, alimony, or division of property. Any accompanying documents must be certified by an official of the issuing court.

- Notification to DFAS can be by regular mail, e-mail, fax or certified mail

- No later than 30 days after effective service, DFAS shall send written notice to the affected member at the last known address

- DFAS may reject any request for direct pay that does not satisfy the statutory requirements

- If the member responds to the notification, DFAS will consider the response and will not honor the court order whenever it is shown to be defective, modified, superseded, or set aside

- No later than 90 days after effective service, DFAS shall make payment to the former spouse and inform him or her of the amount to be paid. If the court order will not be honored, an explanation shall be sent as to why the court order was not honored.

Domestic Abuse Cases

- Allows the former spouse to collect his/her portion of retirement pay (and other benefits) even though the service member does not retire because of adverse action based on domestic abuse

- Requirements:

  -- Court order for portion of disposable retired pay as property settlement

  -- Member eligible by years of service for retirement but loses right to retire due to misconduct involving dependent abuse

  -- Person with court order is either victim of abuse or parent of the child who was the victim of the abuse

- Benefits:

  -- Retirement pay determined by amount member would have received if retired

  -- Other benefits: Base Exchange (BX), Commissary, medical and dental, legal assistance

- Procedures:

  -- DFAS treats just like any other direct payment request

  -- Must still meet 10 year test (10/10 spouse)

Reserve and National Guard Retirement

- Typically deferral of payment until 60 years old needs to be considered in divorce situations

- Early Retirement:

  -- Reserve retired pay age may be reduced below age 60 by 3 months for each aggregate of 90 days active duty performed in support of a contingency during the same fiscal year

  -- The age for retired pay cannot be reduced below the age of 50

-- Most active duty time qualifies, including training, operational support duties and school tours, provided such active duty is performed under the authority of 10 U.S.C. Code § 12301(d)

Eligibility for Military Benefits

- 20/20/20 Spouse:

  -- An unremarried former spouse receives medical, commissary, BX, and theater privileges under morale, welfare, and recreation (MWR) if qualifies as a 20/20/20 spouse:

    --- He or she was married to the military member for at least 20 years at the time of the divorce, dissolution or annulment

    --- The military member has performed at least 20 years of service that is creditable in determining eligibility for retired pay (the member does not have to actually be retired from active duty); and

    --- The former spouse was married to the member during at least 20 years of member's retirement-creditable service

- 20/20/15 Spouse:

  -- An unremarried former spouse may be eligible for limited medical benefits (but not BX or Commissary privileges) if qualifies as a 20/20/15 spouse:

    --- He or she was married to the military member for at least 20 years at the time of the divorce, dissolution or annulment

    --- The military member has performed at least 20 years of service that is creditable in determining eligibility for retired pay (the member does not have to actually be retired from active duty); and

    --- The former spouse was married to the member during at least 15 years of member's retirement-creditable service

- Restoration of Benefits:

  -- Qualifying former spouses who have remarried may receive a restoration of some benefits upon the termination of that marriage by divorce or death. Medical benefits, however, are lost forever upon remarriage, unless the marriage is annulled.

References

Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408
10 U.S.C. § 1072, 1076, 1086a, 1413a, and 1414
10 U.S.C. § 12301(d)
32 C.F.R. Part 63.6
AFI 36-3026_IP, Volume 1, *Identification Cards for Members of the Uniformed Services, Their Family Members, and Other Eligible Personnel* (17 June 2009)
DD Form 2293, *Application for Former Spouse Payments from Retired Pay* (September 2013)

ENSURING THE FAIR HANDLING OF DEBT COMPLAINTS AGAINST SERVICE MEMBERS

Service members have the same legal rights under state and federal law as civilian consumers. It is important for commanders to understand that both law and Department of Defense (DoD) policy make a distinction between dealing with third parties who are "creditors" whom the debt originated with, and "debt collectors" who are in the business of collecting debts for another person or business.

- The Fair Debt Collection Practices Act (FDCPA) is a federal law that regulates how debts may be collected. The FDCPA regulates debt collection agencies and attorneys and does not apply to original creditors. A creditor is defined as a person or entity to whom or which a debtor owes money. Most major creditors, particularly credit card companies, have adopted collection policies that do not violate federal law. Original creditors are also regulated by state laws which may closely follow the FDCPA.

  -- Debt collectors are in the business of collecting debts that are owed to creditors. This includes individuals, collection agencies, lawyers who collect debts on a regular basis, and companies that buy delinquent debts and then try to collect them. Debt collectors are strictly limited in how they conduct their activities, under both under the FDCPA and state law. Therefore, if a debt collector's conduct violates the FDCPA, as noted in the following sections, it may also violate applicable state law.

- Specific procedures for commanders to address cases alleging personal financial indebtedness are outlined in AFI 36-2906, *Personal Financial Responsibility*

Debt Collector Communications with the Chain of Command

- The purposes of the FDCPA are to: (1) eliminate abusive debt collection practices; (2) ensure that those collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and (3) to promote consistent state action to protect consumers against debt collection abuses

- Accordingly, debt collectors are generally **prohibited** from contacting third parties—including commanders and first sergeants—without a court order or the debtor's prior consent given directly to the debt collector. This is because the debt collector should be dealing directly with the service member/debtor. There are two limited exceptions to this rule:

  -- First, a creditor or debt collector can call and ask for the member's contact information, but they are not permitted to identify themselves as someone calling regarding a debt

- -- Second, if the member has given them written permission after the debt was created

- Under these exceptions, debt collectors may only contact the command section and then only once. Absent these circumstances, a debt collector should not be contacting the command section.

- Furthermore, under DoD policy, the chain of command's assistance in indebtedness matters shall not be extended to any creditors:

  - -- Who have not made a bona fide effort to collect the debt directly from the member;

  - -- Whose claims are patently false and misleading; or

  - -- Whose claims are obviously exorbitant

Debt Collector Communications with the Service Member/Debtor

- A debt collector is allowed to directly contact and communicate with a debtor, but the FDCPA limits where, when, and how these communications may occur. The FDCPA requires a debt collector to furnish a debtor with written notice of the debt within five days after first communicating with him/her.

  - -- The notice must identify the debt, the creditor, and how the debtor can require the debt collector to verify the debt (if the debtor believes payment has already been made or the amount of the debt is incorrect)

- If the debtor chooses to dispute the existence or amount of the debt, he/she must do so within 30 days of receiving this notice. Once a debt is disputed, the debt collector must stop communicating with debtor until the debt is verified and a copy of that verification is mailed to the debtor.

  - -- A debtor who refuses to pay a debt should make those intentions known to the debt collector in writing

  - -- Once the debt collector has written notification that the debtor does not plan to pay the debt, he/she should cease communications with the debtor. The debt is not forgotten, however, and a debt collector can still file a lawsuit to recover the amount that is owed. A debt collector may still communicate with a debtor for the limited purpose of notifying him/her of plans to pursue a lawsuit.

Prohibited Debt Collector Communications

- The FDCPA prevents debt collectors from a number of illegal actions:
  - -- Harassing the alleged debtor or others
    - --- Includes threats of violence, use of obscene language, repeated or continuous phone calls, and threats to contact third parties
  - -- Debt collectors cannot contact the alleged debtor at unusual hours, such as before 0800 or after 2100
  - -- Failure to send the required notice
    - --- When a debt collector first contacts the alleged debtor, they must notify him or her within 5 days of (1) the amount of the debt, (2) name of the original creditor, (3) the right to dispute the debt, (4) the right to obtain validation of the debt, and (5) the right to obtain the name and address of the original creditor
  - -- Continuing to contact the consumer after receiving a notice from the consumer to cease all communication
    - --- If you notify a debt collector in writing to cease all further contact with you, their failure to honor this demand is a violation of FDCPA
  - -- Revealing the debt to third parties
    - --- Third-party contacts are generally unauthorized
  - -- Calling the consumer's place of employment
  - -- Threatening dire consequences if the consumer fails to pay
    - --- Some debt collectors may falsely threaten lawsuit or other action that they do not intend to take. Others falsely threaten arrest or the seizure of property.
    - --- Creditors can obtain a judgment against the debtor for the debt they owe, but the creditor must first notify the debtor of the court action

Remedies for Affected Service Members

- If a debt collector has violated the law, the debtor has the right to sue the collector in state or federal court within 1 year of the date the law was violated

- Any problems in dealing with debt collectors should be reported immediately to the base legal office. Additionally, service members may contact the Consumer Financial Protection Bureau, the state Attorney General's Office, and the Federal Trade Commission for further assistance.

- Service members have the right to dispute a debt listed on their credit report, and to request a free copy of their credit report, in accordance with the Fair Credit Reporting Act

- Service members should consult with a legal assistance attorney before making payments to a debt collector and to find out more about their rights under applicable law

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References

Fair Debt Collection Practices Act, 15 U.S.C. § 1692, as amended by Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203 § 1089

Fair Credit Reporting Act, 15 USC §§ 1681 *et seq.*

DoDI 1344.09, *Indebtedness of Military Personnel* (December 8, 2008)

AFI 36-2906*, Personal Financial Responsibility* (30 May 2013)

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CHAPTER ELEVEN: CIVIL LAW ISSUES FOR THE COMMANDER

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NATIONAL DEFENSE AREAS

Air Force commanders are charged with responsibility for protecting Department of Defense (DoD) resources under their control. The responsibility is not limited to resources located on federal land under DoD jurisdiction, but applies to such resources wherever they are located, whether on or off a military installation. For the most part, commanders rely on federal, state, and local civil authorities to protect off-base assets. However, when civil authorities are unavailable, unable, or unwilling to provide protection, it may be necessary to establish a National Defense Area (NDA), thereby enabling direct military protection of the assets concerned. The installation commander is ultimately responsible for the protection of military equipment, property, information, or personnel in the United States and its territories. If they are at risk off a military installation, the installation commander may declare an NDA to contain and secure the federal government resources.

- Definition: An NDA is an area established on non-federal lands and lands under the control of federal agencies other than the DoD located within the United States, its territories, or possessions for the purpose of safeguarding classified defense information or protecting DoD equipment or material

  -- Establishment of an NDA temporarily places the land concerned under the effective control of the DoD

- Commanders of major commands, numbered air forces, wings, groups, installations, and designated DoD incident commanders for major accident responses, all have authority to establish NDAs

  -- Once established, the commander has authority/responsibility to define the boundary, mark it with an appropriate barrier, and post warning signs

Rules For Establishing an NDA

- NDAs may only be established within the United States, its possessions, or territories. They are not applicable in overseas areas.

- NDAs may only be established under emergency situations

  -- Examples include aircraft crashes, emergency landings by aircraft carrying nuclear weapons, emergency diversions of military aircraft to civilian airports, and accidents involving temporary immobilization of nuclear weapons ground convoys

  -- Planned rest stops are not emergencies

- Size, shape and location of the NDA must be reasonably related to what is needed to protect the resource concerned
    - -- Boundaries should be clearly defined, preferably by some form of temporary barrier, such as rope or wire
    - -- Warning signs should be posted at each entry control point and along the boundary
- To the extent possible, the consent and cooperation of the landowner should be sought when establishing an NDA
    - -- However, military necessity ultimately drives the location, size, and shape of an NDA, and it may be established with or without the owner's consent
- Because the NDA effectively deprives the landowner of the use of the property during the period the NDA is in existence, the Air Force may have to compensate the landowner for the temporary "taking" of the property
- Commanders should consult with their servicing staff judge advocate (SJA) when deciding to establish, disestablish, or modify an NDA

Airspace Considerations

- If a commander determines it is necessary to establish a NDA, the commander should also consider whether airspace restrictions are necessary
- If airspace restrictions are deemed necessary, commanders may request the Federal Aviation Administration (FAA) impose a Temporary Flight Restriction (TFR)
    - -- TFRs are regulatory actions issued via a Notice to Airmen (NOTAM) to restrict certain aircraft from operating within a defined area, on a temporary basis
- FAA regulatory guidance pertaining to TFRs is located primarily in 14 C.F.R. Part 91, specifically Sections 91.137 – 91.145
    - -- One section likely to be applicable when a NDA is established is 91.137, *Temporary Flight Restrictions in the Vicinity of Disaster/Hazard Areas*, which authorizes a TFR to be established in order to (among other things) "[p]rotect persons and property on the surface or in the air from a hazard associated with an incident on the surface" (14 C.F.R. § 91.137(a)(1))

- In addition, pursuant to 14 C.F.R. § 99.7, *Special Security Instructions*, the DoD can request a TFR for a "defense area"

  -- A "defense area" for purposes of this C.F.R. provision is any airspace of the United States "in which the control of aircraft is required for reasons of national security" (14 C.F.R. § 99.3)

- The FAA may impose TFRs for a number of reasons, to include reasons of national security (see FAA Advisory Circular (AC) No. 91-63C, *Temporary Flight Restrictions*). AC 91-63C clearly states that a TFR can be requested by, among other entities, a military command.

Enforcement

- Commanders have the authority to prohibit entry into NDAs and to remove those who enter without authority, using the minimum force reasonably necessary to prevent violation of the NDA and to protect the DoD resources concerned

- Apprehension or detention of civilian personnel who violate the security requirements of the NDA should normally be done by civilian law enforcement authorities

- If civil authorities cannot or will not provide assistance, on-scene military personnel may detain civilian violators or trespassers and escort them from the NDA

- Civilian offenders detained by military personnel should be released to proper civil authorities as quickly as possible; coordinate with the servicing SJA

- Military action to detain civilian violators is limited to the NDA and the immediate boundary area

  -- Pursuit of civilian offenders by military authorities beyond the immediate area should be left to the responsibility of civil law enforcement authorities

- Observed violations of FAA-imposed TFRs should be reported to the FAA for enforcement action

Media Relations

- Incident commanders should be sensitive to interests of the media, and should limit photography only as much as necessary to protect classified information

  -- For example, rather than prohibiting all photography, it may be sufficient to simply limit photography to those angles or distances which would not result in exposure of classified information

- Media representatives should be briefed on appropriate disclosable information during a nuclear accident or incident and the procedures to be followed, such as escort requirements

- If the off-base site is designated as an NDA, support news media representatives as on a military installation

- <u>If an NDA has been established</u>, military authorities may use reasonable force to prevent photography by anyone within the NDA, to apprehend or detain offenders, and to seize film and equipment

  -- If photography is done from outside the NDA, civilian authorities should handle the matter

- <u>If an NDA has not been established</u>, military authorities at off-base locations may not use force, but should ask civilian law enforcement officials to stop further filming of exposed classified information, and to collect all photographs already taken

- If civil authorities are unwilling or unable to assist, the commander concerned should contact the managing editor or director of the news agency employing the photographer, request return of the film suspected of containing classified information, and explain that failure to return the film may constitute a violation of federal law

References

18 U.S.C. § 1382

50 U.S.C. § 797

14 C.F.R. 99.3, 99.7

DoDI 5200.08, *Security of DoD Installations and Resources* (10 December 2005), incorporating through Change 3 (20 November 2015)

Directive-Type Memorandum (DTM) 09-012, *Interim Policy Guidance for DoD Physical Access Control* (8 December 2009), incorporating through Change 6 (20 November 2015)

AFI 10-2501, *Air Force Emergency Management (EM) Program Planning and Operations* (19 April 2016)

AFI 31-101, *Integrated Defense* (FOUO) (8 October 2009)

AFI 31-118, *Security Forces Standards and Procedures* (5 March 2014), incorporating Change 1 (2 December 2015)

AFI 35-101, *Public Affairs Responsibilities and Management* (12 January 2016)

AFI 35-104, *Media Operations* (13 July 2015)

FAA Advisory Circular (AC) No. 91-63C, *Temporary Flight Restrictions* (20 May 2004)

POSSE COMITATUS

The Posse Comitatus Act

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

Punishment for Violations

- Possible sanctions for violating the Posse Comitatus Act
  - -- Fine and/or 2 years imprisonment
  - -- Suppression of evidence illegally obtained
    - --- Court may let the accused go free
    - --- So far, the courts have been reluctant to grant this remedy. However, in recent cases, some courts have warned that repeated violations of the Posse Comitatus Act could lead to application of the exclusionary rule in some cases.

What Posse Comitatus Prohibits

- Prohibitions: The armed services are precluded from assisting local law enforcement officials in enforcing civilian laws, except where authorized by the Constitution or act of Congress
  - -- By its terms, the Act applies only to the Army and Air Force
  - -- The Navy and Marine Corps follow the Act by Department of Defense (DoD) policy (policy enacted pursuant to Congress's direction)
  - -- The Act applies to the Reserves and to the National Guard while in Title 10 (federal) service, but not to the National Guard while in Title 32 or State Active Duty (SAD) status
  - -- The Act **DOES NOT** apply to the Coast Guard
- Does not apply to off-duty conduct, unless induced, required, or ordered by military officials

- The act does not apply to civilian employees, unless acting under the direct command and control of a military officer

Exceptions to Posse Comitatus

- Statutory Exceptions: By its terms, the Act does not preclude support "expressly authorized by the Constitution or Act of Congress." Congress has enacted a number of statutory provisions falling into this category.

- Several statutes authorize the military to engage in actions that would otherwise violate the Posse Comitatus Act

  -- 10 U.S.C. § 371:

    --- Allows the military to provide to local law enforcement officials any law enforcement information collected "during the normal course of military training or operations"

    --- Requires the military to consider the needs of local law enforcement when planning training missions

    --- Moreover, it mandates turning over information relevant to drug operations unless doing so would threaten national security

  -- 10 U.S.C. § 372:

    --- Allows the military to loan any equipment, base facility, or research facility to local law enforcement, although the military may charge for its use (see 10 U.S.C. § 377)

    --- Loan of "arms, ammunition, tactical-automotive equipment, vessels and aircraft" requires proper coordination

  -- 10 U.S.C. § 373:

    --- Makes military personnel available to train federal, state, and local civilian law enforcement officials on operation and maintenance of equipment properly loaned under 10 U.S.C. § 372, and to provide expert advice to such officials

-- 10 U.S.C. § 374:

--- Allows the Secretary of Defense to make military personnel available to operate and maintain loaned equipment under 10 U.S.C. § 372

- The military is still prohibited from enforcing civilian laws. The military may not participate in a search, seizure, arrest, or similar activity in support of local law enforcement unless participation in such activity is otherwise authorized by law (10 U.S.C. § 375).

  -- The military can execute the civilian laws on the installation for a military purpose

  -- Even on the installation, the military "detains" civilians before turning them over to civil authorities. The military does not arrest or apprehend civilians. This is a critical distinction.

- The military may engage in *humanitarian acts* such as looking for a lost child or rescuing civilians from a destroyed building

  -- However, the courts will examine humanitarian acts to ensure the military is not engaging in a subterfuge to disguise a Posse Comitatus Act violation

Posse Comitatus is Still a Modern Problem

- Despite the fact that the law's origins go back to the Civil War, Posse Comitatus is still an issue that surfaces fairly frequently

- For example, in the immediate aftermath of the Oklahoma City bombing, the Posse Comitatus Act was determinative in responding to civilian law enforcement agency requests for assistance from the military

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References

10 U.S.C. § 371
10 U.S.C. § 372
10 U.S.C. § 373
10 U.S.C. § 374
10 U.S.C. § 375
The Posse Comitatus Act, 18 U.S.C. § 1385
DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies* (27 February 2013)
AFI 10-801, *Defense Support of Civil Authorities* (23 December 2015)
AFI 31-118, *Security Forces Standards and Procedures* (5 March 2014), incorporating Change 1, 2 December 2015

AIR FORCE SAFETY AND ACCIDENT INVESTIGATIONS

Introduction

- AFI 91-204, *Safety Investigations and Reports*, and AFI 51-503, *Aerospace and Ground Accident Investigations*, are the two most important instructions dealing with investigating accidents involving aircraft, missiles, or nuclear resources
    - -- Additionally, AFI 51-503 deals with investigating accidents occurring on land and on water, not involving aircraft, missiles or other aerospace assets
- Safety investigations, conducted by a safety investigation board (SIB), determine cause to prevent future mishaps
- The deliberations, opinions, and conclusions of investigators and any evidence from witnesses and contractors given under a promise of confidentiality are in Part II of the safety mishap report
    - -- Part II is privileged and not releasable outside safety channels
- Aircraft accident investigations, conducted by an accident investigation board (AIB), and ground accident investigations, conducted by a ground accident investigation board (GAIB), provide fully releasable reports, which include the non-privileged Part I of the safety mishap report, and preserve evidence for litigation, claims, disciplinary action and adverse administrative action
- By providing an alternate source of non-privileged information for use outside safety and operational channels, the integrity of the safety privilege is protected

Safety Investigations under AFI 91-204

- A SIB is composed of a board of officers or an investigating officer
    - -- **NOT** for disciplinary actions, line-of-duty determinations, flying evaluation boards, litigation, claims, or assessing pecuniary liability (for or against the government)
    - -- Witnesses are not sworn
    - -- A SIB may offer a promise of confidentiality to witnesses or contractors if necessary and authorized

-- A safety report is barred from use in claims and litigation for or against the United States even if it favors the Air Force

-- In *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984), the Supreme Court upheld the privileged nature of safety reports (Part II)

Potential Problems with Safety Investigations

- Misunderstanding: Misunderstanding the purpose and use of information

- Interface with Accident Investigators:

  -- Part I of the safety report consists of non-privileged factual information and is releasable to the accident investigators

  -- The safety investigation has priority over the accident investigation on wreckage, witnesses, and documents

- Talking to the Next of Kin (NOK) of Mishap Victims:

  -- Relatives should speak with the family liaison officer appointed by the commander

  -- Do not discuss mishap responsibility, legal liability, classified information, or cause factors. The AIB president or GAIB president will brief the AIB or GAIB report to NOK and discuss any causal findings at that time.

  -- Provide non-privileged information only

  -- Use caution: it is easy to invite claims and lawsuits

- Requests for Information:

  -- Determine whether the requester is asking for the SIB report or a GAIB or AIB report

  -- For SIB reports, the disclosure authority is the Commander, Air Force Safety Center. The office of primary responsibility (OPR) is HQ AFSEC/JA.

  -- For AIB and GAIB reports, direct requests to the convening authority responsible for initiating the investigation

- Appearance of Improper Use: Creating the appearance of improper use of privileged safety information for disciplinary actions, flying evaluation boards, etc.

  -- Imperative that commanders have "clean hands"

  -- Document where you got the information to take action

- Criminal Misconduct: Safety investigations and potential courts-martial

  -- Obtaining a conviction is extremely difficult if a safety investigation precedes the court-martial. The defense often requests the privileged portion of the report, resulting in potential litigation over its release.

  -- If substantial evidence of criminal misconduct is present and the mishap cause is readily apparent, the convening authority should delay the SIB and proceed with the AIB or GAIB

Accident Investigations

- Accident investigations under AFI 51-503 are required in all Class A accidents except Class A accidents in which remotely piloted subscale aircraft and aerial targets are destroyed or in cases resulting in only damage to government property and the aircraft is not destroyed

  -- Class A accidents include:

    --- Cases where an injury or occupational illness results in a fatality or permanent total disability

    --- Cases where an Air Force aerospace asset is destroyed

    --- Cases with a probability of high public interest

    --- Mishaps when claims and litigation are anticipated for or against the U.S. Government or a U.S. Government contractor as a result of the mishap

    --- Mishaps causing significant civilian property damage

- Accident investigations otherwise not required may be convened at the convening authority's discretion for any occurrence considered an "accident" or "mishap"

Accident Investigation Responsibilities:

- Convening Authority: The MAJCOM commander who convened or would have convened the preceding safety investigation under AFI 91-204, delegable to the major command vice commander

  -- Convenes investigation

  -- Ensures appropriate condolence letters are sent to NOK. Also, sends letter to the NOK of deceased and seriously injured personnel explaining process and status of ongoing investigations and of any planned NOK briefings.

  -- Funds costs associated with conducting AIB

  -- Determines what accident information may be released to the public prior to completion of the AIB Report

  -- Approves the AIB report and public affairs office (PA) notification and release plan

  -- High-interest mishaps (defined in para. 7.3 of AFI 51-503) must be coordinated and staffed by the convening authority's staff judge advocate through AFLOA/JACC and AF/JA for review by the Secretary of the Air Force (SecAF) and the Chief of Staff of the Air Force (CSAF) and the Chief of Staff at least 4 duty days prior to public release and NOK briefing

- Installation Commander:

  -- Appoints a host installation liaison officer to assist the AIB in obtaining accommodations and administrative support, as well as arranging witness interviews

  -- Provides in-house facility, communications, supply, photography, and billeting support for the AIB

  -- Removes and stores wreckage from the mishap site at the direction of the convening authority until AFLOA/JACC releases it from legal hold

  -- Assists the convening authority with initial cleanup of the mishap site

-- GAIB reports do not usually contain a statement of opinion, unless specifically authorized in advance by AFLOA/JACC

--- Unlike AIBs, opinions of GAIB board presidents are not statutorily protected and may affect the United States in litigation

--- A well-documented, thorough GAIB report should allow facts to speak for themselves in most instances

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References

United States v. Weber Aircraft Corp., 465 U.S. 792 (1984)

AFI 51-503, *Aerospace and Ground Accident Investigations* (14 April 2015)

AFI 91-204, *Safety Investigations and Reports* (12 February 2014), corrective actions applied on 10 April 2014, including AFI 91-204_AFGM2016-02, 11 January 2016

ADMINISTRATIVE INQUIRIES AND INVESTIGATIONS

Commanders may be involved in or supervise several different types of investigative procedures. Reprisal against an individual for making a complaint is prohibited under 10 U.S.C. § 1034.

Inherent Authority to Investigate

- All commanders possess inherent authority to investigate matters or incidents under their jurisdiction

- Authority to investigate is incident to command

- Air Force policy is that inquiries and investigations will be conducted by the echelon of command capable of conducting a complete, impartial, and unbiased investigation

- Commanders shall not investigate allegations concerning reprisal or restriction

- When a specific regulation does not apply, the investigation is conducted under the commander's inherent authority

  -- AFI 90-301, *Inspector General Complaints,* provides guidance (e.g., procedures, format) on how to conduct a commander directed investigation or inquiry but AFI 90-301 **SHOULD NOT** be cited as the authority for the investigation or inquiry

Investigations Governed by Air Force Instructions

- AFI 90-301 provides guidance for investigations and inquiries

  -- Only the Inspector General's Office (IGs) may investigate allegations concerning reprisal and restriction

  -- IG directed inquiries and investigations are privileged documents

    --- The Inspector General controls release of those documents in accordance with Freedom of Information Act (FOIA) and Privacy Act (PA) requirements

- Other administrative investigations and inquiries, such as flying evaluation boards, aircraft mishap, ground accidents, reports of survey, line of duty determinations, etc., are governed by specific regulations (see the reference list at the end of this section for a sampling)

Investigation Procedures

- Often conducted by a single investigating officer (IO) who is equal or senior in grade to the subject(s); and who gathers all necessary evidence (facts, documents, witness testimony) to help the appointing authority make an informed decision

- Generally, the standard of proof for administrative investigations and inquiries is by the preponderance of the evidence

- If the matter is more properly in the domain of Security Forces or the Air Force Office of Special Investigations (AFOSI) (suspected criminal activity, etc.), have them conduct the investigation

- Always consult with the servicing staff judge advocate before directing any inquiry or investigation

- The Chief of Staff of the Air Force (CSAF) Hand-Off Policy requires a person-to-person hand-off of all subjects, suspects, and distraught witnesses following investigative interviews. The individual's commander or designee must be physically present immediately following the interview to receive the hand-off, and this hand-off must be documented at the end of the testimony.

- Inquiry Versus Investigation:

  -- INQUIRY: Determination of facts on matters not usually complex or serious; inquiries may be handled through routine channels, and reports may be summarized

  -- INVESTIGATION: Appropriate for serious, complex matters requiring a determination of extensive facts. Investigations conducted under the commander's inherent authority should include a written report. Normally, exhibits and sworn witness testimony support the facts that are determined.

Witnesses

- Must be advised of the nature of the investigation and, if applicable, their right to counsel

- Military members and Department of Defense (DoD) civilian employees have a duty to testify but may refuse to answer questions that are self-incriminating (by invoking Article 31 of the UCMJ or Fifth Amendment rights)

- *Weingarten Rights* for civilian employees may apply (see Chapter 15, Civilian Personnel and Federal Labor Law, for more information)

- IOs have no authority to grant express promises of confidentiality to subjects, suspects, complainants, or witnesses

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References

Freedom of Information Act, 5 U.S.C. § 552
Privacy Act, 5 U.S.C. § 552a
10 U.S.C. § 1034
NLRB v. Weingarten, 420 U.S. 251 (1975)
DoD 5400.7-R_AFMAN 33-302, *Freedom of Information Act Program* (21 October 2010), incorporating through Change 3 (16 May 2016)
AFMAN 23-220, *Reports of Survey for Air Force Property* (1 July 1996)
AFI 11-402, *Aviation and Parachutist Service, Aeronautical Ratings and Aviation Badges* (13 December 2010), certified current 5 February 2013
AFI 31-115, *Security Forces Investigations Program* (10 November 2014)
AFI 33-332, *Air Force Privacy and Civil Liberties Program* (12 January 2015)
AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011
AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay* (8 October 2015)
AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (8 July 2014)
AFI 51-503, *Aerospace and Ground Accident Investigations* (14 April 2015)
AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice* (28 July 2015)
AFI 71-101, V-1, *Criminal Investigations Program* (8 October 2015), certified current 17 December 2015
AFI 71-101, V-2, *Protective Service Matters* (23 January 2015), certified current 17 December 2015
AFI 90-301, *Inspector General Complaints Resolution* (27 August 2015)
AFI 91-204, *Safety Investigations and Reports* (12 February 2014), corrective actions applied on 10 April 2014, including AFI91-204_AFGM2016-02 (11 January 2016)

ALLEGATIONS AGAINST SENIOR OFFICIALS AND COLONELS (OR EQUIVALENTS)

AFI 90-301, *Inspector General Complaints Resolution*, Chapters 4 and 5, establish strict reporting and investigation standards for allegations against senior officials.

Senior Officials

- Senior Officials Include:

  -- Active or retired Regular Air Force, Air Force Reserve, or Air National Guard military officers in the grade of O-7 select and above

  -- Air National Guard Colonels with a Certificate of Eligibility (COE)

  -- Current or former members of the Senior Executive Service (SES) or equivalent

  -- Current and former Air Force civilian Presidential appointees

- Investigative Policy: Unless otherwise specified by SAF/IG, all investigations into non-criminal allegations against senior officials will be conducted by SAF/IGS

- Reporting Policy: When a commander, civilian leading an organization (in accordance with AFI 38-101, *Air Force Organization*) or an inspector general (IG) receives an allegation of wrongdoing or adverse information involving a senior official, it must be reported to SAF/IGS immediately

  -- Adverse Information: Defined by DoD policy as:

    --- A substantiated adverse finding or conclusion from an officially documented investigation or inquiry; or

    --- Any credible information of an adverse nature

      ---- To be credible, the information must be resolved and supported by a preponderance of the evidence

      ---- To be adverse, the information must be derogatory, unfavorable, or of a nature that reflects unacceptable conduct, or lack of integrity or judgment on the part of the individual

---- For the purposes of this definition, the following types of information are not considered adverse:

----- Motor vehicle violations that did not ***require*** a court appearance

----- Minor infractions without negative effect on an individual or the good order and discipline of the organization that was not identified as a result of substantiated findings or conclusions from an officially documented investigation, and did not result in more than a non-punitive rehabilitative counseling administered by a superior to a subordinate

--- Adverse information does not include:

---- Information previously considered by the Senate pursuant to the officer's appointment

---- Information attributed to an individual 10 or more years before the date of the personnel action under consideration, except for incidents, which if tried by court-martial, could have resulted in the imposition of a punitive discharge and confinement for more than 1 year

-- IG officials who receive allegations against an Air Force senior official may inform their commanders only of the general nature of the allegations and the identity of the person against whom the allegations were made, without revealing the source of the allegations

-- Senior Officer Unfavorable Information File (SOUIF): A SOUIF is a written summary of adverse information about an officer, documentation of the command action, and any comments from the subject officer. The SOUIF is created solely for use during the general officer promotion/federal recognition process.

Colonels (or Equivalents)

- Colonels or Equivalents Include:

  -- Regular Air Force, Air Force Reserve, or Air National Guard officer in the grade of O-6

  -- An officer who has been selected for promotion to the grade of O-6, but has not yet assumed that grade

  -- An Air Force civil service employee in the grade of GS-15

- Reporting Policy: When a commander, civilian leading an organization (in accordance with AFI 38-101), or an IG receives an allegation of wrongdoing or adverse information (which is not obviously frivolous) involving a colonel or equivalent, it must be reported to SAF/IGQ immediately through their MAJCOM, forward operating agency (FOA), or designated reporting unit (DRU) channels

Military Equal Opportunity (MEO) Complaints

- MEO complaints against senior officials must be immediately referred to SAF/IGS

- MEO complaints against colonels (or equivalents) must be referred to the local IG (or SAF/IGQ if there is no local IG)

- SAF/IGS does not investigate civilian equal employment opportunity (EEO) or sexual harassment allegations against senior officials, those matters will be worked within the appropriate EEO channels. SAF/IGS does, however, investigate other military equal opportunity MEO allegations against senior officials.

References

AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011

AFI 38-101, *Air Force Organization* (16 March 2011)

AFI 90-301, *Inspector General Complaints Resolution* (27 August 2015)

FLYING EVALUATION BOARDS

Aircrew members have an obligation to maintain professional standards. When performance of rated duty becomes suspect, a flying evaluation board (FEB) may be convened.

- Applies to rated officers, Career Enlisted Aviators (CEAs), and non-rated officer, enlisted aircrew members and civilian government employees only

- FEBs are administrative, fact-finding proceedings conducted to ensure information relevant to an aircrew member's aviation and professional qualification is reviewed and discussed in a fair and impartial manner. The proceedings are not adversarial and are closed to the public.

- FEBs are not a substitute for disciplinary or other administrative action

Reasons to Convene a Flying Evaluation Board

- Suspension or disqualification from aviation service for more than 8 years

- Lack of proficiency (unless enrolled in a formal flying training program)

- Failure to meet training standards while enrolled in a U.S. Air Force formal flying training course

- Lack of judgment in performing rated duties

- Failure to meet ground/flying training or annual physical exam requirements

- Intentional violation of aviation instructions or procedures

- Aircrew member exhibits habits, traits of character, or personality characteristics that make it undesirable to continue using the aircrew member in flying duties

Composition of a Flying Evaluation Board

- A flying unit commander (wing or comparable level) normally convenes an FEB

- Three rated voting members, qualified for aviation service in an active aviation service code (ASC) and senior in rank to the respondent, will be appointed and will constitute a quorum

  -- Voting members should be in the same aircrew specialty (e.g., pilot, navigator, or flight engineer) as the respondent

  - To the greatest extent possible, at least one voting member should have the same primary duty Air Force Specialty Code (AFSC) as the respondent

- A recorder prepares the case by presenting the evidence and examining the witnesses in a non-adversarial manner

- The senior board member is a voting member and final authority regarding conduct at the board

- Do not appoint the convening authority as a member of the board. A judge advocate may advise the recorder but shall not be appointed as an assistant recorder.

  - The judge advocate may not be present during closed sessions

- Do not appoint enlisted members to FEBs convened for officers, or officers to FEBs convened for enlisted members

- One additional aircrew member is appointed to act as a nonvoting recorder

- A judge advocate may be appointed as a nonvoting legal advisor to advise on procedural matters and ensure a fair hearing. If appointed, a judge advocate may not be present at board sessions.

- A flight surgeon may be appointed as a nonvoting member when a medical problem may be a significant contributing factor

Flying Evaluation Board Procedures and Guidelines

- Notify the respondent in writing

  - Notification letter contains the reasons for the FEB, when and where the board will meet, witnesses to be called, and rights of the respondent. State the basis for convening the board and all allegations.

  - The respondent must reply within 48 hours (2 duty days)

  - Normally, convene the board within 30 days after the convening authority appoints the board

- Respondent may submit a request for voluntary disqualification from aviation service in lieu of the FEB (VILO) within 5 workdays of receiving the FEB notification letter. FEB action is suspended until the MAJCOM acts on the VILO request.

- Respondent may also request a waiver of FEB to return to previously qualified aircraft if enrolled in flying training

  -- An FEB waiver is considered an FEB action and requires the same coordination and approval as an FEB

  -- FEB waiver process is not an appropriate means to disqualify a member

  -- Convening authority will submit or forward waiver requests through command channels only when convinced the reviewing authorities would recommend the member remain qualified in the aircraft and/or crew position in which he/she was previously qualified

  -- If there is any doubt regarding potential for continued aviation service, direct an FEB

  -- Forward FEB waiver requests through command channels to the MAJCOM commander for final approval

Rights of the Respondent at a Flying Evaluation Board

- Assigned military counsel of his/her own choosing (if available) or civilian counsel (at respondent's expense)

- Informed in writing of the specific reasons for convening the board

- Review all evidence and documents to be submitted to the board by the recorder (before convening the board)

- Challenge voting members for cause

- Cross-examine witnesses called by the board, call witnesses and present evidence (recorder arranges for military witnesses)

  -- Although civilian witnesses may appear, an FEB cannot compel their attendance. Consult with the servicing staff judge advocate as to the procedures to request the presence of civilian Department of Defense (DoD) employees.

- Testify personally and submit a written brief (respondent may not be compelled to testify)

Rules of Evidence

- A FEB is not bound by formal rules of evidence prescribed for courts-martial; however, observing these rules promotes orderly procedures and a thorough investigation

- The decision about the authenticity of documents rests with the senior board member

Findings and Recommendations

- Made in closed session (voting members only)

- Each finding must be supported by a preponderance of the evidence

- Findings must specifically include comment on each allegation or point in question

- Recommendations must be consistent with the findings and generally only address qualification for aviation service (i.e., remain qualified or be disqualified)

  -- If the officer holds more than one aviation qualification, the FEB must make a recommendation as to both qualifications

  -- If the FEB recommends disqualification, it may also recommend whether the officer should be prohibited from wearing the associated aviation badge

- A minority report is appropriate if there is a disagreement among the voting members

Review Process

- The convening authority's staff judge advocate reviews for legal sufficiency; review is limited to sufficiency of the evidence and compliance with procedural requirements

- The convening authority adds comments and recommendations, but must explain any recommendations that are contrary to those of the FEB

- The convening authority or higher reviewer may reconvene the FEB or order a new board

- The MAJCOM commander makes the final determination in all FEB cases convened at the MAJCOM level or lower

Reference

AFI 11-402, *Aviation and Parachutist Service, Aeronautical Ratings and Badges* (13 December 2010), certified current 5 February 2013

COMMERCIAL ACTIVITIES

Private organizations (PO) and unofficial activities/organizations must not engage in activities that duplicate or compete with Army and Air Force Exchange Service (AAFES), activities, or Nonappropriated Funds Instrumentalities (NAFIs). This means POs and unofficial activities/organizations may not engage in frequent or continuous resale activities. However, the installation commander may authorize such things as continuous thrift-shop sales operations, museum shop sales of items related to museum activities, and occasional sales for fund-raising purposes like bake sales, dances, carnivals, or similar occasional functions.

Department of Defense Commercial Sponsorship Program

- Commercial sponsorship is a DoD program that allows commercial enterprises to provide support to morale, welfare, or recreation (MWR) programs in exchange for promotional recognition and access to the Air Force market for a limited period of time. Such sponsorship helps finance enhancements for MWR elements of Services events, activities, and programs.

- There must be one or more bona fide MWR program events for sponsorship to apply

- Membership drives over extended periods can be treated as events for sponsor support and recognition purposes; however, sponsor displays can only be authorized at specific events during the drive

- MWR events appropriate for commercial sponsorship do not include normal day-to-day MWR management and overhead

- Only a Services MWR program may utilize commercial sponsorship

  -- Other Air Force organizations, private organizations, or unofficial activities are not authorized to use commercial sponsorship to offset program or activity expenses nor may they partner with an MWR program to gain access to sponsorship benefits

- Installation commanders control the commercial sponsorship program at base level and approve/disapprove sponsorships worth $5000 or less (or other values as delegated by the major command)

  -- Installation commanders may delegate authority for approval/disapproval of sponsorships and donations valued up to $5,000 to the Mission Support Group (MSG) Ccommander or Force Support Squadron (FSS) commander/director

Unsolicited Commercial Sponsorship

- Unsolicited commercial sponsorship must be entirely initiated by the prospective sponsors or their representatives

- FSS activities may generate sponsor awareness and interest by publishing brochures and leaflets, placing ads in newspapers and magazines, or issuing public affairs-like news releases about the existence and availability of the program. They may also send nonspecific letters as follow-ups to general advertisements.

- Air Force personnel may not provide information about specific needs of the Services MWR program to "encourage" offers of unsolicited sponsorship

- The prospective company and the Air Force will enter into a commercial sponsorship agreement (see AFI 34-108, *Commercial Sponsorship and Sale of Advertising*, Attachment 2)

Solicited Commercial Sponsorship

- Commercial sponsorship "refers to the act of a civilian enterprise providing support to help finance or provide enhancements for MWR elements of Services activities, events, and programs in exchange for promotional consideration and access to the Air Force market for a limited period of time"

- The solicited commercial sponsorship program is the only authorized process for soliciting support for FSS activities, events, or programs defined as MWR

  -- Other sections of FSS as well as other Air Force organizations, units, private organizations, or unofficial activities or organizations are not authorized to use commercial sponsorship nor may they partner with an MWR program to gain access to sponsorship benefits

- The prospective company and the Air Force will enter into a commercial sponsorship agreement (see AFI 34-108, Attachment 2)

- Per AFI 34-108, solicitations are part of the procurement process, and must be done competitively and sent to the maximum number of potential sponsors in a specific product category (except alcohol related companies or defense contractors) after an initial solicitation announcement has been made

  -- The solicitation should inform the maximum number of potential sponsors, being announced in one or more of the following: Fed Biz Opps, local newspapers,

Chamber of Commerce newsletters, or other appropriate business community publications

-- Sponsorship may not be solicited from alcohol companies, or military systems divisions of defense contractors

--- However, unsolicited sponsorship from them may be accepted when approved at the discretion of the commanding authority (i.e., the commanding authority at the installation would be the installation commander)

--- Alcohol company/manufacturer sponsors must also provide a "responsible use" campaign logo/message to be included in all promotional materials and in banner form at the event site

On-Base Commercial Solicitation

- On-base solicitation is a privilege, not a right, granted at the discretion of the installation commander

- Personal commercial solicitation on an installation will be permitted only if the following requirements are met:

  -- The solicitor is duly licensed under applicable laws

  -- The installation commander permits it

  -- A specific appointment has been made with the individual concerned and conducted in family quarters or other areas designated by the installation commander

Sponsor Recognition

- All sponsor recognition must be tied to an MWR activity, event, or program

  -- Post-event recognition will be limited to "Thank you for your support" in ads, monthly publications, web sites, etc.

  -- Recognition for sponsors at places, times, unrelated to the activity, event, or program is prohibited

- Sponsorship recognition is limited to the sponsor's name, logo, and/or a brief slogan. Materials may be displayed in appropriate FSS facilities. Materials may also be displayed in AAFES, Defense Commissary Agency (DeCA), and other appropriate on-installation locations with the approval and coordination of AAFES, DeCA, or other appropriate officials.

  -- The display time for such materials is determined by the length of the event, program, or activity, the value of sponsorship, and the judgment of the entities

- Sponsors may provide event posters and banners identifying the sponsor or its products or services. While all commercial sponsorship signs, banners, etc., must contain disclaimers, normal concession type stands and distribution equipment used by the commercial sponsor do not need disclaimers when they identify the sponsor or its products (e.g., "Brand X Cola") on the dispenser for cola products.

- Housing occupants may operate limited business enterprises while living in base housing limited to the sale of products, minor repair service on small items, limited manufacturing of items or tutoring.

  -- Members must request permission in writing to conduct the commercial activity from the housing office

  -- Occupants must meet local government licensing requirements, agreements, and host country business practices before requesting approval to operate a private business

Prohibited On-Base Commercial Solicitation

- Certain solicitation practices are prohibited on military bases, including, but not limited to:

  -- Soliciting personnel who are on-duty

  -- Soliciting any kind of mass audience, e.g., commanders call or guard mount

  -- Soliciting in housing areas without an appointment

  -- Soliciting door-to-door

- -- Implying DoD sponsorship or sanction
- -- Soliciting members junior in grade
- -- Procuring or supplying roster listings of DoD personnel
- -- Using official ID cards by active duty members, retirees or reservists to gain access for soliciting

Games of Chance

- Bingo and Monte Carlo (Las Vegas) events are controlled by the Air Force Club Program
  - -- Games of chance must not otherwise violate local civilian laws
- Cash prizes may be awarded for bingo in accordance with AFI 34-272, *Air Force Club Program*, para. 3.17
- Play in bingo programs should be limited to eligible patrons, their family members, and guests
- Only non-monetary prizes may be awarded for Monte Carlo events, in accordance with AFI 34-272, para. 3.18
- Play in Monte Carlo events should be limited to club members and their adult family members, members of other clubs exercising reciprocal privileges and their adult family members, and adult guests
- Once a participant purchases a money substitute for a Monte Carlo event, no reimbursement can be made for any unused portion, and money substitutes can't be used to buy resale items, including food and beverages

Raffles

- Occasional and infrequent raffles must be approved in advance by the installation commander, with the staff judge advocate's advice. Raffles must not otherwise violate local civilian laws.
- For more information see Raffles section

References

DoDI 1000.15, *Procedures and Support for Non-Federal Entities Authorized to Operate on DoD Installations* (24 October 2008)

DoDI 1344.07, *Personal Commercial Solicitation on DoD Installations* (30 March 2006)

DoD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

AFI 32-6001, *Family Housing Management* (21 August 2006), incorporating through Change 5, 3 September 2015

AFI 34-101, *Air Force Morale, Welfare, and Recreation (MWR) Programs and Use Eligibility* (28 March 2013), including AFI34-101_AFGM2016-01, 6 May 2016

AFI 34-108, *Commercial Sponsorship and Sale of Advertising* (12 October 2011)

AFI 34-144, *Child and Youth Services* (2 March 2016)

AFI 34-219, *Alcoholic Beverage Program* (4 February 2015)

AFI 34-223, *Private Organizations (PO) Program* (8 March 2007), incorporating Change 1, 30 November 2010, certified current, 4 April 2011

AFI 34-272, *Air Force Club Program* (1 April 2002), incorporating through Change 3, 6 April 2010

AFI 36-3101, *Fundraising within the Air Force* (12 July 2002)

AFMAN 34-228, *Air Force Club Program Procedures* (1 April 2002), incorporating through Change 2, 25 March 2010

MWR AND NONAPPROPRIATED FUND INSTRUMENTALITIES

Morale, Welfare, and Recreation (MWR)

MWR activities are those activities that provide for the comfort, pleasure and mental and physical improvement of authorized users. The activities include recreational and free-time programs, resale merchandise and services, and activities to promote the general interest.

MWR activities are classified under a three-tiered system:

- MWR Category A – Mission support activities that are 100% supported by appropriated funds (APFs): Armed Forces entertainment program overseas, gymnasium/ fitness center/aquatic training/aerobic studios, general libraries, community center, parks and picnic areas, sports/athletics (self-directed, unit level, intramural), unit level programs and activities, Single Service Member Programs, Airmen and Family Readiness Center (A&FRC), isolated/deployed/free admission motion pictures, and common support services

- MWR Category B – Community support activities that are partially supported by APFs: Child development centers, family day care programs, youth programs, recreation swimming pools, automotive skills development, arts & crafts, outdoor recreation programs (organized activities and undeveloped recreation areas), marinas without resale, equipment check out, recreation ticket and tour, amateur radio, government owned or leased riding stables, community programs, service member techno activities, directed outdoor recreation, entertainment (music and theater), bowling centers with less than 16 lanes, and sports competition above the intramural level

- MWR Category C – Revenue generating activities that are not supported at all by APFs: Clubs, golf courses, bowling centers with more than 16 lanes, marinas with resale or private boat berthing, equipment rental, aero clubs, rod and gun clubs, riding clubs, motorcycle clubs, parachute/ sky diving clubs, snack bars, restaurants, catering, audio/photo clubs, amusement machine locations and centers, skating rinks, unofficial commercial travel services, Armed Forces Recreation Centers, cabins/ cottages/cabanas/ recreational guest houses/family camps, bingo, motion pictures (paid admissions), scuba diving, vehicle storage, aquatics center

  -- May be opened to the public if the following conditions are met:

    --- The installation commander determines that adequate facilities are available and they are currently underutilized by higher priority users (must be re-certified every two years with AFPC/CC prior to expiration)

--- Allowing the public to use these facilities is beneficial to both the military members and civilians in the community

--- No conflict exists with federal, state, or local laws (including Status of Forces Agreements)

--- Written agreements are obtained from local businesses of like nature, local government officials, including the chamber of commerce, or other appropriate community leaders indicating they have no objection to expanded use of these programs

--- Authorization is limited to attendance and purchase of food and beverages, and convenience merchandise incidental to participation (such as golf tees and balls)

Nonappropriated Funds (NAF)

Generally, NAF are funds that are not appropriated by Congress and are not furnished from revenue derived from taxation. Although at times APFs can be permanently converted to NAFs, generally NAF are self-generated by Nonappropriated Fund Instrumentalities (NAFIs).

- NAFIs are Department of Defense (DoD) fiscal and organizational entities that exercise control over NAFs and furnish or assist other DoD organizations in providing MWR services

- NAFIs are instrumentalities of the federal government created by Air Force instructions. NAFI employees are federal employees with their own 401(k) plan.

- NAFIs are not incorporated under the laws of any state, but enjoy the legal status of an instrumentality of the United States, i.e., a lawsuit against a NAFI is a suit against the United States. NAFIs are not private organizations established under AFI 34-223, *Private Organizations (PO) Program*.

- The resource management flight chief (RMFC) is the appointed funds custodian responsible for protecting, accounting for and using NAFs

  -- The RMFC is the single custodian for all base level NAFIs, except base restaurants, civilian welfare funds, and some NAFIs at remote or isolated sites

  -- No individual or group has any right to ownership in NAFI assets

- Benefits accrue to persons through participation in NAFI activities and programs

- NAFIs may not generally show movies; sponsor, conduct, or allow gambling; provide or sell alcoholic beverages; hoard or dissipate NAFI assets

- Army and Air Force Exchange Service (AAFES) is the primary source of resale merchandise and services for military personnel, dependents, and other authorized patrons

- NAFIs may engage in resale activities when FSS commander determines AAFES cannot meet the requirement in a responsive manner and the goods or services provided are directly related to the purpose and function of the NAFI involved

  -- There must be a written agreement between the Force Support Squadron (FSS) commander and the regional vice president of the servicing exchange stating AAFES cannot meet the particular requirement

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References

AFI 34-101, *Air Force Morale, Welfare, and Recreation (MWR) Programs and Use Eligibility* (28 March 2013), including AFI34-101_AFGM2016-01, 6 May 2016

AFI 34-201, *Use of Nonappropriated Funds (NAFS)* (17 June 2002)

AFI 34-223, *Private Organizations (PO) Program* (8 March 2007), incorporating Change 1, 30 November 2010, certified current 4 April 2011

RAFFLES

Generally, raffles and other forms of gambling are prohibited on Government property or while on official duty, per DoDI 5500.07-R, *Joint Ethics Regulation (JER)*, section 2-302. This includes the Pentagon, Navy Annex, or General Services Administration (GSA) leased or owned buildings under 32 C.F.R. 234.16 and 41 C.F.R. 102-74.395.

- Officially recognized private organizations, as defined in AFI 34-223, *Private Organization Program,* may engage in raffles if they meet the requirements outlined below and in the AFI

- The installation commander may authorize occasional events for fund-raising purposes

  -- The approval may be delegated to the mission support group commander or the FSS/CC/CL

  -- "Occasional" is defined as not more than two per quarter, per AFI 34-223

- <u>All Private Organization Raffles Must</u>:

  -- Not duplicate or compete with activities of the Army and Air Force Exchange Service (AAFES) or Service Nonappropriated Funds Instrumentalities (NAFIs)

  -- Not directly solicit funds for their organization on base

  -- Not be co-sponsored by the U.S. Air Force

  -- Cannot use the Department of Defense (DoD) Moral, Welfare, Recreation (MWR) commercial sponsorship program

  -- Not give the appearance of installation endorsement or special treatment to the donors/givers involved

  -- Comply with the provisions of AFI 34-223, para. 10.16

- <u>AFI 34-223, para. 10.16., Requires All Private Organization Raffles</u>:

  -- Be reviewed by the staff judge advocate (SJA)

  -- Comply with the law of the city, county, state, or country in which the installation is located and comply with any applicable requirements of such laws

- -- Cannot be for purely social, recreational, or entertainment purposes that benefit only individual private organization members and/or their families

- -- Must serve a charitable, civic, or other community welfare purpose within the DoD community and which direct benefits DoD personnel and/or their family members

- -- Must identify the purpose of the funds raised and the beneficiaries

- -- Must not be officially endorsed or supported except as permitted by JER sections 3-210 and 3-211

- -- Not be conducted in the workplace

- -- Not be conducted by military members or civilian employees on duty time

- 5 C.F.R. 950.602 currently permits raffles and lotteries in support of the Combined Federal Campaign, ***but those rules are changing*** so consult with the SJA and updates to AFI 36-3101, *Fundraising within the Air Force,* before submitting any request for approval

- AFI 36-3101, para. 22.1., permits "special events" in support of the Air Force Assistance Fund (AFAF) campaign, but such events must comply with Federal, State and local laws and must not amount to gambling which is defined as:

  - -- Betting something of value (usually money);

  - -- In a game of chance;

  - -- That offers a reward or prize.

- For instance, a drawing using AFAF pledge slips, when it is clear there is no monetary contribution required to enter (i.e., one could enter the drawing merely by writing their name on a pledge slip), is not gambling because the participants are not required to furnish consideration to enter the drawing

References

5 C.F.R. § 950.602

32 C.F.R. § 234.16

41 C.F.R. § 102-74.395

DoD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

DoD Standards of Conduct Office Advisory No. 10-06, *2010 Combined Federal Campaign* (9 Sept. 2010)

AFI 34-223, *Private Organizations (PO) Program* (8 March 2007), incorporating Change 1, 30 November 2010, certified current, 4 April 2011

AFI 36-3101, *Fundraising within the Air Force* (12 Jul 2002)

HR Advisory Number: 2012-52, AFPC/DPIEPW, *Duty Time to Support Fundraising within the Air Force* (18 Oct 2012)

OFF-LIMITS ESTABLISHMENTS

The establishment of off-limits areas is a function of command. It may be used by installation commanders to help maintain discipline, health, morale, safety, and welfare of service members. Off-limits action is also intended to prevent service members from being exposed to or victimized by crime-conducive conditions. Armed Forces Disciplinary Control Boards (AFDCBs) advise and make recommendations to commanders on matters including establishment of off-limits areas.

Armed Forces Disciplinary Control Boards

- AFDCBs are established under the provisions of Air Force Joint Instruction (AFJI) 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations*

  -- AFDCBs may be local or regional; boards must meet quarterly

  -- AFDCBs may recommend the installation commander place a civilian establishment or area off-limits to military members

  -- The AFDCB is usually composed of a president and voting members, appointed by the commander, and representatives from various base functional areas, such as law enforcement; legal counsel; equal opportunity; public affairs; chaplains; consumer affairs; and medical, health, or environmental protection

- <u>To place an establishment off-limits, the AFDCB normally must</u>:

  -- Notify the proprietor of the offending establishment, in writing, of the alleged condition or situation requiring corrective action

  -- Specify in the notice a reasonable time for the condition or situation to be corrected

  -- Provide the proprietor the opportunity to present any relevant information to the board

- If the AFDCB recommends an establishment be placed off-limits, the installation commander makes the final decision

  -- A decision to place an establishment off-limits may be appealed to the next higher commander after exhausting any local appeal rights

- The establishment remains off-limits until the decision is overturned or the commander determines adequate corrective action has been taken

Emergency Situations

- In emergency situations, commanders may declare establishments or areas temporarily off-limits to personnel of their respective commands. Follow-up action must be taken by AFDCBs as a first priority.

Commander Disciplinary Options

- Members who enter off-limits areas or establishments are subject to UCMJ action
  - Family members of service members and others associated with the Service or installation should be made aware of off-limits restrictions
- Do not post off limits signs or notices in the United States on private property
- In areas outside of the continental United States, off-limits and other AFDCB procedures must be consistent with existing status of forces agreements (SOFAs)

Reference

AFJI 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations* (27 July 2006), certified current 2 January 2014

UNOFFICIAL ACTIVITIES/SQUADRON SNACK BARS

- Unit coffee funds, flower funds, or other small operations commonly known as "snack bar" funds are permitted when determined to be classified as unofficial activities with limited assets

  -- Assets may not exceed a monthly average of $1000 over a 3-month period

  -- When assets exceed the above figure, the snack bar must either become a private organization, discontinue its operations, or reduce its assets below the $1000 threshold

- Installation and unit commanders must carefully review the status of all such unofficial activities operating on their installation and ensure their compliance with all applicable rules and regulations

- No such fund can duplicate or compete with an installation nonappropriated fund revenue-generating activity

- Unofficial activities may not engage in frequent or continuous resale activities

  -- AFI 34-223, *Private Organizations (PO) Program,* permits occasional sales for fund-raising purposes when approved in advance by the installation commander or designee

    --- "Occasional" is defined as not more than 2 fund-raising events per calendar quarter

    --- The prohibition against frequent or continuous resale activities does not preclude collective purchasing and sharing of purchased items by members of private organizations or unofficial activities so long as there is no actual resale

    --- See AFI 36-3101, *Fundraising within the Air Force*, for fundraising activity during the Combined Federal Campaign

  -- Unit snack bars are subject to lawsuits and installation commanders may require private organizations to purchase liability insurance in an amount adequate to cover potential liability arising from their activities. Individual members of the unit/squadron could incur personal liability if not insured.

-- Snack bars must comply with all federal, state and local laws governing such activities, including federal tax laws

--- Interest from an interest bearing bank account must be reported to the IRS by the financial institution

--- Accordingly, it might be wise for the fund to utilize only a noninterest bearing account

- Unofficial activities/private organizations may not sell alcoholic beverages, solicit funds, operate amusement or slot machines, or conduct games of chance, lotteries, raffles, or other gambling-type activities

-- However, private organizations which are composed primarily of Department of Defense (DoD) personnel or their family members may conduct fund-raising raffles on an Air Force installation on an occasional, infrequent basis when authorized in advance by the installation commander or designee subject to the limitations detailed below

--- Such raffles provide a means of extending needed services or other assistance to members of the DoD family, but failure to strictly follow the provisions below could result in the raffles violating the general gambling prohibition in DoD 5500.7-R, *Joint Ethics Regulation*

-- All requests to conduct raffles must be reviewed by the servicing staff judge advocate

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References

DoD 5500.07-R, Joint Ethics Regulation (30 August 1993), incorporating through Change 7, 17 November 2011

AFI 34-223, *Private Organizations (PO) Program* (8 March 2007), incorporating Change 1, 30 November 2010, certified current 4 April 2011

AFI 36-3101, *Fundraising within the Air Force* (12 July 2002)

ACCEPTANCE OF VOLUNTEER SERVICES

Officers and employees of the federal government may not accept voluntary services exceeding that authorized by law except in emergencies involving the safety of human life or the protection of property.

- Acceptance of gratuitous services (when the provider agrees in writing and in advance to waive any right to compensation) is permissible

- Acceptance of gratuitous services may pose other issues, such as conflicts of interest, liability for damages or injuries both to and by the provider, or the illegal augmentation of another appropriation

- Government employees may not waive their rights to statutory entitlements. This issue may arise in connection with civilian employees and uncompensated overtime.

- Seek a staff judge advocate opinion any time free services are offered, unless you know they are specifically authorized by law

Types of Permissible Volunteer Service

- Military Services are specifically authorized by law to accept certain voluntary services, including medical, dental, legal, religious, family support, library, and morale, welfare, and recreation (MWR) services

- Volunteers providing services under authorized programs are considered federal employees only for purposes of compensation for work-related injuries, tort claims for damages or loss, maintenance of records, and conflicts of interest

  -- The volunteer must have been acting within the scope of the accepted services

  -- The volunteer will most likely be entitled to Department of Justice representation should he or she be named in an action filed under the Federal Tort Claims Act (FTCA)

  -- A volunteer may not hold policy-making positions, supervise paid employees or military personnel, or perform inherently governmental functions, such as determining entitlements to benefits, authorizing expenditures of Government funds, or deciding rights and responsibilities of any party under Government requirements

  - Volunteers may be used to assist and augment the regularly funded workforce, but may not be used to displace paid employees or in lieu of filing authorized paid personnel positions

- Volunteers may be provided training related to their duties

- Volunteers may be provided official e-mail access using the Volunteer Logical Access Credential (VOLAC) program

- Volunteers may be provided access to Personally Protected Information (PII) if it is required for their duties and they are given proper training

- Properly licensed volunteers may use government vehicles (GOVs) if required for their duties

- Volunteers may be reimbursed for minor miscellaneous expenses they incur in the course of their duties

- Volunteers may use child care services in the installation Child Development Center (CDC) (space permitting) during the period of their duties

- All volunteers should sign the DD Form 2793, *Volunteer Agreement for Appropriated Activities or Nonappropriated Fund Instrumentalities*

- Federal agencies are specifically authorized by law to accept voluntary services provided by student interns as part of an established educational program

- Military services are statutorily authorized to accept services of Red Cross volunteers

- By a memorandum of understanding between the DoD and the Red Cross, Red Cross volunteers are generally considered government employees for purposes of the protections of the FTCA when acting in the scope of the services accepted by the DoD

  - Volunteers accepted per 10 U.S.C. § 1588 are also generally considered government employees for purposes of the protections of the FTCA when acting in the scope of the services accepted by the DoD

References

Federal Tort Claims Act, 28 U.S.C. § 1346(b)

10 U.S.C. § 1588

31 U.S.C. § 1342

DoDD 1000.26E, *Support for Non-Federal Entities Authorized to Operate on DoD Installations* (2 February 2007)

DoDI 1100.21, *Voluntary Services in the Department of Defense* (11 March 2002), incorporating Change 1, 26 December 2002

AFI 51-502, *Personnel and Carrier Recovery Claims* (5 August 2016)

Memorandum of Understanding between the United States Department of Defense and the American Red Cross (March 2009) and http://download.militaryonesource.mil/12038/MOS/MWR/PR000613-09REDXMOU.pdf

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CHAPTER TWELVE: THE AIR FORCE CLAIMS PROGRAM

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INTRODUCTION TO CLAIMS

- A claim is a demand made on or by the Air Force for the payment of a specified amount of money

- It does **NOT** include any obligations incurred in the regular procurement of services, supplies, equipment, or real estate

Air Force Claims Policy

- Establish and administer a vigorous Air Force claims program to investigate and process all claims **on behalf of or against** the Air Force

- Pay meritorious claims in the amount necessary to restore the claimant, as nearly as possible, to his/her position before the incident on which the claim is based

- The personnel claims process is not an adversarial one

  -- The purpose of the Military Personnel and Civilian Employees' Claims Act is to pay meritorious personnel claims fairly and promptly to maintain claimants' morale and avoid their financial hardship

  -- Claimants who have suffered loss or damage are entitled to helpful, friendly, and courteous service

Claims Jurisdiction and Settlement Authority

- Personnel claims are centrally adjudicated by the Air Force Claims Service Center (CSC), located at Wright-Patterson Air Force Base, Ohio

  -- The DoD assigns single-service claims responsibility to each military department for processing and settling of tort claims for and against the United States arising in foreign areas. For example, the Army provides single service claims responsibility for all claims in South Korea.

References

The Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. §§ 3701, 3721
DoDI 5515.08, *Assignment of Claims Responsibility* (11 November 2006)
AFI 51-501, *Tort Claims* (15 December 2005)
AFI 51-502, *Personnel and Carrier Recovery Claims* (5 August 2016)
Air Force Claims Service Center, https://claims.jag.af.mil/

PERSONAL PROPERTY CLAIMS

The Personnel Claims Act (PCA) is a gratuitous payment statute. It does not provide insurance coverage and is not designed to make the United States a total insurer of the personal property of claimants. Payment does not depend on tort liability or government fault. Congress instead determined to lessen the hardships of military life by providing prompt and fair payment for certain types of property loss or damage, especially those caused by frequent moves. The Air Force aims, within approved guidelines, to compensate active duty members and civilian employees for property loss or damage to the maximum extent possible.

Introduction

- The Air Force Claims Service Center (CSC), located at Wright-Patterson Air Force Base, Ohio, centrally adjudicates all personnel claims
- Under the PCA, the Air Force may settle and pay claims for loss and damage of members' personal property when such loss or damage is "incident to service"
- Not all property claims are covered
- Covered claims generally fall into three categories:
  - -- Household goods (PT) claims
  - -- Vehicle shipment (POV) claims
  - -- Other tangible personal property (P) claims

Requirements under the Statute

- The loss or damage must be incident to the member's service
- The loss or damage cannot be recoverable through private insurance (limited exceptions apply)
- The claim must be substantiated
- The Air Force must determine that the member's possession of the property was "reasonable or useful" under the circumstances
- The loss or damage must not have resulted from negligence of the claimant

-- Other than household goods claims paid under the full replacement value program described below, maximum payment is $40,000, unless the claim arises from emergency evacuations or extraordinary circumstances in which cases the maximum payment is $100,000

Processing Guidelines

- Full Replacement Value (FRV) Program:

  -- FRV applies to household goods shipments picked up on or after 1 October 2007. Under this program, members may first claim full replacement value for damaged or lost household goods directly with the carrier.

  -- If a member cannot reach an acceptable settlement with the carrier on certain items, the member can file a claim with the CSC for the disputed items only. Standard depreciation rules will apply. The CSC will assert an FRV claim against the carrier, and if recovery is successful, will pass it on to the member.

  -- If a member has a significant loss under FRV, they should be aware that the carrier's maximum liability is $50,000 or $4.00 times the net weight of the shipment. In other words, if the member's shipment weighs 10,000 pounds the carrier's maximum liability is $40,000. The CSC can pay an additional $40,000 at depreciated value.

- FRV Program Filing Deadlines (from date of delivery):

  -- The claimant files the "Notice of Loss/Damage After Delivery" in the Defense Personal Property System (DPS) within 75 days, placing the carrier on notice that additional loss or damage has been detected after delivery. Alternatively, the member can file directly with the carrier or with the CSC within 75 days.

  -- This time limit may be extended for certain causes such as the member being on temporary duty (TDY) or hospitalized. The CSC will evaluate the cause and extend the deadline as appropriate.

  -- The claimant must file a claim directly with the carrier within 9 months. If the claimant fails to file during this time, they may file the claim with the carrier or the CSC within 2 years, but standard depreciation rules will then apply.

- Defense Personal Property System (DPS):

  -- The DPS system phased in for household goods moves between November 2008 and summer 2011. Under this program, members file a claim in the DPS Claims Module.

  -- A claimant will file a "Loss/Damage Report After Delivery" within 75 days (this takes the place of the DD Form 1840R) online within the DPS claims module. If the member cannot file the "Loss/Damage Report After Delivery" due to computer or other technical issues, the member should contact the CSC for guidance.

  -- Similar to FRV, the claimant must file a claim against the carrier in DPS within 9 months. If the claimant is dissatisfied with the carrier's offer, he or she can transfer the items/file the claim with the CSC.

- Statute of Limitations and Other Important Time Periods:

  -- A claim for a sum certain must be presented by the member (or authorized agent with a power of attorney) within 2 years from the incident date or date of delivery in accordance with the PCA. FRV is only available if filed within 9 months.

  -- The 2 year statute may be extended, for good cause, during time of war. The CSC will determine whether good cause exists to extend the timeline.

  -- The requirement to file the "Notice of Loss or Damage After Delivery" within 75 days is separate from the requirement to file the claim within 2 years—damage for privately owned vehicles (POVs) is noted on DD Form 788 at the port. If additional damage is discovered after leaving the port, members should proceed to their local legal office as soon as possible, usually within 30 days, to complete an inspection and have photos taken.

Proper Claimants

- Active duty Air Force military personnel

- Retired or separated Air Force military personnel who suffer loss or damage resulting from the last entitled storage or movement of their personal property

- Air Force civilian employees paid from appropriated and nonappropriated funds. Claims filed by nonappropriated funds civilian employees are paid from nonappropriated funds.

- Civilian employees of the Defense Commissary Agency (DeCA) who work on an Air Force installation

- DoD dependent school teachers and administrative personnel serviced by an Air Force installation

- Air Force Reserve (AFR) and Air National Guard (ANG) personnel when performing federally-funded active duty, full-time Guard duty, inactive duty for training, and ANG technicians serving under 32 U.S.C. § 709

- Air Force Reserve Officer Training Corps (AFROTC) cadets traveling at government expense or on active duty summer training

- United States Air Force Academy cadets

- Survivor of a deceased proper claimant or authorized agent or legal representative of a proper claimant

Payable Claims

- For loss or damage in the following general categories:

  -- <u>From government-sponsored transportation or storage under orders</u>

    --- Examples include household goods and unaccompanied baggage shipments, shipped vehicles, mobile homes and contents in shipment, and, in some circumstances, personally procured moves (PPM), also known as do-it-yourself (DITY) moves, luggage and hand-carried property

  -- <u>At quarters and other authorized places</u>

    --- Examples include fire, explosion, hurricane, theft, and vandalism in continental United States (CONUS) base housing or at overseas quarters either on- or off-base

  -- <u>To privately owned vehicles (POVs)</u>

    --- Examples include damage in shipment, theft or vandalism to parked cars, damage or loss during TDY where POV is authorized, and paint oversprays. Members should proceed to their local legal office as soon as possible to complete an inspection and have photos taken.

-- Other categories

--- As described in AFI 51-502, *Personnel and Carrier Recovery Claims*

- **Uniform items damaged while performing normal duties are not payable**

  -- Claims for damaged or missing uniforms are not paid automatically. All claims must be investigated and any payment must be supported by the facts contained in the claim file. There should be no negligence or lack of due care on the claimant's part, claimant must have done everything possible to "protect" the clothing items, and the damage cannot be a result of normal risks associated with daily work duties.

- To contact the CSC's customer service, call DSN 986-8044 or commercial toll free 1-877-754-1212. To file a claim on the world wide web, visit: https://claims.jag.af.mil/.

References

Military Personnel and Civilian Employees' Claims Act (Personnel Claims Act), 31 U.S.C. §§ 3701, 3721

32 U.S.C. § 709

DoDD 5515.10, *Settlement and Payment of Claims Under 31 U.S.C. 3701 and 3721, "The Military Personnel and Civilian Employees' Claims Act of 1964"* (24 September 2004), Certified Current as of 31 October 2006

AFI 51-502, *Personnel and Carrier Recovery Claims* (5 August 2016)

AFMAN 23-110, *USAF Supply Manual* (1 April 2009), incorporating through Interim Change 5, 1 July 2010

Air Force Claims Service Center, https://claims.jag.af.mil/

DISASTER CLAIMS

Disasters come in all shapes and sizes at installations around the globe. From hail storms, floods, fire, tornados, hurricanes, ice storms, and high wind events, the Air Force Claims Service Center (CSC) and base legal offices work together when a disaster strikes to ensure Airmen and their families receive compensation for lost and destroyed personal property that is lost incident to service.

Disaster Claims Team

- A disaster claims team from the Air Force Legal Operations Agency, Claims and Tort Litigation Division is available to assist base legal offices in large disasters. The disaster claims team, along with reach-back support, or even on-site assistance from CSC personnel, will deploy to the disaster location at the request of the wing or installation commander.

- The CSC, with Defense Finance and Accounting Services (DFAS) support, can make emergency payments within 96 hours by electronic funds transfer (EFT). Alternatively, the CSC can provide the wing accounting liaison officer (ALO) an emergency funding document in order to make cash payments, if needed.

- If the claims team is deployed to the disaster location, CSC personnel, along with base legal personnel, will inspect and document damaged property, and assist Airmen and their families file claims. Claims must first be filed with any available insurance coverage. Claims filed against the Air Force are secondary.

- Affected Airmen and their families have 2 years from the date of the disaster to file their claims with the Air Force

- CSC contact information – DSN 986-8044, COMM 937-656-8044, toll free 1-877-754-1212 or via e-mail at CSC.JA@us.af.mil

References

Military Personnel and Civilian Employees' Claims Act (Personnel Claims Act), 31 U.S.C. §§ 3701, 3721

32 U.S.C. § 709

DoDD 5515.10, *Settlement and Payment of Claims Under 31 U.S.C. 3701 and 3721, "The Military Personnel and Civilian Employees' Claims Act of 1964"* (24 September 2004), Certified Current as of 31 October 2006

AFI 51-502, *Personnel and Carrier Recovery Claims* (5 August 2016)

AFMAN 23-110, *USAF Supply Manual* (1 April 2009), incorporating through Interim Change 5, 1 July 2010

Air Force Claims Service Center, https://claims.jag.af.mil/

TORT CLAIMS

Takeaways for Commanders

- Dependents, retirees, and nonaffiliated civilians may contact you to complain about accidents or injuries they have suffered. In those situations, you may inform them that it is their right to file a claim to seek compensation for their loss. You should refer them to your servicing staff judge advocate's (SJA) office but do not make any promises or implications that their claim will be approved. There are numerous legal reasons a person's claim may not be payable even though at first blush it may appear to be.

Introduction

- Under certain circumstances, federal law subjects the United States to liability for property damage, personal injuries, and death that result(s) directly from the negligent or wrongful acts/omissions of government personnel acting within the scope of their employment

- Federal law authorizes the United States to pay for property damage, personal injuries, and death that directly result(s) from "noncombat activities" of United States armed forces

- Normally, to receive compensation, an injured person or entity must present a signed written request for payment of a specific amount of money (claim) within 2 years of the accident or incident to the agency that created the loss, personal injury, or death

- In some cases, denial of a claim or failure to resolve a claim within 6 months after it is presented to the Air Force creates a right to sue the United States in federal district court

- Installation legal offices work with the Air Force Legal Operations Agency, Claims and Torts Litigation Division (JACC) to receive and process claims against the Air Force and help defend the Air Force when claims are litigated

Claims and Claimants

- Claims arising from alleged negligent or wrongful acts or omissions of government personnel are tort claims

- Common tort claims include government owned vehicle (GOV)-privately owned vehicle (POV) accidents, slips and falls on base, barrier or bollard accidents, medical malpractice, aircraft accidents, or mishaps with rental cars while on temporary duty (TDY)

- Claimants may be individuals, organizations, or companies that have suffered loss because of alleged negligent or wrongful acts or omissions by government personnel acting within the scope of their employment

- Claimants may also be agents, legal representatives, or persons with subrogation rights of the injured party

Payable Claims

- Claim must demand a specific amount of money and be signed by claimant or authorized agent

- Claim must allege damage to real or personal property, personal injury, or death

- Damage must be direct result of negligent or wrongful act or omission of government personnel acting within the scope of employment

- A negligent act occurs when a person's failure to exercise the degree of care considered reasonable under the circumstances results in an unintended injury to another party

- Government personnel include Air Force military and civilian employees, Civil Air Patrol members performing Air Force authorized missions, and Air National Guard military members in federal status

- The base legal office determines (preliminarily) whether an employee acted within scope of employment after reviewing relevant facts, circumstances, and applicable law

  -- Ordinarily, a person is within the scope of employment if the actions in question were serving some governmental purpose when the negligent act or omission allegedly occurred

  -- Not a line of duty question

- Generally, the extent of government liability is about the same as that of a private person

  -- For claims arising in the United States and its territories, liability is determined based on the law of the place (state) where the alleged negligent act or omission occurred

  - For claims arising in foreign countries, liability is based on legal standards controlled by United States military regulation or policy, or applicable international agreements

  - The principles of absolute or strict liability do not apply

- If the loss, injury or death is the direct result of "noncombat activity," the claim may be paid without regard to negligence or other fault

  - "Noncombat activity" is a term of art that means any activity, other than combat, war or armed conflict that is particularly military in character, has little parallel in civilian pursuits, and has been historically considered as furnishing the proper basis for claims. However, "noncombat activity" should not be interpreted as simply meaning, "not combat."

  - Common "noncombat activities" include operation of military aircraft/spacecraft/missiles, practice bombing or firing of heavy guns and missiles, movement of tanks, and explosive ordinance disposal (EOD) operations

Claims Not Payable

- Claims specifically excluded by statute

- Examples of excluded claims

  - Damages, injuries, or death that stem from the performance of or failure to perform a discretionary function by a federal agency or government employee

  - Intentional torts (acts that the person intends to commit) such as assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights (claims may be payable with regards to acts or omissions of investigative or law enforcement officers of the United States Government arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution)

  - Government taking of air space over land

  - Personal injury, death or property damage of a military member incurred incident to service

-- Personal injury or death of a civilian employee of the United States sustained while in performance of his/her duty

-- Punitive damages

Processing and Payment

- Installation legal office accepts, investigates, and adjudicates most tort claims alleging $5,000 or less in losses with the exception of personal injury and medical malpractice tort claims. Claims above $5,000 for personal injury or alleging medical malpractice at Continental United States (CONUS) locations are forwarded immediately to AFLOA/JACC.

  -- All installation level claims, other than those settled under the Federal Tort Claims Act (FTCA) for more than $2,500, are paid from Air Force claims funds

    --- If JA approves an FTCA claim for more than $2,500, payment comes from the Judgment Fund Group of the Department of the Treasury

  -- Installation legal office consults with AFLOA/JACC prior to adjudicating claims alleging:

    --- Personal injury

    --- Legal malpractice

    --- Property damage caused by an Air Force member driving a rental vehicle

    --- Property damage that occurred in a navigable waterway (admiralty and maritime claims)

    --- Property damage caused by activities of the Civil Air Patrol

    --- Property damage or personal injury to wing commander, vice wing commander or their immediate family members

  -- AFLOA/JACC investigates and takes final action on all medical malpractice claims arising within the United States. At USAFE bases and at PACAF bases outside the 50 states, base legal offices investigate medical malpractice claims and forward the claims files to AFLOA/JACC for final action.

- If installation legal office denies a claim, claimant may appeal or request reconsideration, depending on which statute dictates processing of the claim

  -- Installation legal office can grant appeal or reconsideration request

  -- Installation legal office must forward any appeal or reconsideration request it does not grant to AFLOA/JACC for final action

- CONUS installation legal offices accept claims alleging more than $5,000 in damages or personal injury, but immediately forwards them to JACC for adjudication

  -- Installation legal office will appoint a point of contact (POC) (attorney or paralegal) within the installation legal office to work with AFLOA/JACC to investigate the claim

  -- In some cases, installation POC will take a more proactive role in the adjudication process, to include legal research, drafting memoranda, and negotiating settlements, to provide training and increase experience for both attorneys and paralegals

- Outside the continental United States (OCONUS) installation legal offices accept, investigate, and may settle non-medical malpractice claims up to $25,000. Those claims not settled for less than $25,000 are forwarded to JACC with the full investigation and recommendation for final adjudication.

  -- Before adjudicating a claim, OCONUS legal offices should ensure they have single-service claims responsibility within the country they are located. If not, forward claims to the appropriate military service for investigation and adjudication.

- In certain cases, claimant may sue the Air Force within 6 months after final action is taken on the claim

  -- Final action is taken by mailing the denial of claim or, when applicable, denial of a reconsideration request. Six months of no action may be deemed a denial by the claimant and he/she can file suit.

  -- Suit is in federal district court. Department of Justice (DOJ) defends the Air Force in litigation. JACC works with the installation legal office to help DOJ defend litigation.

- Special procedures apply to claims arising in a foreign country. Installation legal offices coordinate with the Foreign Claims Branch of JACC when handling foreign and international claims.

References

Military Claims Act, 10 U.S.C. § 2733
Foreign Claims Act, 10 U.S.C. § 2734
International Agreement Claims Act, 10 U.S.C. §§ 2734(a) and (b)
National Guard Claims Act, 32 U.S.C. § 715
Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401, 2671-2680
AFI 51-501, *Tort Claims* (15 December 2005)

AVIATION CLAIMS

- Aviation claims occur in a variety of ways, including claims arising from low overflights and sonic booms, and accidents involving active duty, Air Force Reserve (AFR), Air National Guard (ANG), Aero Club, and Civil Air Patrol aircraft

- If the claim arose from military flight activity, it may be payable under the "noncombat activity" provisions of the Military Claims Act (MCA) or the National Guard Claims Act (NGCA)

  -- No requirement to show negligence in noncombat activity claims. Causation and damages are the only issues.

  -- MCA/NGCA claimants may receive advance payments under certain circumstances, primarily for damage mitigation purposes

  -- If the claim cannot be settled, the claimant may bring a lawsuit under the Federal Tort Claims Act (FTCA), unless otherwise exempted, but must prove negligence, causation, and damages

Sonic Boom and Low Overflight Claims

- Sonic Boom Damage:

  -- Overpressures based upon speed, altitude and location of aircraft relative to a claimant's property, in pounds per square feet, will determine whether claimed damage could have been caused by sonic boom

  -- Sonic booms are not selective and may encompass an entire area. A sonic boom is unlikely to cause damage to a claimant's home while having no effect on nearby properties.

  -- Window glass and bric-a-brac are generally the first items to be damaged. A sonic boom is unlikely to cause significant structural damage, such as cracked foundations or sidewalks, without also breaking windows or shaking bric-a-brac from shelves.

- Low Overflight Damage:

  -- Noise alone generally does not cause damage to property

  -- Noise may harm animals, such as by stampeding cattle and horses; startling chickens, silver foxes, and minks; cracking exotic bird eggs; or injuring ostriches

  -- Claims alleging loss of property value due to noise from repeated low overflights are not usually payable under any tort claims statute. The property owner's remedy is a "takings" claim under the Fifth Amendment's due process clause.

Aircraft Accident Claims

- ANG Claims:

  -- Settlement authorities may settle claims for death, personal injury, or property damage arising out of the authorized noncombat activities of the ANG under the NGCA, 32 U.S.C. § 715

  -- Determine status of crewmembers or ANG personnel involved in mishap

    --- Title 10 – federal active duty orders

    --- Title 32 – federally funded training orders (e.g., inactive duty training (IDT) or active duty training (ADT))

    --- State duty – disaster response, riot control, emergency situations

  -- The United States is only liable for negligence of ANG members performing federal duties under Title 10 or Title 32 at time of incident. The provisions do not apply when a member is performing duty for the state.

  -- ANG aviation claims are adjudicated under the noncombat activity provisions of the MCA if the member was in Title 10 status, or the NGCA if the member was in Title 32 status

- AFR Claims:

  -- Crewmembers have same status as active duty personnel

  -- AFR aviation claims are usually adjudicated under the noncombat activity provisions of the MCA

- Aero Club Claims:

  -- Aero Club participation is a recreational activity, and the United States is not liable for the negligence of Aero Club members or participants while engaged in Aero Club activities because such activities are outside the scope of their employment

  -- All Aero Club members and participants are covered under the National Association of Flight Instructors (NAFI) liability insurance for their negligence in causing a mishap

    --- Look to NAFI insurance to pay third party claims caused by the negligence of Aero Club members or participants engaged in Aero Club activities

    --- Not cognizable under Air Force claims statutes

  -- Third-party claims arising from the negligence of Aero Club employees or military members working at the Aero Club in their official capacity are cognizable under the FTCA. Aero Club claims settled under the FTCA are paid from nonappropriated funds administered by USAF/JAA-S, Lackland Air Force Base, Texas.

  -- The *Feres* doctrine bars active duty, guard and reserve military members from receiving compensation under federal claims statutes for death or injuries arising out of their participation in Aero Club activities. Such participation is deemed incident to their military service.

  -- Similarly, the Federal Employees Compensation Act (FECA) bars Air Force civilian employees from receiving compensation under federal claims statutes for death or injuries arising from their participation in Aero Club activities

- Civil Air Patrol (CAP) Claims:

  -- CAP is a federally supported, congressionally chartered, nonprofit civilian corporation, and a volunteer civilian auxiliary of the Air Force. Its mission is to provide aerospace education and training to its senior and cadet members, provide volunteer emergency services, and promote civil aviation in the public sector.

  -- The Air Force is authorized to use the services of the CAP in fulfilling certain noncombat programs and missions of the Air Force that have been officially designated as Air Force Assigned Missions (AFAMs)

    --- Typical AFAMs include support of homeland security, search and rescue, disaster relief, and counter-narcotics reconnaissance flights

--- CAP is an instrumentality of the United States when performing an AFAM

--- Third-party claims arising out of activities of CAP while performing AFAMs are cognizable under FTCA

--- Senior CAP members or CAP cadets (18 years or older) are covered under FECA for their death or injuries incurred while in the performance of an AFAM

-- The United States is not liable for third party claims arising out of CAP corporate activities or for claims for the use of privately owned property that CAP or its members use during AFAMs

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References

Federal Employees Compensation Act, 2 U.S.C. § 431 *et seq.*
Military Claims Act, 10 U.S.C. § 2733
Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680
National Guard Claims Act, 32 U.S.C. § 715
AFI 51-501, *Tort Claims* (15 December 2005)

FOREIGN AND INTERNATIONAL CLAIMS

Single Service Claims Responsibility

- DoDI 5515.08, *Assignment of Claims Responsibility,* assigns certain countries to each military department (Army, Navy, and Air Force) and makes the military departments responsible for final action on tort claims arising within their assigned countries. This instruction applies to numerous claims statutes, including the Foreign Claims Act (FCA), International Agreement Claims Act (IACA), Military Claims Act (MCA), Use of Government Property Claims Act (UGPCA), and Advance Payments Act (APA).

- Naval Forces Afloat Exception: Naval forces afloat visiting foreign ports may settle claims arising outside the scope of duty for under $2,500 without regard to single service assignment

- Not all countries are assigned under DoDI 5515.08. Claims arising in unassigned countries will be adjudicated by the command responsible for generating the claim. If the command is joint, the claim should be adjudicated by the service component command whose personnel allegedly caused the claim.

- Claims in foreign countries are settled under the regulations of the service having single service claims responsibility (DoDD 5515.3, *Settlement of Claims Under Sections 2733, 2734, 2734a, and 2734b of Title 10, United States Code*)

- DoD/GC can change assignments by updating DoDI 5515.08 or by interim letter

International Agreement Claims Act (IACA)–U.S. Military in Foreign Countries

- 10 U.S.C. § 2734a applies to acts and omissions of U.S. forces in foreign countries when the United States has a status of forces agreement (SOFA) with a foreign government and the SOFA explicitly provides for both governments to share the cost of any claim payout

  -- Under the NATO SOFA, "receiving State" is the state receiving visiting forces and "sending State" is the state sending forces

  -- For NATO SOFA claims against U.S. personnel in foreign countries, the United States would be the sending state

- Claims are adjudicated and paid by the receiving state (host nation), which sends the United States a bill for its pro rata share of any claim payout

  - Host nation must adjudicate the claim applying the same statutes it would apply if its own military had caused the damage

  - Host nation statute of limitations applies to these claims

  - If the host nation pays attorney fees as part of the settlement, the United States is obligated to pay its percentage of those fees

  - Claims caused by U.S. enemy actions or actions of U.S. forces in combat are not payable

- The United States currently has cost-sharing SOFAs with NATO members, many Partnership for Peace (PfP) countries, Portugal (for the Azores), Iceland, Japan, Korea, Australia, and Singapore

  - NATO SOFA and PfP SOFA (latter incorporates NATO SOFA by reference) are reciprocal, which means they apply to tortious incidents in the territories of all parties to the agreement

  - SOFAs with Iceland, Japan, Korea, Australia, as well as the Lajes Technical Agreement (for the Azores), are not reciprocal. They apply only to tortious incidents by U.S. personnel in these foreign countries.

  - Singapore Counter Agreement is also not reciprocal. However, it applies solely to tortious incidents by Singaporean personnel in the United States (see below "International Agreement Claims Act (IACA)—Foreign Personnel in the United States").

  - U.S. reimbursement percentage is usually 75 percent, but this percentage can vary if more than one nation is responsible for the damage, injury, or death, or if a different cost-sharing arrangement has been negotiated

- The United States can object to a bill for reimbursement if the host nation paid a claim not cognizable under the SOFA or the host nation did not adjudicate the claim under the laws that would apply to its own military

International Agreement Claims Act (IACA)–Foreign Personnel in the United States

- 10 U.S.C. § 2734b applies to acts of foreign forces in the United States when the foreign country has a SOFA with the United States and the SOFA explicitly provides for both governments to share the cost of any claim payout

  -- For NATO SOFA claims against foreign personnel in the United States, the United States would be the receiving state

- Claims are adjudicated and paid by the United States as the host nation, which sends the responsible foreign country a bill for its pro rata share of any claim payout. The Air Force will investigate these claims to the extent they involve foreign military personnel or property involved in an Air Force activity, but only the Army is authorized under DoDI 5515.08 to settle (pay or deny) these claims.

  -- The United States will adjudicate the claim applying the same statutes it would apply if its own military had caused the damage

  -- U.S. statute of limitations applies to these claims

  -- If the United States pays attorney fees as part of the settlement, the foreign country is obligated to pay its percentage of those fees

  -- Claims caused by U.S. enemy actions are not payable

- Cost-sharing agreements with applicability in the United States include the NATO SOFA, PfP SOFA, and Singapore Counterpart Agreement

  -- SOFAs with Japan, Korea, Australia, and the Azores are not reciprocal and apply only to tortious incidents arising in those countries

  -- According to the United States State Department, NATO SOFA applies to Alaska, but not Hawaii

  -- Foreign government reimbursement percentage is usually 75 percent, but this percentage can vary if more than one nation is responsible for the damage, injury, or death, or if a different cost-sharing arrangement has been negotiated

- Responsible foreign government can object to a bill for reimbursement if the United States paid a claim not cognizable under the SOFA or the United States did not adjudicate the claim under the laws that would apply to its own military

- Immediately notify JACC of any on-base or off-base incident involving foreign military personnel or property in the United States

Foreign Claims Act (FCA)

- 10 U.S.C. § 2734 applies only to claims arising abroad where the IACA is not applicable (IACA takes precedence over FCA). The Secretary of the Air Force (SecAF) has promulgated AFI 51-501, *Tort Claims*, as authorized by 10 U.S.C. § 2734, to implement Air Force policy under the FCA.

  -- Use IACA where SOFA cost-sharing exists and damages, injury, or death are caused in the performance of official duty (as understood by the United States and the foreign government)

  -- Use FCA where no SOFA cost-sharing exists or where damages, injury, or death arise outside the scope of employment

- Claimant must be a foreign inhabitant

  -- U.S. military members, federal civilian employees, and dependents thereof are not foreign inhabitants

- Claims personnel must be appointed a Foreign Claims Commission (FCC) in order to act on an FCA claim (AFI 51-501 governs appointments/delegations of FCC authority)

- Two-year statute of limitations applies to FCA claims

- Damage, injury, or death must be either incident to a noncombat activity or caused (negligently or wrongfully) by a DoD military member or civilian employee

- Statutory exceptions to payment include claims by subrogees and acts of the United States in combat. However, a claim may be allowed if it arises from an accident or malfunction incident to operation of an aircraft of the armed forces of the United States, including its airborne ordnance, indirectly related to combat and occurring while preparing for, going to, or returning from a combat mission.

- Apply the law of the country where the incident occurs to the extent it does not conflict with AFI 51-501. If conditions for payment exist, and no basis under AFI 51-501 prohibits payment, payment may occur. All payments are *ex gratia* and remain within the discretion of SecAF.

- Claimants are paid in the currency of the country where the incident occurred unless JACC receives a compelling justification why payment should occur in some other foreign currency

Solatia (Rarely Justified)

- Solatium payment is a nominal payment made immediately to a victim or victim's family to express sympathy. Paid with personal funds or command (O&M) funds, it is not compensation (thus not deducted from claim award) and is not subject to single service claims responsibility. Immediately report to JACC any attempt to pay solatia in a country where solatia has not been explictly authorized by U.S. military regulation as proof of clear custom must be established to justify such payment.

References

The Military Claims Act, 10 U.S.C. § 2733
Use of Government Property Claims Act 31 U.S.C. § 2737
Foreign Claims Act, 10 U.S.C. § 2734
International Agreement Claims Act, 10 U.S.C. §§ 2734(a) and 2734(b)
37 U.S.C. § 1006
DoDD 5515.3, *Settlement of Claims Under Sections 2733, 2734, 2734a, and 2734b of Title 10, United States Code* (27 September 2004)
DoDI 5515.08, *Assignment of Claims Responsibility* (11 November 2006)
AFI 51-501, *Tort Claims* (15 December 2005)

PROPERTY DAMAGE TORT CLAIMS IN FAVOR OF THE UNITED STATES

The United States may assert and collect claims for damage to its property through someone's negligence or wrongful act. As a property owner, the Air Force is often the victim of a tort and has the right under the Federal Claims Collection Act, 31 U.S.C. § 3701, 3711-3719, to collect for tort damages. Claims on behalf of the United States for property damage by a tortfeasor require the base to be proactive and aggressively look for these claims, which are known as "G" claims or government claims. This does **NOT** include medical cost reimbursement claims.

Assertable Claims

- Claims personnel may assert claims against a tortfeasor for loss or damage to government property when:

  -- The loss or damage to government property is for $100 or more. If the loss or damage is less than $100, assert the claim if it can be collected easily.

  -- The loss or damage is based on a contract and the contracting officer does not intend to assert a claim under the contract. Document the contracting officer's decision not to assert a claim for the file.

  -- The claim arises from the same incident as a medical cost reimbursement claim

    --- Process the two claims separately

    --- Coordinate the investigations

  -- The tortfeasor or his insurer presents a claim against the government arising from the same incident, i.e., counterclaims. Coordinate the processing of both the pro-government and anti-government tort claims together.

  -- The claim is based on products liability theory of recovery. Due to the unique nature of product liability issues and claims litigation, obtain approval from AFLOA/JACC before asserting.

Nonassertable Claims

- Claims personnel do not assert a claim for loss or damage of government property in these instances. Do not assert a claim:

  -- For reimbursement against military or civilian employees for claims paid by the United States due to that employee's negligence

  -- For loss or damage that a nonappropriated fund instrumentality (NAFI) employee causes to government property while on the job

  -- If the loss or damage was caused by a government employee with accountability for the property under the reports of survey system

    --- Under the reports of survey system, military members and civilian employees may be held pecuniarily liable for the loss, damage or destruction of government property caused by their negligence. With some exceptions, the usual limit of liability is 1 month's pay.

    --- However, the reports of survey manual, AFMAN 23-220, *Reports of Survey for Air Force Property,* paras. 3.2.4 and 3.3.6, indicates assertion of a tort property damage claim instead of a report of survey is appropriate if the military member or civilian employee damages government property with his/her private automobile

Statute of Limitations

- The United States must file a lawsuit for loss or damage of government property, based in tort, within **3 years** after the date when a responsible official of the United States knew or reasonably should have known the material facts that resulted in the claimed loss

- Suits based in contract, upon state law, or upon some other legal theory may have a different statute of limitations period

Collecting Claims

- Claims personnel collect tort claims in favor of the government

- The settlement authority may accept a third party's offer to repair or replace the damaged property to the satisfaction of the accountable property officer

- The Air Force may offset a tort claim against an amount that it owes to the claimant

- When two or more tortfeasors are jointly and severally liable, settlement authorities may divide the payment between the tortfeasors

- A settlement authority may waive prejudgment interest (where statute, contract, or regulation do not require it) to encourage payment

Depositing Collections

- Claims personnel deposit collections

  -- Deposit collections for loss, damage, or destruction to Air Force family housing, caused by abuse or negligence, to the DoD military family housing management account

  -- Deposit collections for loss, damage, or destruction to other real property to the appropriate funds account of the organization responsible for the repair, maintenance, or replacement of the real property. These funds may not be reused without their appropriation by Congress.

  -- Deposit collections for loss, damage, or destruction to property of an Air Force industrial fund or other revolving funds account to that account

  -- Pay or deposit recoveries involving NAFI property to the appropriate NAFI

  -- Deposit all other collections for which there is no statutory exception to the United States Treasury miscellaneous receipts account

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References

10 U.S.C. § 2415
10 U.S.C. § 2782
10 U.S.C. § 2831
31 U.S.C. § 3302
Federal Claims Collection Act, 31 U.S.C. §§ 3701, 3711-3719
AFI 51-502, *Personnel and Carrier Recovery Claims* (5 August 2016)
AFMAN 23-220, *Reports of Survey for Air Force Property* (1 July 1996)

MEDICAL COST REIMBURSEMENT CLAIMS

The Air Force may recover the cost of providing medical care to active duty and retired military members and their beneficiaries who are injured as a result of tortious conduct of third parties under the Federal Medical Care Recovery Act (FMCRA) and for all care covered by a third party payer under the Coordination of Benefits statute (COB). The Air Force may also recover pay given to an active duty member during a period of disability caused by tort under the FMCRA.

Federal Medical Care Recovery Act (FMCRA)

- Under this statute, the government's recovery is predicated on "circumstances creating tort liability"

  -- Usually, the four common law elements of tortious conduct (duty, breach, causation, damages) must be present before considering the assertion of a Medical Cost Reimbursement claim (MCR) under the FMCRA

  -- The FMCRA applies even in no-fault jurisdictions. Where a system of tort liability has been replaced by a no-fault system, the government may pursue an FMCRA claim as a third party beneficiary.

  -- At the same time, any defenses available under state law that may negate tort liability, such as contributory negligence, may be interposed to defeat the government's claim. However, state procedural defenses cannot be interposed to defeat the claim.

  -- In general, a federal statute of limitation of 3 years applies

  -- Since the United States has an independent statutory right of recovery, a release signed by the injured party is usually not effective in extinguishing the government's claim

- All successful collections for treatment provided by a military treatment facility (MTF) are deposited into the Operations and Maintenance (O&M) account of the MTF rendering treatment. Collections for active duty pay are deposited to the O&M account of the unit to which the disabled member was assigned at the time of the injury. Recoveries for TRICARE paid treatment is returned to the TRICARE Management Activity.

Coordination of Benefits (COB) Claims

- Congress allows MTFs to pursue recoveries from statutorily defined plans
  - These include health insurance policies/plans, auto insurance providing for medical treatment, workers' compensation coverage, and similar plans, policies, and programs
  - The COB statute makes the United States a third-party beneficiary under such plans
  - In general, a federal statute of limitations of 6 years applies
- Successful recoveries of medical expenses are deposited directly into the treating MTF's O&M account
- Claims offices use COB as the primary statutory basis of recovery against various types of automobile insurance
- COB has been extended to allow recovery of payments made through TRICARE. Medical expenses paid for by TRICARE are deposited into a TRICARE Management Activity.

Collection of Medical Cost Reimbursement Claims

- These claims are collected either by overseas base legal offices or one of eight Medical Cost Reimbursement Program ("MCRP") regional offices within the United States. The MCRP offices are located at:
  - Joint Base McGuire-Dix-Lakehurst, New Jersey
  - Joint Base Langley-Eustis, Virginia
  - Eglin Air Force Base, Florida
  - Wright-Patterson Air Force Base, Ohio
  - Lackland Air Force Base, Texas
  - Offutt Air Force Base, Nebraska
  - Nellis Air Force Base, Nevada
  - Travis Air Force Base, California

- Collections are generated from reports of injuries to covered personnel from medical treatment facilities, medical treatment providers, Security Forces blotters, and notice from the injured party's chain-of-command. If commanders become aware of an injury to an active duty or retired military member and/or their beneficiaries caused by a tortious act, the commander should promptly notify the base legal office for guidance on how to process this information and/or advise the injured party to contact the closest MCRP office.

References

10 U.S.C. § 1095
10 U.S.C. § 1095b
Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653
AFI 51-502, *Personnel and Carrier Recovery Claims* (5 August 2016)

ARTICLE 139 CLAIMS

Under Article 139, UCMJ, commanders may direct collection and pay a claim for property that military personnel willfully damage or wrongfully take, if the claim results from riotous, violent, or disorderly conduct.

Scope of Article 139 Claims

- Assertable Claims:

  -- Property claims only; not personal injury or wrongful death

  -- Must involve willful misconduct, not performance of legally authorized duties; and must arise from riotous, violent, or disorderly conduct, not conduct involving simple negligence or, for example, bad checks or private indebtedness

- Article 139 claims are entirely separate and distinct from disciplinary action taken under any other article of the UCMJ, or any other administrative action that may be appropriate

- Proper Claimant:

  -- Any individual, to include military and civilian, business entity, state, territory, local government, or nonprofit organization may file an Article 139 claim

    --- However, an appropriated fund (AF) or nonappropriated fund (NAF) instrumentality of the United States may not file an Article 139 claim

Procedures

- The claim must be submitted to an appropriate commander within 90 days of the date of the incident, unless the commander determines good cause for a delay

  -- Examples of good cause for delay may include deployment, a claimant who does not know the identity of the tortfeasor, or the claimant's reasonable lack of knowledge of the ability to file an Article 139 claim

  -- The claim should be submitted to the commander of the military organization or unit of the alleged offending member or members. However, it may be presented to the commander of the nearest military installation to be forwarded to the appropriate commander for jurisdiction.

    - Initially, the claim may be presented orally, but it must be written and state a sum certain before final action may be taken

- The claim is sent directly, or through channels, to the appointing commander, who is the officer exercising special court-martial convening authority over the offender. The appointing commander appoints a board of officers to investigate the claim.

    - A board of officers may consist of one to three commissioned officers

    - After evaluating all available evidence, which may include interviewing the individual against whom the claim was asserted (in accordance with Article 31, UCMJ, rights and the right to counsel), the board:

        - Determines if the claim falls under Article 139, UCMJ

        - Identifies the offender(s)

        - Determines liability and damages

    - The board may recommend:

        - Assessing damages against the identified service member (deducting from the assessment any voluntary or partial payments already made)

        - Assessing damages against members who were present during the incident, if authorities cannot individually identify the offenders

        - Disapproving the claim

- After the board completes its review, it forwards the claim to the staff judge advocate for a legal review prior to action by the appointing commander

Action by the Appointing Commander

- Determine if the claim falls under Article 139, UCMJ

- Assess an amount against each offender, but not more than the board's recommended amount

    - Cognizable claims in excess of $5,000 must be approved by AFLOA/JACC prior to payment

- Forward the board's report to the appropriate commander if it is determined that one or more offenders are in a different command, since only the commander of an offender may order payment of the claim under Article 139

- Direct the Accounting and Finance Office to withhold the specified amount from each offender's pay and to pay the claimant

- Notify the offender and claimant of the action taken

Appeal and Reconsideration

- The commander's action may not be appealed by the claimant or the offender

- The commander who originally ordered the assessment may reconsider and change the decision if the findings later prove to be wrong, even if offender is no longer a member of that command

- A successor in command may change or cancel the assessment only on the basis of newly discovered evidence, fraud, or obvious error of law or fact

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References

UCMJ Art. 139

AFI 51-502, *Personnel and Carrier Recovery Claims* (5 August 2016)

LIABILITY FOR DAMAGE TO RENTAL VEHICLES

Introduction

- Vehicles rented on government orders are for official use only

- "Special conveyance use is limited to *official purposes*, including transportation to and from duty sites, lodgings, dining facilities, drugstores, barber shops, places of worship, cleaning establishments, and similar places required for the traveler's subsistence, health or comfort." Joint Federal Travel Regulations (JTR), see Chapter 3, Section 3320(E).

- The use of a rental vehicle for other than official purposes places a member at risk of personal liability for damages

- "Official Purposes" is a different standard than "scope of employment"

  -- ***"Official purposes"*** is a standard in the JTR, and is used to determine whether or not a renter will be reimbursed for damage to a rental vehicle

  -- ***"Scope of employment"*** is based on the law of the state in which the accident occurs and is the legal standard under the claims statutes that will be used to determine whether or not the United States will defend a renter in a lawsuit

  -- Within NATO Status of Forces countries, there is yet a third standard, "in the performance of official duty," which bears on both claims and foreign criminal jurisdiction questions

- Use must be reasonable, but even if reasonable, may still not be in scope of employment

- It is important for commanders to factor into rental car authorizations whether or not the member/employee has private automobile liability insurance that could be relied upon in the event the member/employee were in an accident and found to be outside the scope of employment

- When renting a vehicle pursuant to an authorization on orders, it is mandatory to obtain the rental vehicle through the commercial travel office (CTO). See JTR, Chapter 3, Section 3000(B).

  -- Generally, CTO will reserve a vehicle from a company participating in the Defense Travel Management Office (DTMO) negotiated agreement

-- It is TRANSCOM policy for CTOs to reserve a rental vehicle from a company that subscribes to the DTMO-negotiated agreement

--- Use of companies and rental car/truck locations participating in the DTMO agreement is encouraged because their government rate includes liability and vehicle loss and damage insurance coverage for the traveler and the government

--- Rental companies having a negotiated agreement with DTMO will be used, unless another rental company can provide better service at a lower cost and abides by the same rules/guidance contained in the DTMO-negotiated car/truck rental agreement

--- Government Administrative Rate Supplement (GARS). The GARS is a $5 per day fee added by rental car/truck companies that are party to the DTMO Car Rental Agreement. GARS is reimbursable to the traveler as specified in the JTR, Appendix G, *Reimbursable Expenses on Official Travel* and Appendix O, Section T4030(C)(2).

DTMO Rental Vehicles Agreement

- Major rental car companies subscribe to a memorandum of understanding (MOU) with DTMO. The MOU sets rates and conditions of the rental.

- Names of companies participating in the rental car program, current maximum rates offered and terms and conditions of the U.S. Government Rental Car Agreement, effective 15 October 2010, are published on the DTMO web site: https://www.defensetravel.dod.mil/site/rentalCar.cfm

- Travel orders must reflect that a rental vehicle is authorized

- Agreement is not valid when using an International Merchant Purchase Authorization Card (IMPAC)

- Must rent from a participating company **AND** location. While most rental car companies subscribe to the agreement, a particular location may opt out.

- Rental agency should be notified of all persons who are going to be driving vehicle

  -- While not mandatory under the DTMO agreement, it might relieve the renter of personal liability if another driver uses the vehicle on other than official business

  - Rental agency cannot charge for the addition of other drivers. A contractor is not your "fellow employee" and may not drive a car you rent on official business.

- DTMO Car Rental Agreement: Applies to cars and mini-vans, available at https://www.defensetravel.dod.mil/Docs/CarRentalAgreement.pdf

- DTMO Truck Rental Agreement:

  - Available at https://www.defensetravel.dod.mil/Docs/TruckRentalAgreement.pdf

  - Applies to cargo vans, pick-ups, and utility and straight trucks. Gross weight must not require a Class C driver's license.

  - Trucks are not necessarily listed with the commercial travel office (CTO). Must call company or go to DTMO web site: https://www.defensetravel.dod.mil/site/rental.cfm

  - Driver must be 21 years old

  - Unlike cars, if a driver rents a different truck than one with DTMO rate, DTMO agreement does not apply

  - May apply to do-it-yourself (DITY) moves, but coverage under the agreement does not extend to spouse driving vehicle, nor to detour, e.g., driving out of the way to see parents. Some states do not consider permanent change of station (PCS) moves to be in scope of employment, so government would not defend member for negligence causing damage or injury to another.

Liability for Damages to the Rental Vehicle and to Others

- Four Different Situations:

  - Rented on orders pursuant to DTMO agreement

  - Rented on orders not under DTMO agreement

  - Personal rental vehicle on official temporary duty (TDY)

  - Rented pursuant to umbrella contract

- Claims personnel do not pay claims for damage to rental vehicles rented on orders pursuant to DTMO agreement. Follow guidance below for each situation.

Rented on Orders Pursuant to DTMO Agreement

- The rental company assumes and bears the entire risk of loss of or damage to the rented vehicles up to the policy limits; full comprehensive and collision coverage is in effect

- Renter may be personally liable for loss or damage caused by a fellow government traveler in official travel status while acting outside the scope of their employment duties

  -- Example: A unit sends five people TDY and authorizes one rental car. One member rents the vehicle and charges the rental on the member's government travel card (GTC) (not the unit's government purchase card (GPC)). Any of the five members are authorized drivers while acting *within the scope of their employment duties*. But if one of the members takes the vehicle to a bar late at night, gets drunk, and crashes the car, that member would not be considered an authorized driver at the time of the accident.

- Negligence claims for personal injury or property damage against the driver by third parties are covered under the liability insurance provided by the rental car company, up to the policy limits. Under the current DTMO agreement, rental companies must have personal injury policy limits of at least $100,000 per person/$300,000 per occurrence and property damage limits of $25,000 per occurrence. Regardless of fault, so long as the driver was within the scope of employment, the government will defend the driver in any civil lawsuit. Within the United States, the exclusive remedy is against the government—the driver cannot be held personally liable while he/she was within the scope of employment.

Rented on Orders, Not Under the DTMO Agreement

- For damage to rental vehicle, the government travel card currently carries collision coverage

  -- The traveler must decline the rental car company's collision damage waiver insurance

  -- Damage must be reported to the government travel card company immediately

  -- Covers collision or rollover, theft and theft-related charges, malicious vandalism, windshield damage due to road debris, and loss of use and towing charges due to covered damage

    - Does not apply if the vehicle is rented for more than 31 days; if used off-road; if driver is driving under the influence (DUI); if damage results from hail, lightning, flood or other weather-related causes; or if damage is from failure to protect the car, e.g., leaving the car running and unattended

    - Does not apply to expensive, exotic, and antique autos; vans over eight passenger; trucks; motorcycles; limos; or recreational vehicles

    - If no travel charge card coverage, member usually pays rental company and claims reimbursement on the travel voucher under JFTR, Appendix G

        - Defense Finance and Accounting Service (DFAS) can also pay rental company directly

        - Travel claim comes to the legal office for review

        - Payment for damage is from unit travel funds

- For damage to another vehicle, property, or personal injury, the claims office adjudicates

- So long as the driver was in the scope of employment, the United States will defend the driver

    - Within the United States, the driver cannot be held personally liable if the accident occurred while he/she was within the scope of employment

Personal Rental Vehicle on Official TDY

- For damage to rental vehicle, the driver is usually personally responsible

- For damage to another vehicle, property, or personal injury, the United States will defend the driver if driver is in the scope of employment

    - Within the United States, the driver cannot be held personally liable if the accident occurred while he/she was within the scope of employment

Rented Pursuant to Contract

- DTMO agreement not applicable unless made a part of the contract

- Will be subject to specific contractual provisions under Federal Acquisition Regulations (FAR) (FAR clause 52.228-8 is required within the United States); generally, the United States is liable for any damages to the rental vehicle except fair wear and tear and loss or damage caused by the negligence of the contractor

- Along with typical contracts for fleet rentals, rental with a GTC is a government contract, and not a rental between the traveler and the company

- Claims for damage to rental vehicles under contract are settled under contractual provisions as claims against the contract

- Unlike vehicles rented on a GTC, a report of survey may be required for damage to a vehicle rented under a government contract

- For damages to another vehicle or property, claims office adjudicates as a tort claim. Again, so long as the driver is within the scope of employment, the government will defend the driver. Within the United States, the driver cannot be held personally liable if the accident occurred within the scope of employment.

In Case of Accident

- Call the rental company and report. If rented on a government travel card, call travel card company and report immediately.

- If the police respond, try to get a copy of the accident report. If you cannot get a copy of the report, find out how to get a copy later.

- If someone else is injured in the accident and you are TDY at or near a base, let the base legal office know of the accident. If not near a base, contact your base legal office upon return.

- Inform the staff judge advocate immediately if you become aware litigation is filed regarding a vehicle rented by an Air Force member/employee, even if the United States is not a named party in the suit

- Never admit liability at the site of an accident

References

28 U.S.C. § 2679

Joint Federal Travel Regulations (JTR), http://www.defensetravel.dod.mil/Docs/perdiem/JTR.pdf)

Federal Acquisition Regulation (FAR) §§ 28.312, 52.228-8

Defense Transportation Regulation (DTR) DoD Regulation 4500.9-R-Part I, *Passenger Movement* (November 2010)

AFMAN 23-220, *Reports of Survey for Air Force Property* (1 July 1996)

AFI 51-501, *Tort Claims* (15 December 2005)

Defense Travel Management Office, http://www.defensetravel.dod.mil/index.cfm

REPORTS OF SURVEY (ROS)

Commanders at all levels are responsible for not only the personnel in their unit, but also for all assigned equipment and property under their control. Occasionally some of that equipment may be lost, damaged or destroyed. Depending on the type of item(s) that are lost or damaged, a report of survey (ROS) might be required to investigate and document the circumstances and as a tool to determine the appropriate corrective actions to prevent recurrence. This paper will walk you through the fundamentals of the ROS process. It is important to note that this information does not apply to nonappropriated funds (NAF) assets (see AFI 34-202, *Procedures For Protecting Nonappropriated Funds Assets*, Ch. 8 for guidance).

Purposes

- The general purposes of the ROS program are to:
  - -- Investigate the cause of loss, damage, or destruction of property and determine if it was attributable to an individual's negligence or abuse
  - -- Assess monetary liability or relieve individuals from liability if no evidence of negligence, willful misconduct, or deliberate unauthorized use
  - -- Provide documentation to support adjustment of accountable records
  - -- Provide commanders with case histories to enable them to take corrective action to prevent recurrence of the incident

Mandatory Reports of Survey

- There are certain situations in which a ROS is mandatory. These situations include the following:
  - -- Damage or destruction of controlled or sensitive items, weapons, or classified items
  - -- Cases with evidence of abuse, gross negligence, willful misconduct, or deliberate unauthorized use of government property
  - -- Hand tools or other pilferable items over $100 unit cost or $500 total cost
  - -- Supply system stock record adjustments greater than $50,000

- See AFMAN 23-220, *Reports of Survey For Air Force Property*, para. 3.1 for additional mandatory situations

When Reports of Survey are Not Mandatory

- There are certain situations/items that do not require initiation of an ROS. The most common situations not requiring an ROS include:
  - When an individual voluntarily agrees to pay for property and value is $500 or less (provided the item(s) are not subject to mandatory ROS requirements)
  - Property lost in combat operations
  - Property becomes unserviceable due to fair wear and tear

Report of Survey Liability Thresholds

- Before moving into the process itself, it is important to be aware of the amount of financial liability Air Force members may expected to repay. These amounts vary depending on the nature of the items affected by the loss/damage.
  - Personal Arms or Equipment: The full amount of the loss or damage
  - Military Supply Items: The full amount of damage/loss
  - Government Housing: The full amount of loss or damage if proximate cause was gross negligence or abuse by the military member, dependent, or guest
  - All Other Cases: Up to the full amount of the loss, damage, or destruction, but in no case more than 1 month's regular military compensation (1/12th of annual pay for civilian employees)

The Report of Survey Process

- The first step to initiating an ROS is for the unit commander (or in some cases the appointing authority) to appoint an investigating officer (IO) to determine the facts. Some of the investigative processes are highlighted below. AFMAN 23-220, Chapter 7 contains detailed guidance regarding the IOs' responsibilities and duties.

-- The IO will answer the following six questions:

  --- What Happened?

  --- How?

  --- Where?

  --- When?

  --- Who was involved?

  --- Was there any evidence of negligence, misconduct, or deliberate unauthorized use or disposition of the property?

-- Based on the facts, the IO makes findings and recommendations on the issue of liability of the person(s) involved

-- The ROS is then referred to the accountable officer so that the records may be adjusted as soon as possible

-- Once referred to the accountable officer, the IO allows the person(s) involved to review the case and provide verbal or written information to refute the findings and recommendations

-- The ROS is then processed to the appointing authority for assignment of financial responsibility against the individual(s) charged, **OR** relieving them from responsibility

  --- ROS referred to the legal office for review if financial responsibility is to be assessed

  --- If IO has not performed a thorough job, the ROS should be returned for reaccomplishment

-- Once the previous steps have been satisfactorily completed, the approving authority reviews the ROS and assigns financial liability or relieves the individual(s) of responsibility

-- The individual(s) charged may appeal the approving authorities' decision to the next level in the chain of command

Post-Approval ROS Actions

- After the approving authority assesses liability against a person(s) or receives a request for reconsideration, appeal, or waiver, there are prescribed timelines for additional processing actions

  -- The ROS Program Manager will advise the individual found liable within 5 workdays if located on the same base (12 work days for mail notification within the Continental United States CONUS)

  -- The ROS Program Manager will advise the Financial Services Office (FSO) to record the debt on the member's pay record concurrently with notifying the individual of their liability

  -- Within 30 days of being notified of financial liability the individual(s) **MAY** voluntarily pay the amount assessed or, if the dollar amount is 1 month's pay or less, appeal the assessment to the approving authority

  -- If the liability assessment exceeds 1 month's pay, the individual **MUST** notify the approving authority of the intent to appeal the assessment within 60 days of receipt of the notification

  -- If an appeal is submitted, the FSO is immediately advised not to collect until the appeal is ruled upon by the approving authority. If the debt exceeds 1 month's pay they will be advised not to collect for 60 days.

Processing Times

- As lost, damaged, or destroyed property has an impact on both the Air Force and the individual(s) who caused the loss, damage, or destruction, the Air Force has established the following timelines for initiation and completion of a ROS

  -- The organization will obtain an ROS investigation number, appoint an investigating officer (IO), and complete the preliminary investigation phase within 15 days from the date of the discovery of the loss

  -- The established timelines to complete the ROS are as follows:

    --- 100 days if there is no assessment of financial liability (145 for Air National Guard (ANG) and Air Force Reserves (AFR))

--- 130 days if financial liability officer or board is appointed (185 for ANG and AFR)

--- 150 days if financial liability is recommended because legal review is required (245 for ANG and AFR)

References

AFMAN 23-220, *Reports of Survey for Air Force Property* (1 July 1996)
AFI 34-202, *Procedures For Protecting Nonappropriated Funds Assets* (22 December 2015)

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CHAPTER THIRTEEN: CONTRACTING ISSUES FOR THE COMMANDER

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CONTRACT LAW FOUNDATION

The current acquisition environment is complex and faces extensive budgetary pressures and increased scrutiny. Concurrently, the Department of Defense (DoD) is relying more heavily than ever before upon contractors to deliver necessary supplies and services to the warfighter. Budget pressures, intense scrutiny of a commander's use of appropriated funds, and increased requirements have resulted in a more complex legal landscape. Yet, despite this the Air Force contracting workforce has decreased in the last decade. Thus, it is imperative that acquisition professionals, attorneys, and commanders work together to protect the integrity, precision, and reliability of the acquisition process.

The rules governing the acquisition process can be found in the Federal Acquisition Regulation (FAR) System. The FAR is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies.

Contracting Authority

- Commanders have a duty to ensure personnel are informed of proper contracting authority

- Normally, only contracting officers (COs) who have been delegated authority by the head of an agency in the form of a "warrant" have the authority to enter into contracts on behalf of the U.S. Government to purchase the supplies, services, and construction requirements for the operation of the installation or unit

  -- Contract authority and limitations are specified in the CO's "warrant"

  -- Government purchase card (GPC) cardholders (with limited thresholds) have limited contract authority

- Generally, commanders do not have contracting authority

Unauthorized Commitments

- On occasion, an individual without contract authority will enter into a commitment to accept supplies or services

- Once discovered, unauthorized commitments may be "ratified" by a person with contract authority, allowing for government payment. Ratification procedures and authorization levels are provided in the Air Force FAR Supplement

- An unauthorized commitment must meet the following criteria to be eligible for ratification:

  -- Supplies or services have been provided to and accepted by the government, or the government has or will obtain a benefit from performance of the commitment;

  -- The ratifying official has the authority to enter into a contractual commitment;

  -- The resulting contract would otherwise have been proper if made by an appropriate CO;

  -- The CO determines the prices to be fair and reasonable;

  -- The CO recommends payment and legal counsel concurs; and

  -- Funds are currently available and funds were available at the time of the unauthorized commitment

- The commander of the organization involved must ensure the CO is provided a report of the circumstances surrounding the unauthorized commitment, including a statement on corrective actions taken to prevent a recurrence of the event and a description of disciplinary action taken, or an explanation why no action was taken

- Any unauthorized commitments that are not ratified are the sole financial responsibility of the individual making the unauthorized commitment and are not the financial responsibility of the government

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References

FAR 1.6, *Career Development, Contracting Authority, and Responsibilities*
AFFARS MP 5301.602-3, *Ratification of Unauthorized Commitments*
AFMAN 34-214, *Procedures for Nonappropriated Funds Financial Management and Accounting* (14 February 2006), incorporating through Change 5, 23 March 2010

ACQUISITION, STRATEGY, PLANNING

Acquisition planning is required to ensure the Air Force obtains requirements in the most effective, economical, and timely manner possible. Written acquisition plans, requirements development, cost estimating, incorporating lessons learned from previous procurements, and allowing sufficient time to conduct acquisition planning are several important elements of successful acquisition planning. Commanders must ensure sufficient capability to manage and oversee the contracting process from start to finish. Some functions, such as inherently governmental functions, cannot be performed by contractors. Other functions require special consideration before deciding to contract and close supervision in the administration when contracting is appropriate.

Inherently Governmental Functions (IGFs)

- IGFs must not be performed by anyone other than a government employee. Contractors are specifically prohibited from performing these functions.

- If, after awarding a contract, monitoring reveals that contractors are performing IGFs, Air Force personnel must reestablish control over these functions by strengthening oversight, in-sourcing the work to government employees, refraining from exercising options under the contract, or terminating all or part of the contract

- OFPP Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*, constitutes the most recent guidance for federal agencies regarding what is and is not an IGF. It establishes two tests:

  -- Nature of the Function Test: Categorizes functions involving the exercise of U.S. sovereign power as IGF due to their "uniquely governmental nature," regardless of any "type or level of discretion associated with them"

  -- Exercise of Discretion Test: Prohibits agencies from contracting out functions involving an exercise of discretion that would commit the government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance

- <u>Examples of Functions Designated as IGF</u>:

  -- The direct conduct of criminal investigations

  -- The control of prosecutions and performance of adjudicatory functions

- The command of military forces
- Combat
- The determination of budget policy, guidance, and strategy
- The direction and control of federal employees

Work Closely Associated with Inherently Governmental Functions

- Although not an IGF, this is a function requiring additional oversight and special consideration for in-sourcing due to the nature of the function, the manner in which the contractor performs the contract, or the manner in which the government administers contract performance
- Before awarding a contract for a function closely associated with the performance of an IGF, the agency must determine in writing that:
  - Special consideration has been given to having federal employees perform the work
  - Resources exist to give special management attention to contract performance

Critical Functions

- Defined as functions necessary to the agency's ability to effectively perform and maintain control of its mission and operations
- Special consideration should be given to in-sourcing critical functions
- Contracting out critical functions is permitted when a determination in writing is made prior to issuing a solicitation that sufficient internal capability exists so that federal employees maintain control of missions and operations

References

10 U.S.C. §§ 2383, 2461, and 2463
FAR Part 7, *Acquisition Planning*
DFARS 207.5, *Inherently Governmental Functions*
Office of Procurement Policy, Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions,* (12 September 2011)
OMB Cir A-76 (Revised), *Performance of Commercial Activities*, (29 May 2003)
DoDI 1100.22, *Policies and Procedures for Determining Workforce Mix* (12 April 2010)
AFI 63-138, *Acquisition of Services* (21 May 2013)

COMPETITION IN CONTRACTING

Awarding contracts through competition ensures that the Air Force receives the best value for its money. The Competition in Contracting Act (CICA) directs federal agencies to procure requirements through competitive processes unless a statutory exception applies. Commanders should ensure that any contracts not awarded through "full and open competition" fall under a statutory exception and include the required written justifications.

The Competition in Contracting Act

- CICA, 10 U.S.C. § 2304, requires "full and open competition through the use of competitive procedures" unless an express exception applies

  -- To fulfill competition requirements, the procuring office will advertise the requirement, request bids or proposals, and select an awardee based on the solicitation's evaluation criteria

- CICA has two categories of exceptions, allowing limited competition and sole-source awards

  -- Limited Competition: "Full and open competition after exclusion of sources"—allows the procuring office to limit the sources from which it seeks competition

    --- This exception is primarily used to meet requirements of the Small Business Act. Procurements can be set aside for firms that qualify as a small business or particular category of small business, such as service-disabled veteran-owned small business.

    --- For assistance needed after a major disaster or during an emergency, solicitations can be limited to local firms

    --- To establish or maintain alternate sources of supplies or services

  -- Sole Source Awards: Made through "other than full and open competition"—require a written justification identifying the specific exception

    --- Only one contractor can provide the service or supply

    --- Unusual or compelling urgency such that delay in award would result in serious injury, financial or other, to the government

--- It is necessary to award the contract to a particular source in order to:

---- Maintain the manufacturer or supplier in case of a national emergency or to achieve industrial mobilization,

---- Establish/maintain an research and development (R&D) capability to be provided by a nonprofit institution or a federally funded research and development center, or

---- Procure the services of an expert for use in litigation

--- An international agreement requires use of non-competitive procedures

--- Federal statute authorizes or requires the use of specific source

--- Disclosure of the agency's needs would compromise national security

--- The Secretary of the Air Force determines that a non-competitive procurement is in the public interest and provides notice to Congress

- Air Force installations have designated competition and commercial advocates whose duties include promoting effective competition in acquisition programs

Contract Modifications

- A modification to an existing contract will violate CICA when the changes are beyond the scope of the original contract and a sole source award has not been justified

  -- The scope analysis considers the degree of change in the type of work, performance period, contract cost, and whether the change is the type that offerors could have anticipated when bidding on the originally awarded contract

Unsolicited Proposals

- It is not unusual for a commander to receive an unsolicited proposal from a business not in response to a solicitation from the government. An unsolicited proposal is a written proposal introducing a new or innovative idea and seeking a contract with the government without competition.

- Regulation prescribes procedures and standards for evaluating unsolicited proposals. CICA requirements are not waived for unsolicited proposals. If award of a contract is contemplated, a sole source award justification and approval must be accomplished.

References

The Competition in Contracting Act, 10 U.S.C. § 2304
FAR Part 2, *Definitions of Words and Terms*
FAR Part 6, *Competition Requirements*
FAR Subpart 15.6, *Unsolicited Proposals*
DFARS Part 206, *Competition Requirements*
AFFARS Part 5306, *Competition Requirements*
AFFARS MP315.606-90, *Receipt, Evaluation, and Disposition of Unsolicited Proposals*
AFFARS MP306.502, *Mandatory Procedures*

ACQUISITION PROCESS

"Acquisition process" is a term used to describe how the Air Force purchases the supplies and services necessary to accomplish its missions. The acquisition process is subject to the rules contained in the Federal Acquisition Regulation (FAR), the Defense Federal Acquisition Regulation Supplement (DFARS), the Air Force Federal Acquisition Regulation Supplement (AFFARS), Department of Defense Instructions (DoDIs), supplementing Air Force Instructions (AFIs), and Major Command (MAJCOM) or installation supplements to the FAR and/or AFIs. The process is heavily regulated even for small purchases. If issues arise when purchasing supplies or services the best course of action is to work with your contracting squadron and/or legal office.

Micro Purchases

- A micro purchase is a government purchase of supplies or services which in the aggregate does not exceed $3,500, except for:
  - -- Construction, the value is $2,000
  - -- Support of contingency or chemical/biological/radiological/nuclear (CBRN) recovery/defense operations (excluding construction), the threshold is $20,000 inside the United States and $30,000 outside the United States
- The DoD is directed to use the government purchase card (GPC) to pay for purchases valued at or below the micro purchase threshold
  - -- Purchases on the GPC are limited to the micro purchase threshold unless orders are placed against pre-priced vehicles (such as the federal supply schedule, a blanket purchase agreement, or an indefinite delivery, indefinite quantity (IDIQ) contract) in which case the limit is $25,000 for authorized cardholders
  - -- Splitting a larger purchase into smaller segments to stay under the micro purchase threshold is not allowed
- <u>Timeline</u>: Full and open competition is not required
  - -- A determination must be made by the authorized individual that the price is reasonable
  - -- As much as possible, micro purchases should be distributed equitably among qualified suppliers

Simplified Acquisition Procedures

- Simplified acquisition procedures allow the contracting officer to reduce the amount of time required to procure supplies and services below the simplified acquisition threshold and to create or utilize more efficient ordering methods

- These procedures are used to purchase more routine items like office supplies and grounds keeping services

  -- The simplified acquisition threshold is $150,000

    --- For support of contingency or CBRN recovery/defense operations (excluding construction), the threshold is $300,000 inside the United States and $1 million outside the United States

    --- Acquisitions under the simplified acquisition threshold are reserved exclusively for small businesses

- Commercial Items

  -- It is the government's policy to procure commercial items when possible

  -- Contracting officers can use simplified acquisition procedures when purchasing commercial items not exceeding $7 million ($13 million if purchasing commercial items in support of contingency or CBRN recovery/defense operations)

- Timeline: Contracting officers can use streamlined acquisition procedures designed to reduce the time required to solicit and award contracts

  -- Generally, agencies must synopsize for at least 15 days, and then issue a solicitation and allow a reasonable opportunity to respond

Negotiated Procurement

- Most acquisitions over $150,000

- Accomplished by using the best value process seeking either the lowest-priced technically acceptable offer or a best-value tradeoff where the Air Force may select a higher priced offer because the offeror has superior past performance or technical skill

- There is no dollar threshold limiting the use of negotiated procurement techniques.

- Timeline: Generally, for proposed contract actions expected to exceed the simplified acquisitions threshold ($150,000), contracting officer's must publically synopsize a solicitation for 15 days, and then issue a solicitation allowing at least 30 days to respond

  -- Timelines for solicitations and the government evaluation of proposals can vary greatly depending upon the monetary value, item, and complexity of the acquisition

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References

FAR Part 12, *Acquisition of Commercial Items*
FAR Part 13, *Simplified Acquisition Procedures*
FAR Subpart 13.2, *Actions at or Below the Micro-Purchase Threshold*
FAR Part 15, *Contracting by Negotiation*
DFARS Part 213, *Simplified Acquisition Procedures*
DFARS Part 215, *Contracting by Negotiation*
DoDI 5000.02, *Operation of the Defense Acquisition System* (7 January 2015)
AFI 64-117, *Air Force Government-wide Purchase Card (GPC) Program* (20 September 2011)

BID PROTESTS

The bid protest system ensures the government follows regulatory requirements for advertising, evaluating, and awarding contracts. A bid protest is a written objection by an interested party of a contract solicitation or award. Protests can be filed with: 1) the Air Force – typically called an "agency protest," 2) the Government Accountability Office (GAO), or 3) the Court of Federal Claims (COFC). A trial attorney from the Air Force Legal Operations Agency is the sole representative for the Air Force before the GAO and works with the Department of Justice before the COFC.

- An agency protest is a protest filed directly with the contracting officer (CO) or other designated Air Force official. COs must consider the protest, seek legal advice, and respond.

- A GAO protest is a protest which has been filed with the GAO, an arm of the legislature, and is the typical means for protests

- Under the Competition in Contracting Act, the Air Force must suspend (stay) award or performance of a contract if it receives a GAO protest before contract award; within 10 days of the date of contract award; or within 5 days of the date offered for a required post-award debriefing

  -- Only the Deputy Assistant Secretary for Contracting may override the mandatory stay. Authority to override an agency protest stay lies with an official at the level above the contracting officer. An override will usually require an "urgent and compelling" justification. A decision to override a stay in a GAO protest is reviewable by COFC.

- The Air Force must formally respond to a GAO protest within 30 calendar days

  -- The GAO will issue a decision no later than 100 days after a protest is filed. If a protest is sustained, the GAO will recommend what actions the Air Force should take. The GAO decision or the Air Force's failure to follow the GAO recommendation may be subject to further litigation.

- A COFC protest is substantially similar to proceedings in federal district courts

  -- A protester can file with the COFC despite having been the subject of a previous GAO protest

-- There is no statutory automatic stay in a COFC protest. However, the protester can seek a restraining order and temporary injunction to suspend award or performance of the contract.

-- The Air Force must promptly respond to a COFC protest

-- Unlike GAO and agency-level protest decisions, the COFC has no time limit on the issuance of protest decisions

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References

Competition in Contracting Act, 31 U.S.C. §§ 3551-3556
FAR Subpart 33.1, *Protests*
Office of General Counsel Guidebook, *Bid Protests at GAO: A Descriptive Guide* (3 April 2009)

CONTRACT ADMINISTRATION

The ever changing operational environment requires flexibility in administering Air Force contracts. This section reviews the most common issues in contract administration, such as, how the Air Force is protected from defective supplies after a contract ends, how contracts are changed or cancelled, and what process is used to resolve disputes between contractors and the Air Force.

Contract Warranties and Defective Supplies

- Standard contract clauses normally give the government the right to inspect supplies and services before acceptance and reject supplies and services that are defective or fail to meet requirements

- After acceptance, the government normally loses its right to inspect and reject supplies and services and the contractor's obligation under the contract to cure defects in those supplies and/or services ends. The only exception is for latent defects (defects which could not have been discovered by a reasonable inspection), fraud, or gross contractor mistake.

- Some contracts contain "warranties" which allow the government, after acceptance, to order a contractor to repair or replace a defective product, or allow the government to keep it at a reduced price

Formal Contract Changes

- Contract changes are any additions, subtractions, or modifications to the work or performance time required by a contract. Changes should be in writing and included in the contract file.

  -- Only a contracting officer (CO) can make a contract change

- In some cases, the CO can unilaterally change certain terms in a contract. In these instances, contractors must comply with the change, but may be entitled to additional compensation or time.

  -- A contractor cannot make a unilateral change to a contract

- The contracting officer and contractor can agree to a bilateral modification

- A contract may not be changed so drastically that it no longer represents the original contract in violation of the Competition in Contracting Act. These types of changes are referred to as cardinal changes.

- Competitors of the contractor may challenge the legality of the modification before the Court of Federal Claims (COFC) or the Government Accountability Office (GAO)

Constructive Contract Changes

- The government may impose a change, intentionally or unintentionally, but fail to capture the change in writing. This is referred to as a constructive change.

- If the contractor provides notice of a constructive change, the contracting officer should: adopt the change; reject the change; or adopt the conduct, but deny a change exists

Terminating a Contract for the Convenience of the Government

- A termination for convenience (T4C) occurs when the government exercises its right to cancel a contract, or portion of a contract, because it is in the government's best interest

  -- Before a T4C, the government and the contractor may agree to a no-cost T4C where the contract is terminated at no cost to either the government or the contractor; or

  -- After a T4C, the government and contractor will settle the amount owed to the contractor based on: the contractor's incurred costs; a fair profit on the incurred costs; and settlement expenses. For commercial goods T4Cs, the contractor's settlement is based on the percentage of the contract completed plus reasonable charges.

  -- The government has no duty to terminate a contract for the contractor's benefit

  -- A T4C may be reviewed by the Armed Services Board of Contract Appeals (ASBCA) and/or COFC to determine if it was accomplished in bad faith or was a clear abuse of discretion

Terminating a Contract because of a Contractor's Failure to Perform

- A termination for default (T4D) (in commercial contracts called a termination for cause) occurs when the government exercises its right to cancel a contract after a contractor's unexcused failure to perform in accordance with contract terms
  - The contractor must pay the government the additional costs of acquiring goods or services similar to those terminated for default referred to as the excess costs of re-procurement. The contractor may also have to pay additional damages caused by their failure to comply with the contract.
  - The government only pays for the value it actually received under the contract
- The government should notify the contractor of the potential T4D before termination
  - A "cure notice" is a written notice telling a contractor they do not comply with the contract and providing a limited time (at least 10 days) to correct the problem or possibly face a T4D. A cure notice is required to uphold almost all T4Ds.
  - A "show cause notice" tells a contractor they failed to comply with the contract and will be terminated unless they can show cause why they should not be terminated. A show cause notice should be issued if practicable.

Resolving Government and Contractor Disputes – Contract "Claims"

- Disputes between the government and a contractor over administration of a contract are resolved through the claims process established under the Contract Disputes Act (CDA)
  - A claim is a written demand by one party seeking, as a matter of right, money, interpretation of terms, or a change to the contract
  - Only the government and the prime contractor may submit a claim. Claims of subcontractors must be filed by the prime contractor.
- After a claim is submitted, the CO has 60 days to:
  - Issue a written final decision, or if the claim exceeds $100,000, identify a firm date by which a final decision will be issued
  - If no final decision or firm date notice is issued, the contractor may treat the matter as an appealable denial of their claim (known as a deemed denial)

- CO final decisions may be appealed at the ASBCA or COFC
  - -- ASBCA claims must be filed within 90 days of receipt of the final decision
  - -- COFC claims must be filed within 12 months of receipt of the final decision
- Contractors may recover monetary damages and reasonable attorney fees as the result of successful ASBCA and COFC claims
  - -- Payments may be made on claim judgments and awards using the judgment fund, but the Air Force must repay the judgment fund from a current appropriation
- ASBCA and COFC rulings may be appealed to the Court of Appeals for the Federal Circuit

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References

Competition in Contracting Act, 41 U.S.C. § 253
Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109
FAR Part 43, *Contract Modifications*
FAR Part 49, *Terminations of Contracts*
Rules of the United States Court of Federal Claims
Rules of the Armed Services Board of Contract Appeals

COMMUNICATIONS WITH INDUSTRY/INTERFACING WITH CONTRACTORS

Air Force leaders should engage with industry on matters of mutual interest for the purpose of learning about private sector products, systems, and innovations that might improve our warfighting capabilities, the way we care for Airmen, and our stewardship of taxpayer dollars. Private sector collaboration and information-gathering benefit both parties and are in the public interest. However, such engagement efforts by Air Force personnel must also meet the high ethical standards expected of all Airmen and must comply with the laws and DoD regulations on procurement and ethical conduct.

- Meetings are generally permitted subject to the following guidelines:

  -- Ensure the purpose of the meeting is clear. The nature and types of information shared or obtained during these meetings must not provide the commercial entity with an unfair competitive advantage.

  -- Include other interested or potentially interested parties and commercial entities in such meetings if possible and practical to avoid the appearance you are providing exclusive access to a particular company or group

    --- If you meet exclusively with one entity—and another entity requests the same opportunity—then you should honor the request to avoid any perception of unfair or preferential treatment. Commanders must maintain an impression of equal access.

  -- Avoid meeting alone with industry. Meetings should include more than one Air Force representative to ensure discussions are accurately recorded and properly characterized.

  -- Focus discussions on topics the Air Force can share publicly and on publicly-available information the Air Force would share with any interested party. Avoid discussing proprietary or procurement-sensitive information, but if it arises, you are legally obligated to protect it from disclosure to third parties.

  -- Do not discuss ongoing procurements or litigation

  -- Do not invite other contractor personnel into the meeting. If support contractor personnel are necessary, the senior Air Force participant should clearly identify the contractor personnel.

--- A commercial entity may require support contractor personnel to sign a nondisclosure agreement as a condition of participation

--- In accordance with the Trade Secrets Act, government employees will not sign nondisclosure agreements due to their affirmative duty under federal law to protect business trade secrets and proprietary information

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References

Trade Secrets Act, 18 U.S.C. § 1905

DoD 5500.07-R, Joint Ethics Regulation, including through Change 7 (17 November 2011)

SAF/GC Memorandum, *Engagement with Industry* (31 March 2015), with Attached DepSecDef Memorandum, *Policy for Communication with Industry* (21 June 2010)

CONFLICTS OF INTEREST (PERSONAL AND ORGANIZATIONAL)

The Federal Acquisition Regulation (FAR) requires government business to be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. The general rule is to strictly avoid any conflict of interest or even the appearance of a conflict of interest in government-contractor relationships. Various federal laws and regulations prohibit personal or organizational conflicts of interest or the appearance of such conflicts.

Personal Conflicts of Interest (PCIs)

- Air Force employees (military and civilian) are prohibited from participating personally and substantially (e.g., making a decision, giving advice, or making a recommendation) in any government matter that would have a direct and predictable effect on the financial interests of:

  -- The employee, employee's immediate family, or general partner;

  -- An organization for which the employee serves as an officer, director, trustee, general partner, or employee; or

  -- A company or organization with which the employee is negotiating for employment or has an arrangement for future employment

- Air Force employees also should not participate in a particular government matter if the employee believes a reasonable person with knowledge of the facts would question his or her impartiality unless the employee's supervisor and ethics counselor determine that the government's interest outweighs the appearance of a conflict. Such a determination is required where an employee's participation matter would affect the financial interests of:

  -- A person or organization with which the employee has a business, contractual, or other financial relationship, or is an active participant (e.g., committee chair or project officer);

  -- A member of the employee's household or a relative with whom the employee has a close personal relationship;

  -- An organization for which the employee's spouse, parent, or dependent child works (as an officer, employee, consultant, etc.); or

  -- An organization the employee has worked for in the past year

Organizational Conflicts of Interest (OCIs)

- OCIs are situations where, because of other activities or relationships, a contractor or potential contractor is: unable or potentially unable to render impartial assistance to the Government; in a situation of impaired or potentially impaired objectivity; or, has an unfair competitive advantage

- There are three types of OCIs:

  -- Unequal Access to Information: a contractor's access to nonpublic information may give it an unfair advantage in future competitions

  -- Biased Ground Rules: a contractor's involvement in defining requirements, preparing work statements, or developing business cases could skew a competition in its own favor

  -- Impaired Objectivity: a contractor's judgment or objectivity in performing a contract may be impaired because its performance may affect its other activities or interests

- Contracting officers are responsible for identifying and evaluating OCIs as early as possible in the acquisition process and avoiding, neutralizing, or mitigating significant potential OCIs before contract award

- The contracting officer is prohibited from awarding a contract where an OCI cannot be avoided or mitigated, unless an OCI waiver is approved by the agency head or designee (Deputy Assistant Secretary of the Air Force for Contracting)

- Since OCIs call into question the integrity of the procurement process, no specific prejudice must be proven to justify a sustained protest when it is challenged by a competing offeror

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References

18 U.S.C. § 208
5 C.F.R. § 2635.502
FAR 9.5, *Organizational and Consultant Conflicts of Interest*
Michael J. Farr, *Organizational Conflicts of Interest (OCIs), What Every Contract Law Attorney Needs to Know*, AFJAGS The Reporter, Vol. 42, No. 3, at 44 (2015)
Keith R. Szeliga, *Conflict and Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interest*, 35 Pub. Cont. L.J. 639 (2006)

PROCUREMENT INTEGRITY ACT

The Procurement Integrity Act and its amendments regulate the conduct of federal employees who are involved in procurements and the administration of contracts. The fundamental idea behind the Procurement Integrity Act is that government employees have a duty to put the best interests of the U.S. Government first.

WARNING: This is a complex and constantly changing area of the law, and you should contact your local ethics counselor if you have any questions!

- Employees involved in the procurement process must report any employment discussions ("contact") they have with contractors to their supervisors and designated agency ethics official, and must disqualify themselves from further contract work if they do not immediately reject the "contact"
    - For purposes of the Procurement Integrity Act, "contact" includes "seeking employment." An employee is "seeking employment" when:
        - Engaging in negotiations for employment with any person;
        - Making an unsolicited communication to any person regarding possible employment with that person; or
        - Making a response other than immediate rejection of the possible employment
    - Unsolicited communications from offerors regarding possible employment are also considered "contacts"
- Certain employees who are significantly involved in procurements or the administration of contracts, either of which are valued at $10 million or greater, are prohibited from working for the contractor for a period of 1 year following their involvement
    - This compensation ban extends only to the prime contractor. A former official is not prohibited from accepting compensation from a division or affiliate of a contractor provided the product or service is different from the contracted product/service.
- The Procurement Integrity Act also prohibits: knowingly disclosing or obtaining contractor bid or proposal information or source selection information, other than as provided for by law

- Government personnel may request an advisory opinion from their designated agency ethics official as to whether specific conduct would violate the Joint Ethics Regulation or the Procurement Integrity Act. Procurement personnel should obtain advisory opinions when necessary.

References

Procurement Integrity Act, 41 U.S.C. §§ 2101-2107
FAR Subparts 2.101 and 3.104, *Procurement Integrity*
DoD 5500.07-R, Joint Ethics Regulation, including through Change 7, 17 November 2011

SUSPENSION AND DEBARMENT

The Federal Acquisition Regulation (FAR) requires agencies to solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Suspension and debarment are discretionary administrative actions that are an appropriate means to effectuate this policy. The serious nature of debarment and suspension requires that these remedies be imposed only in the public interest for the government's protection and not for purposes of punishment. The Deputy General Counsel for Contractor Responsibility and Conflict Resolution (SAF/GCR) serves as the Air Force Debarring and Suspending Official (SDO).

Definitions

- Suspension: Action taken by the agency SDO upon to disqualify a contractor temporarily from government contracting and government-approved subcontracting (normally not more than 12 months in the absence of an indictment), pending the completion of investigation and any ensuing legal proceedings

- Debarment: Action taken by the agency SDO to exclude a contractor from government contracting and government-approved subcontracting for a reasonable, specified period, normally not more than 3 years

Reasons

- Contractors can be debarred or suspended for a number of reasons, including:

  -- Commission or failure to disclose fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract

  -- Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, receiving stolen property or any other offense indicating a lack of business integrity

  -- Failure to perform in accordance with the terms of a government contract or subcontract so serious as to justify debarment; typically such conduct is willful

  -- Any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor

Consequences

- Contractors who are suspended, proposed for debarment, or debarred are ineligible to receive any new contract awards, task orders under indefinite-delivery, indefinite-quantity contracts, orders under the federal supply schedule contracts or new work, option exercises, or extensions of duration on current contracts or orders

- The suspension/debarment extends to all contracts or potential contracts with the federal government

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References

FAR Subpart 9.4, *Debarment, Suspension, and Ineligibility*

AFI 51-1101, *The Air Force Procurement Fraud Remedies Program* (21 October 2003), including administrative changes, 30 November 2011

THE AIR FORCE COMMUNITY PARTNERSHIP PROGRAM (AFCP) AND INTERGOVERNMENTAL SUPPORT AGREEMENTS (IGSAS)

The AFCP offers opportunities to military installations and local communities to partner and achieve mutual value and benefit. The goal of the AFCP is to leverage military installation and local community capabilities and resources to obtain value and benefit in support of the Air Force mission. The AFCP is currently working with 53 installations and local communities.

- Examples of successful AFCP initiatives include:

  -- Robins Air Force Base, Georgia: Entered into an agreement for Air Force physicians and dentists to attend renewal certification training at local community hospitals, resulting in cost savings of more than $434,000 for the Air Force and up to $2 million for the community

  -- Ellsworth Air Force Base, South Dakota: Leased underutilized base facilities to a health care management firm with lease income equal to $635,000, thereby creating jobs, income to offset base operating costs, and access to base services for the firm's employees

  -- Hill Air Force Base, Utah: Established a satellite pharmacy in underutilized space in the new base exchange, increasing the number of prescriptions filled, recapturing workload from the retail network pharmacies, increasing foot traffic and sales in the exchange facility, and saving an estimated $3.1 million in prescription costs over the last 13 months

- To enter into the AFCP, the wing commander must contact SAF/IEI

  -- Installation leadership must fully support the concept (with MAJCOM concurrence)

  -- Community leaders must fully support the program

- In addition to the AFCP, 10 U.S.C. § 2679 authorizes the service secretaries to enter into IGSAs with state and local governments to provide, receive, or share installation support services if the Secretary determines the agreement will serve the best interests of the department by enhancing mission effectiveness or creating efficiencies or economies of scale

  -- SAF/IEI must approve all IGSAs

  -- The term of an IGSA may not exceed 5 years

References

10 U.S.C. § 2679

AFPD 90-22, *Air Force Community Partnership Program* (24 July 2014)

SAF/AQC/IEI Memorandum, *Air Force Community Partnership (AFCP) Program; 10 U.S.C. § 2679 "Installation Support Services: Intergovernmental Support Agreements (IGSA)"* (24 August 2015)

CONGRESS AND APPROPRIATIONS TO THE AIR FORCE

Congress has the authority to appropriate funds and to establish the conditions governing the use of those funds. Once those funds are authorized and appropriated, additional administrative apportionments and subdivisions occur before funds can be obligated or expended.

Constitutional "Power of the Purse"

- U.S. Constitution, Art. I, § 8 gives Congress the authority to "pay the Debts and provide for the common Defence and general Welfare of the United States" and to "make all Laws which shall be necessary and proper for carrying into Execution the [powers listed in Art. I, § 8]…."

- U.S. Constitution, Art. I, § 9, states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law…."

Authorizations and Appropriations

- Annual authorization acts authorize the appropriation of funds for programs and activities and usually contain restrictions and limitations on the obligation of appropriated funds. An authorization act does not provide budget authority. That authority stems from the appropriations act.

- Appropriation acts contain express statutory authorization "to incur obligations and make payments out of the Treasury for specified purposes"

  -- Air Force funding primarily comes from the annual DoD Appropriations Act and the Military Construction Appropriations Act

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References

U.S. Constitution, Art. I, §§ 8-9
31 U.S.C. §§ 1301(d), 1514
A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP (September 2005)
OMB Cir. A-11, *Preparation, Submission, and Execution of the Budget*, § 150.7 (2015)
DoD 7000.14-R, *Financial Management Regulation*, Vol. 3, Ch. 14 (May 2015)
AFI 65-601, *Budget Guidance and Procedures*, Vol. 1 (16 August 2012), incorporating Change 1, 29 July 2015
Principles of Fed. Appropriations Law, Vol. I, Ch. 2, GAO-04-261SP (3d ed. 2004)

FOUNDATIONS OF FISCAL LAW

Fiscal law requires the commander to have affirmative authority to use funds for a particular purpose. This is unlike many other areas of the law that permit commanders to exercise authority not expressly prohibited to complete the mission. Expenditure of funds requires Congress to have authorized and appropriated funds. The three pillars of affirmative authority are "purpose, time, and amount."

Purpose

- Funds may be expended only for the purpose intended by Congress
  - -- Not every expenditure is required to be specified in an appropriations act
  - -- The Government Accountability Office (GAO) applies a three-part test to determine whether an expenditure is a "necessary expense" and meets the purpose of a particular appropriation:
    - --- The expenditure must be necessary and incident to the purposes of the appropriation
    - --- The expenditure must not be prohibited by law
    - --- The expenditure must not otherwise fall within the scope of another appropriation or statutory funding scheme
- Examples of common issues regarding questionable expenses:
  - -- Bottled Water: Generally a personal expense with some exceptions for disasters and locations where no potable water exists
  - -- Personal Office Furniture and Equipment: If items only serve a single individual (exception for handicapped employees)
  - -- Clothing: Generally a personal expense with limited exceptions
  - -- Payment of Fines and Penalties: For example, an employee receives a moving violation citation while driving a government owned vehicle (GOV)
  - -- Food: Generally a personal expense with some exceptions for certain situations involving training, conferences, and award ceremonies

Time

- An agency may obligate funds only within the time limits applicable to the appropriation. The following are some common DoD appropriations and their typical period of availability:

  -- Installation operation and maintenance (O&M) funds, 1 year;

  -- Research, development, test and evaluation (RDT&E) funds, 2 years;

  -- Procurement funds, 3 years; and

  -- Military construction (MILCON) funds, 5 years

- Bona Fide Needs Rule: Generally, government agencies may not purchase goods or services they do not require for the current fiscal year

  -- Agencies may only obligate funds to fill a requirement once the bona fide need exists

    --- Current year money for current year needs

    --- Generally, the time limitations apply to the obligation of funds and not the disbursement or payment of the funds

  -- The bona fide need for a supply is generally determined by when the government actually requires the supplies

    --- Delivery Lead-Time Exception: This exception allows agencies to use current year money to procure supplies that will not be used during the current fiscal year when (1) the agency currently requires the supply, and (2) the delay is due to delivery lead time

    --- Production Lead-Time Exception: This exception allows agencies to use current year money to procure supplies that will not be used during the current fiscal year when (1) the agency requires the supply in the next fiscal year, and (2) in order to use the supply when required the agency must fund production now

    --- Stock-Level Exception: This exception permits agencies to purchase sufficient readily available common-use standard type supplies to maintain adequate and normal (reasonable) stock levels

---- Stockpiling of supplies in excess of normal usage requirements is prohibited

-- The bona fide need for services does not arise until the services are rendered and must be funded with funds current as of the date the services are performed

--- Non-severable Services: A service is non-severable if the service produces a single or unified outcome, product, or report that cannot be subdivided for separate performance in different fiscal years

---- An example of a non-severable service is a research contract for a 3 year study on migratory birds and the purpose is to publish a final report

---- The government must fund non-servable services contracts with dollars available for obligation at the time the contract is executed and performance of the contract may cross fiscal years

--- Severable Services: A service is severable if it can be separated into components that independently meet a need of the government

---- Must be a bona fide need of the fiscal year in which performed

---- DoD agencies may obligate funds current at the time of contract award to finance a severable services contract with a period of performance that does not exceed 1 year (may cross fiscal years)

- Every appropriation has a period of availability during which money can be obligated from the appropriation

- Expired and Closed Funds: Generally, an appropriation is available for new obligations only during its period of availability. Once the period of availability lapses, the appropriation will expire and eventually close.

-- Expired Appropriation: An appropriation whose period of availability has ended and is no longer available for new obligations

--- Adjustment and liquidation of previously incurred obligations may occur for 5 years

--- Retains its complete accounting classification identifiers throughout the 5 year period

--- **Exceptions** to the prohibition on obligating funds after the period of availability:

---- Contract modifications affecting price

---- Bid protests

---- Terminations for default

---- Terminations for convenience (in limited circumstances)

-- Closed Appropriation: An appropriation that is no longer available for any purpose

--- An appropriation becomes "closed" 5 years after the end of its period of availability as defined by the applicable appropriations act

--- All remaining balances in the account, obligated or unobligated, are canceled

Amount

- An agency must obligate funds within the amounts appropriated by Congress. In other words, do **NOT** spend more money than Congress has authorized the agency to spend.

The Anti-Deficiency Act (ADA)

- The ADA was originally enacted by Congress to prevent the federal government from making expenditures in excess of the amounts that Congress appropriated

-- Under the ADA an officer or employee of the U.S. Government may not:

--- Make or authorize an expenditure or obligation exceeding an amount available in an appropriation unless authorized by law

--- Involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law

--- Make or authorize an expenditure or obligation exceeding (1) an apportionment or (2) the amount permitted by regulations

--- Accept voluntary services for the United States or employ personal services, except for emergencies involving the safety of human life or the protection of property or unless authorized by law

-- Either a purpose or time violation may also lead to an ADA violation

--- These violations can be "corrected." Officials can avoid an ADA violation if both of the following conditions are met:

---- Proper funds were available at the time of the erroneous obligation; and

---- Proper funds were available at the time of correction for the agency to correct the erroneous obligation

-- Potential sanctions for ADA violations:

--- Adverse personnel actions

--- Criminal penalties for a knowing and willful ADA violation, a Class E felony, include not more than a $5,000 fine, confinement for up to 2 years, or both

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References

10 U.S.C. § 2410a
31 U.S.C. § 1301(a)
Anti-Deficiency Act, 31 U.S.C. §§ 1341, *et seq.*
31 U.S.C. § 1341(a)(1)(A), (a)(1)(B)
31 U.S.C. §§ 1342, 1351, and 1517(a)
United States v. MacCollom, 426 U.S. 317 (1976)
GAO, Principles of Federal Appropriations Law, 4th ed., 2016 ("The Redbook"), http://www.gao.gov/legal/red-book/about-fourth-edition
DoD 7000.14-R, *Department of Defense Financial Management Regulation* (May 2016)
AFI 65-601, *Budget Guidance and Procedures* (16 August 2012)
AFI 65-608, *Antideficiency Act Violations* (18 March 2005)

CONSTRUCTION FUNDING THRESHOLDS

"Construction" is a term of art when it comes to funding. Construction projects having a funded cost up to $1,000,000 may be funded with operations and maintenance funds. Projects having a funded cost exceeding $1,000,000 must be funded with military construction funds. Military construction funds may be used for ***specified*** and ***unspecified*** construction projects. The laws governing military construction funding are always subject to change so these dollar thresholds should be verified prior to commencing work.

Specified Military Construction Projects (MILCON)

- Congress specifically authorizes MILCON projects expected to exceed $3 million. The specific authorization is located in the conference report accompanying the annual Military Construction Appropriations Act.

  -- MILCON projects are usually the result of a multi-year long planning, programming, budgeting and execution (PPBE) process

Unspecified Minor Military Construction Projects (UMMC)

- UMMC funds can be used for a project with a cost between $1,000,000 and $3 million (up to $4 million **IF** the project is intended solely to correct life, health, or safety deficiencies)

- Combining UMMC funds with other fund types to accomplish a single requirement is prohibited

- An UMMC project costing more than $1,000,000 must have prior Secretary of the Air Force (SecAF) approval and requires prior Congressional notification

UMMC Projects Using Operations and Maintenance (O&M) Appropriations

- Congress permits the use of O&M funds for UMMC up to $1,000,000 per project

Maintenance and Repair Projects

- Maintenance and repair projects are not considered construction for funding purposes

  -- Repairs exceeding $7.5 million must be approved by SAF/IEI and reported to Congress

References

10 U.S.C. §§ 2805, 2811

DoD 7000.14-R, *Financial Management Regulation*, Vol. 2B, Chapter 6, "Military Construction/ Family Housing Appropriations" (June 2013)

AFI 32-1021, *Planning and Programming Military Construction (MILCON) Projects* (31 October 2014)

AFI 32-1032, *Planning and Programming Appropriated Fund Maintenance, Repair, and Construction Projects* (24 September 2015)

CONTINUING RESOLUTION AUTHORITY AND FUNDING GAPS

Because the Anti-Deficiency Act (ADA) generally bars federal agencies from obligating funds in the absence of an appropriation, the operations of the Air Force depend heavily on Congress enacting annual appropriations bills by the first day of October, the beginning of the federal government's fiscal year. When such appropriations are not enacted, Congress may pass a continuing resolution bill. If Congress fails to enact either its annual appropriations bills or a continuing resolution, a funding gap occurs.

Continuing Resolution Authority

- A continuing resolution (CR) is an appropriation act that provides budget authority for federal agencies, specific activities, or both to continue in operation when Congress fails to pass, or the President fails to sign an appropriation act by the beginning of the fiscal year

  -- Congress routinely enacts 12 annual appropriations bills to fund federal activities

  -- Between fiscal years 1977 and 2015, Congress passed 172 CRs to maintain funding for federal activities; this is an average of 4 CRs per fiscal year during the period

- In recent years, CRs have contained several key components, including:

  -- <u>Activities Funded by the CR</u>: Most often, CRs refer back to the activities or programs authorized and funded in the previous year's appropriations

    --- Thus, commanders generally may not fund "new starts" while operating under a CR. "New starts" are activities and programs that were not authorized by Congress under a previous year's appropriations.

    --- However, if Congress authorized a program or activity under a previous year's appropriation and an agency chose not to fund the program during the fiscal year, the commander would normally still be authorized to fund the program or activity under the following fiscal year's CR

    --- CRs sometimes contain express authority for new programs and activities

  -- <u>Duration of the CR</u>: The duration specifies the time period of the CR, which could range from a single day to the remainder of the fiscal year

--- Commanders and their contracting officials must remain aware of the expiration status of CRs to ensure funds are not inadvertently obligated during a funding gap

-- Funding Rate of the CR: Unlike regular appropriations which specify amounts, CRs typically designate funding rates, which are formulas used for determining the amounts available under the CR

--- The amounts are apportioned and published in a bulletin by the Office of Management and Budget (OMB) after enactment of the CR

--- A CR's designated funding rate could produce an amount greater than, equal to, or less than the previous fiscal year's appropriation. Accordingly, commanders must be prepared to continue operations with less funding if a CR's funding rate so requires.

Funding Gaps

- A funding gap is a period where no annual appropriations exist against which agencies can obligate the government. Although a funding gap often occurs at the end of a fiscal year, it may also occur at any time a CR expires without Congress enacting another CR or annual appropriation.

  -- Between fiscal years 1977 and 2014, 18 funding gaps occurred among 13 separate fiscal years (several fiscal years experienced multiple funding gaps)

  -- Funding gaps are distinguishable from a "shutdown" in that shutdowns result from a prolonged funding gap (generally more than 1-2 days). Funding gaps lasting more than 1-2 days normally require agencies to implement shutdown procedures.

- Because the ADA generally bars the obligation of funds in the absence of an appropriation, commanders are significantly limited in regards to what operations they may continue during a funding gap

  -- "Excepted" Activities: One exception to the ADA during a funding gap is that any activities affecting the "safety of human life or the protection of property" are allowed to continue. Such activities are often labeled as "excepted" when:

  --- There is a reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property; and

--- There is some reasonable likelihood that either or both would be compromised in some significant degree by the delay in the performance of the function

-- Multi-year & Revolving Funds: Operations and activities that are funded by unexpired, multi-year appropriations or revolving funds are also not affected by a funding gap involving annual appropriations

-- Authorized by Statute: Another exception to the ADA is when a federal statute explicitly authorizes the agency to obligate funds in advance of appropriations. For example, 41 U.S.C. § 11, the Feed and Forage Act, allows the DoD to obligate funds in advance of an appropriation in order to procure essential supplies during times of emergency.

- During funding gaps and shutdowns commanders and Air Force leaders should always seek the most current guidance regarding continued operations from their chain of command, staff judge advocates (SJAs), and finance advisors. The following non-exhaustive list summarizes some of the DoD activities often excepted during these lapses in appropriations:

  -- Military personnel serving on active duty, regardless of affiliation with excepted or excepted activities

  -- The minimum number of civilian employees required to carry out excepted activities

  -- Military permanent change of station (PCS) moves to an excepted activity; or from an excepted activity if commander of excepted activity determines it is essential to mission

  -- Temporary duty (TDY) travel directly related to safety of human life or the protection of property, including national security and foreign relations (oftentimes requires high-level approval)

  -- Contracts fully-funded before previous appropriation expired, regardless of whether they support an excepted activity. New contracts and incrementally funded contracts may also continue if they support an excepted activity.

References

Anti-Deficiency Act, 31 U.S.C. §§ 1341–1342, 1511–1519

Feed and Forage Act, 41 U.S.C. § 11

Congressional Research Service Report, *Continuing Resolutions: Overview of Components and Recent Practices*, R42647 (July 16, 2015)

GAO Redbook, Vol. II, 8-16 & 6-146 (3d. ed. 2006)

OMB Circular A11, Section 123, *Apportionments under Continuing Resolutions Section & Section 124*, Agency Operations in the Absence of Appropriations (2015)

Congressional Research Service Report, *Federal Funding Gaps: A Brief Overview*, RS20348 (October 11, 2013)

Memorandum, Office of Legal Counsel, Department of Justice, *Opinion for the Director Office of Management and Budget* (August 16, 1995)

Memorandum, Deputy Secretary of Defense, *Guidance for Continuation of Operations during a Lapse of Appropriations* (September 25, 2015)

CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES

Contractors support military forces overseas today more than ever. Commanders must understand the basic rules and policies regarding contractor personnel overseas.

Contingency Contractor Personnel: Includes defense contractors and employees of defense contractors and associated subcontractors, including U.S. citizens, U.S. legal aliens, third country nationals (TCN), and citizens of host nations who are authorized to accompany U.S. military forces in contingency operations or other military operations, or exercises designated by the geographic combatant commander. This includes employees of external support, systems support, and theater support contractors. Such personnel are provided with an appropriate identification card under the Geneva Conventions.

Contractors Authorized to Accompany the Force (CAAF): A sub-category of "contingency contractor personnel." CAAF are employees of system support and external support contractors, and associated subcontractors, at all tiers, who are specifically authorized in their contract to deploy through a deployment center or process and provide support to U.S. military forces in contingency operations or in other military operations, or exercises designated by a geographic combatant commander. CAAF includes forward-deployed system support and external support. Such personnel are provided with an appropriate identification card under the Geneva Conventions. CAAF do not include TCN or local national personnel hired in theater using local procurement, e.g., day laborers.

International Law and Contractor Legal Status

- Contractors may support military operations as civilians accompanying the force, ***so long as***:
  - They are designated as such by the force they accompany
  - They are provided with an appropriate identification card
- Contingency contractor personnel may be at risk of injury or death incidental to enemy actions while supporting military operations
- Contingency contractor personnel may support contingency operations through ***indirect participation*** in military operations, such as by providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment, and providing logistic services such as billeting, messing, etc.

- If captured during armed conflict, and if they have proper authorization, contingency contractor personnel accompanying the force are entitled to prisoner of war status

- Subject to the application of international agreements, contingency contractor personnel must comply with applicable host nation and third country nation laws

- Contingency contractor personnel remain subject to U.S. laws and regulations and may be subject to prosecution

- The contracting officer will issue a letter of authorization to CAAF, which will be required to process through a deployment center, and to travel to, from and within the area of responsibility (AOR)

Medical Issues

- Defense contractors must provide medically and physically qualified contingency contractor personnel

- Secretary of Defense may direct immunizations as mandatory for CAAF performing DoD essential contractor services

- In general, defense contractors must provide their own medical care. The government may provide resuscitative care, stabilization, hospitalization at level III military treatment facilities, and assistance with patient movement in emergencies where loss of life, limb or eyesight could occur. Refer to the underlying contract to determine the exact level of medical care agreed upon.

- Generally, costs associated with the treatment and transportation of contingency contractor personnel to the selected civilian facility are reimbursable to the government

Individual Protective Equipment

- Generally, contractors shall be required to provide all life, mission, and administrative support to its employees necessary to perform the contract

- The component commander may decide it is in the government's interest to provide selected life, mission, and administrative support to some contingency contractor personnel. This equipment shall typically be issued before deployment to the AOR and must be returned to the government, otherwise accounted for, or purchased, after use.

Uniforms

- The individual contractor or contingency contractor personnel are responsible for providing their own personal clothing, including casual and work clothing required by the particular assignment

- Generally, commanders shall not issue military clothing to contingency contractor personnel or allow the wearing of military or military look-alike uniforms. However, geographic combatant commanders may authorize certain contingency contractor personnel to wear standard uniform items for operational reasons.

  -- This authorization shall be in writing and carried by authorized contingency contractor personnel

  -- Care must be taken to ensure, consistent with force protection measures, the contingency contractor personnel are distinguishable from military personnel through the use of distinctive patches, arm bands, nametags, or headgear

Force Protection and Weapons Issuance

- The geographic combatant commanders must develop a security plan for protection of those contingency contractor personnel in locations where there is not sufficient or legitimate civil authority and the commander decides that it is in the interests of the government to provide security because of any of the following:

  -- The contractor cannot obtain effective security services

  -- Such services are unavailable at a reasonable cost

  -- Threat conditions necessitate security through military means

- Contingency contractor personnel may be armed for individual self-defense, on a case-by-case basis, **ONLY IF**

  -- It is determined that military force protection and legitimate civil authority are deemed unavailable or insufficient

  -- It is authorized by the geographic combatant commander; and

  -- It does not violate applicable U.S., host nation, and international law, relevant status of forces agreements (SOFAs) or international agreements, or other arrangements with local host nation authorities

- Commanders should consult with their staff judge advocate prior to authorizing the arming of contractors

- If weapons are authorized:

  -- The government shall provide or ensure weapons familiarization, qualifications, and briefings on the rules regarding the use of force

  -- Acceptance of weapons by contractor personnel shall be voluntary and permitted by the defense contractor and the contract; and

  -- These personnel must not be otherwise prohibited from possessing weapons under U.S. law

Security Services

- If consistent with applicable U.S., host nation, and international law, and relevant SOFAs or other international agreements, a defense contractor may be authorized to provide security services for other than uniquely military functions

- Whether a particular use of contract security personnel to protect military assets is permissible is dependent on the facts and requires legal analysis

  -- Requests shall be reviewed on a case-by-case basis by the appropriate staff judge advocate to the geographic combatant commander

  -- Contractors shall be used cautiously in contingency operations where major combat operations are ongoing or imminent. In these situations, contract security services will not be authorized to guard U.S. or coalition military supply routes, military facilities, military personnel, or military property except as specifically authorized by the geographic combatant commander. In November 2006, the authority to approve use of contract security services to protect military personnel in Iraq or Afghanistan was delegated to the Commander of the Multinational Force-Iraq and to the senior U.S. Forces Commander in Afghanistan.

References

10 U.S.C. § 802(a)(10)
18 U.S.C. § 2441
18 U.S.C. § 3261
DoDI 3020.41, *Operational Contract Support* (20 December 2011)
DoDI 3020.50, *Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises* (22 July 2009), incorporating Change I, 1 August 2011

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CHAPTER FOURTEEN: ETHICS ISSUES

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STANDARDS OF ETHICAL CONDUCT

Each commander has the responsibility of ensuring that the standards of conduct in the Joint Ethics Regulation (JER), DoD 5500.07-R, are brought to the attention of all personnel. It is fundamental Air Force policy that personnel shall not engage in any personal business or professional activity that places them in a position of conflict between their private interests and the public interest of the United States. In order to preserve the public confidence in the Air Force, even the appearance of a conflict of interest must be avoided.

- Air Force personnel shall not use inside information to further a private gain for themselves or others if that information was obtained by reason of their Air Force position and is not generally available to the public

- All personnel, upon first assumption of Air Force duties, should be thoroughly informed of the provisions of the JER

- Annual reminders of the regulation can be accomplished by requiring unit members to read the regulation, by posting bulletin board items, by regularly publishing literature, and providing in-person briefings at unit assemblies

- Personnel may obtain further clarification of the standards of conduct and conflict of interest provisions by consulting with their servicing legal office

- Commanders must emphasize that resolution of a conflict of interest must be accomplished as soon as practicable

- The JER prohibits some specific activities, including:

  -- Active duty members making personal commercial solicitations or solicited sales to DoD personnel junior in rank at any time (on- or off-duty, in- or out-of-uniform), particularly for insurance, stocks, mutual funds, real estate, or any other commodities, goods, or services

  -- Soliciting or accepting any gift, entertainment, or thing of value from any person or company, which is engaged in procurement activities or does business with any agency of the DoD (including contractors). There are exceptions to this rule, so if offered a gift consult the ethics counselor, normally the staff judge advocate (SJA).

  -- Soliciting contributions for gifts to a superior, except voluntary gifts or contributions of nominal value (not to exceed $10) on special occasions like marriage, illness, transfer, or retirement

- -- Active duty military or civilian personnel using their grades, titles, positions, or organization names in connection with activities performed in their personal capacities

- -- Endorsing a non-federal entity, event, product, service, or enterprise (explicit or implied). DoD employees must not use their official capacities and titles, positions, or organization names to suggest official endorsement or preferential treatment of any non-federal entity except those listed in subsection 32-10 of the JER, such as the Combined Federal Campaign and the Air Force Assistance Fund.

- -- Accepting employment outside of the Air Force or off-duty, if it interferes with or is not compatible with the performance of government duties, or if it might discredit the government

- -- Unauthorized gambling, while on-base or on-duty

- DoD employees may not participate in their official DoD capacities in the management of non-federal entities without authorization from the DoD General Counsel, except under very limited circumstances requiring the approval of SecAF

- DoD employees may, however, serve as DoD liaisons to non-federal entities when appointed by the head of the DoD component command or organization who determines there is a significant and continuing DoD interest to be served by such representation. Liaisons serve as part of their official DoD duties, under DoD component memberships, and represent only DoD interests to the non-federal entity in an advisory capacity.

- The JER imposes annual financial reporting requirements for officers in the grade of O-7 or above and other government officials such as commanding officers and procurement officials. See Financial Disclosure.

Reference

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

FINANCIAL DISCLOSURE FORMS

The DoD currently uses two different financial disclosure forms, the OGE 450 and the OGE 278e. The Joint Ethics Regulation (JER) describes who must file, outlines the required contents in these reports, and specifies filing times. Which form an individual must use depends on the rank or grade and responsibilities of that individual. Air Force policy requires OGE 278e filers to use the Financial Disclosure Management (FDM) on-line reporting system, unless electronic filing is not practically possible, such as in a deployed or extremely remote location. Air Force policy highly encourages OGE 450 filers to use the FDM system. FDM utilizes the most current OGE forms and builds upon prior years' inputs to reduce duplication of efforts. However, OGE 278e filers are also required to file monthly OGE 278T periodic transaction reports. This capability is not yet built into FDM. Contact your servicing staff judge advocate (SJA) to determine whether FDM is available at your location.

Confidential Financial Disclosure Report (OGE 450)

- Persons required to file this form include:

  -- Commanding officers, heads and deputy heads of all installations or activities, if the military member is O-6 and below or if a civilian, is GS-15 or below. Commanders, heads, and deputy heads who are general officers or senior executive service employees file the OGE 278e report exclusively.

  -- All military members (O-6 and below) and all civilian employees (GS/GM-15 and below) when the official position of such employees or members requires them to participate personally and substantially in taking an official action for contracting or procurement, or if the supervisor of such employee or member determines the position requires such a report to avoid an actual or apparent conflict of interest

  -- If any questions exist as to whether an individual should file such a report, contact the servicing SJA

- The specific requirements for the content of this report are set forth in Chapter 7 of the JER. Several of these requirements are worth highlighting:

  -- The report must provide sufficient information about the individual, as well as the individual's spouse and dependent children, that an informed judgment can be made regarding compliance with conflict of interest laws

  - No disclosure of amounts or values is required
  - This report must be filed within 30 days after assuming a covered position and annually thereafter
- Annual reports are submitted to the servicing SJA no later than 15 February for the preceding calendar year

Public Financial Disclosure Report (OGE 278e)

- Persons required to file this form include:
  - Regular and reserve officers whose grade is O-7 or above
  - Members of the senior executive service
  - Civilian employees whose positions are classified above GS/GM-15 or whose rate of basic pay is fixed at or above 120 percent of the minimum rate of basic pay for a GS/GM-15
- The specific requirements for the content of this report are also set forth in Chapter 7 of the JER
  - Generally, this report is far more detailed in content than the OGE 450
  - Although specific amounts are not required on the report, individuals must indicate the value of assets within both a given range and type of asset
  - General officers must report a mortgage on their personal residence
- This report must be filed within 30 days after assuming a covered position
- Annual reports must be filed between 1 January and 15 May and cover the preceding calendar year
- An individual must also file a termination report within 30 days after terminating a covered position unless, within 30 days, the individual assumes another covered position
- Late reports are subject to a $200 penalty, absent an approved extension

Periodic Transaction Report (OGE 278T)

- Must be filed by OGE 278e filers who conduct the sale, purchase, or exchange of stocks, bonds, and other securities held by the filer, the filer's spouse, or dependent children with a transaction value exceeding $1000

- Filed on a monthly basis (usually by the 15th of every month)

- Negative reports not required

- Reports are considered late (subject to the $200 penalty), absent an approved request for an extension, if they are filed more than 30 days after they are due (i.e., 30 days after notification of a covered transaction or 45 days after the actual covered transaction)

- FDM does not yet have OGE 278T capability. Filers should use the fillable PDF form.

- Completed forms should be sent to the servicing SJA office who will attach the report to the filer's last annual incumbent report in FDM

  -- This will allow the filer to use the OGE 278T reports when building next year's annual OGE 278e incumbent report, Schedule B (Transactions)

References

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

U.S. Department of Defense Standards of Conduct Office, http://www.dod.mil/dodgc/defense_ethics/

OGE 278e, OGE 278T and OGE 450 are, http://www.oge.gov/

GIFTS TO THE AIR FORCE

Acceptance of Gifts

- 10 U.S.C. § 2601 provides general statutory authority to accept gifts to the Air Force
  - -- AFI 51-601, *Gifts to the Department of the Air Force*, provides gift acceptance authorities and procedures
- Gifts of personal property more than $50,000 and real property more than $10,000 must be accepted by the Secretary of the Air Force (SecAF)
  - -- Gifts of lesser amounts may be accepted by MAJCOM commanders and other officials
  - -- Installation commanders may accept gifts of personal property up to $5000 value

Types of Gifts

- Unconditional gifts have no conditions attached to them
- Conditional gifts have specific conditions tied to their acceptance (e.g., a gift of $15 million to construct a new library wing at the United States Air Force Academy)

Rejecting Gifts

- Gifts may be rejected under the following circumstances:
  - -- Acceptance involves expending funds in excess of amounts appropriated by Congress
  - -- The offered item is extremely dangerous
  - -- The offered item is in bad taste
  - -- Acceptance of the gift would raise a serious question of impropriety in light of the donor's present or prospective business relationships with the Air Force
  - -- The cost of acceptance and maintenance is disproportionate to any benefit
  - -- Acceptance would not be in the best interest of the Air Force

Gifts for Distribution

- AFI 51-601, Chapter 5, governs gifts that are received for distribution to individual Airmen
  - These types of gifts must be used for health, comfort, convenience, or morale
  - Examples include sporting tickets, handheld electronic devices, and toiletry kits

Recognition of Donors is Limited

- Receiving commanders may send an appropriate letter of thanks
- Do not grant special concessions to donors
- Do not initiate publicity for donors
- If the gift itself is worthy of a press release (e.g., new USAFA library wing) then the release may discuss the fact of the gift and the identity of the donor without emphasis

Gifts of Voluntary Service

- 10 U.S.C. § 1588 permits installation commanders to accept the gift of volunteer services in the following areas:
  - Voluntary medical services, dental services, nursing services, or other health-care related services
  - Voluntary services to be provided for a museum or a natural resources program
  - Voluntary services provided for programs providing services to members of the armed forces and their families, including the following programs: family support, child development and youth services, library and education, religious, employment assistance to spouses of military members, and morale, welfare, and recreation
  - Volunteers must complete DD Form 2793

References

10 U.S.C. § 1588

10 U.S.C. § 2601

DoDI 1100.21, *Voluntary Services in the Department of Defense* (11 March 2002), incorporating Change 1, 26 December 2002

AFI 51-601, *Gifts to the Department for the Air Force* (26 November 2003)

DD Form 2793, *Volunteer Agreements* (May 2009)

GIFTS OF TRAVEL

Acceptance of Gifts

- Non-federal entities (NFE) may gift the cost of an employee's travel to the Air Force pursuant to 31 U.S.C. § 1353

- Allowable costs include transportation, lodging, meals and conference registration fees

- To allow employees to attend a "meeting" which includes meetings, conferences, speaking engagements and events where the employee receives a public service award from the NFE

- Approval level for acceptance of travel benefits is at the "highest practical administrative level"

  -- Travel benefits must be accepted in advance

Travel Payments

- In-kind provision of travel, lodging and meals is preferred as NFE funds should not pass directly through employee's hands

- In the continental United States (CONUS), the cost of lodging provided may exceed the authorized per diem rate if similar lodging is provided to all other attendees/ speakers

  -- Outside of continental United States (OCONUS), the cost of lodging provided may not exceed the Department of State area per diem rate

- Travel benefits accepted must be reported to SAF/GCA on the semi-annual SF 326, *Semiannual Report of Payments Accepted from a Non-Federal Source*

Spouse Travel

- NFE may also pay for travel for employee's spouse if:
  - -- Spouse attendance supports Air Force mission;
  - -- Employee is to receive award or honorary degree from NFE; or
  - -- Spouse participates in substantive programs related to Air Force programs/ operations

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References

31 U.S.C. § 1353
41 C.F.R. Part 304
SF 326, *Semiannual Report Of Payments Accepted From A Non-Federal Source*

GIFTS TO SUPERIORS

To avoid the appearance that a supervisor is being improperly influenced, the Joint Ethics Regulation (JER) issues the following guidelines concerning gifts to superiors.

- Generally, Air Force personnel **MAY NOT**:

  -- Solicit a contribution from other DoD personnel for a gift to a superior

  -- Make a donation for a gift or give a gift to a superior

  -- Accept a gift from subordinate personnel

- **Exceptions** to the general rule prohibiting gifts to superiors or their solicitation:

  -- On an occasional basis, including occasions where gifts are traditionally given or exchanged, items having an aggregate market value of $10 or less per occasion, items such as food and refreshments, or personal hospitality at a residence may be given to superiors and accepted from subordinates

  -- On special, infrequent occasions (marriage, birth of child, etc.) or on occasions that terminate the superior-subordinate relationship (retirement, separation, or permanent change of station (PCS))

    --- Employees may solicit a contribution for a group gift for a special, infrequent occasion, as long as the amount solicited does not exceed $10 per person. Solicitation must be without pressure or coercion.

    --- The general rule is that a DoD employee **MAY NOT** accept a gift that exceeds $300 in value from a group that consists of one or more subordinates to the honoree

      ---- If an individual donates to more than one donating group, then the donating group(s) will be considered to be one donating group and the combined value of the gifts from the groups must be $300 or less

      ---- There is no limit on the number of donating groups

      ---- Donating groups should be defined by reasonable and rational parameters and are usually related to the structure of the overall organization and individual units within that organization

    --- Under all circumstances, gifts must be truly **voluntary**

References

5 C.F.R. §§ 2635.301–2635.304, 3601.104

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

FOREIGN GIFTS

The United States Constitution prohibits persons holding an "office of profit or trust" for the United States from accepting gifts from foreign "personages or governments" without consent of Congress. Congress has consented to retaining and accepting gifts under certain conditions and when following certain procedures.

- This prohibition applies to military members, civilian employees, consultants, and their spouses or other dependents. This includes retired and reserve component members, regard-less of duty, Air National Guard members, when federally recognized, and their spouses and dependents.

- No DoD employee may request, or otherwise encourage, the offer of a gift from a foreign government

- Table favors, mementos, remembrances, or other tokens bestowed at official functions, and other gifts of minimal value received as souvenirs or marks of courtesy from a foreign government, e.g., plaques or paper certificates, may be accepted and retained by the recipient

- "Minimal value," is defined as not exceeding $375 in retail value. "Minimal value" is based on the Consumer Price Index and is subject to change.

  -- The General Services Administration (GSA) periodically adjusts the amount

  -- The value of the gift is determined by retail value in the United States

  -- Must aggregate the value if more than one gift is given at the same occasion

- DoD employees must refuse offers of gifts of more than minimal value if practical to do so

  -- Advise donor that United States law prohibits persons in service of the United States or their dependents from accepting the gift

  -- However, refusal requires Department of State approval (coordinated through SAF/AA)

--- **Exceptions** to the refusal rule:

---- May accept a gift of greater value if refusal is likely to offend or embarrass the donor or adversely affect foreign relations. The gift becomes United States property and must be reported and turned in to the Air Force in accordance with procedures prescribed in AFI 51-901, *Gifts from Foreign Governments*.

---- A gift recipient may purchase a gift if he or she desires by paying full retail value

- For minimal value gifts accepted, the person receiving the gift should make a written record describing the circumstances of the gift, including the date and place of presentation, identity and position of the donor, description and value of gift, and means by which the value was determined

  -- Request disposition instructions from SAF/AA and make a recommendation as to the disposition of the gift

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References

5 U.S.C. § 7342

41 C.F.R. § 102-42.10

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

DoDD 1005.13, *Gifts and Decorations from Foreign Governments* (19 February 2002), incorporating Change 1, 6 December 2002, certified current 21 November 2003

AFI 51-901, *Gifts from Foreign Governments* (16 February 2005), certified current 1 April 2011

HONORARIA

Federal employees may accept the payment of money or anything of value for an appearance, speech or article, *unrelated* to their official duties, assuming there are no statutory or regulatory prohibitions.

- An honorarium is generally defined as a payment given to someone, such as a consultant or a speaker, for services for which fees are not legally required

- In the context of the Joint Ethics Regulation (JER), honoraria are considered compensation for a lecture, speech, or writing and involve the payment of money or anything of value

- At one time, federal employees were prohibited from accepting any honorarium on any topic, even if there was no connection between the subject of the appearance, or article, and the official duty of the individual

- However, pursuant to the *Wolfe v. Barnhart* case, that prohibition is no longer strictly enforced against government employees, military or civilian. Federal employees are no longer prohibited from accepting the payment of money or anything of value for an appearance, speech, or article, *unrelated* to their official duties.

- Federal employees may accept compensation for a lecture, speech or writing based on the employee's field of individualized expertise (rather than official duties or agency operations) even if that field is generally within the agency's area of responsibility

- JER 3-305 states that an employee who uses, or permits the use of, their military grade or who includes, or permits the inclusion, of his/her official title or position (only allowed as one of several biographical details) when being introduced, must include a disclaimer that the views being expressed are those of the speaker/writer and do not necessarily represent the views of DoD or the Air Force

  -- If a speech, the disclaimer may be made verbally

  -- If a writing, the disclaimer must be in writing as well

- Travel reimbursement for a speech related to official duties may be accepted under certain circumstances, but a fee or other direct compensation for speaking may not be accepted

- Consult your ethics counselor or servicing staff judge advocate before accepting an honorarium

References

Wolfe v. Barnhart, 446 F.3d 1096 (10th Cir. 2006)

5 C.F.R. § 2635.807

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

HONORARY MEMBERSHIPS

Air Force personnel are occasionally offered memberships in various non-defense contractor private organizations such as golf, tennis, gun, health, or social clubs. Such offers usually waive initiation fees and may waive all or a portion of membership dues, but the individual is responsible for all charges incurred and any dues not waived. Usually, these memberships terminate on reassignment or retirement and do not create an equity position in the club.

- The Joint Ethics Regulation (JER) prohibits military members or civilian employees from accepting such a membership if the membership is offered because of their official position

  -- Previously, there was no prohibition to members accepting an unsolicited honorary membership from a non-defense contractor entity. This included country clubs.

  -- Currently, an Air Force member may accept honorary membership only if the offer is unrelated to government employment and offered to all military members, regardless of grade or position. The same rule applies to civilian employees.

- Air Force personnel may become regular members of associations whose membership includes DoD contractor personnel, e.g., Air Force Association

- If acceptance is not otherwise prohibited, acceptance of an honorary membership does not violate 18 U.S.C. § 209 (unauthorized acceptance of compensation by a government official for services as a government official)

- Before accepting any honorary membership, military members should seek the advice and guidance from their ethics counselor or servicing staff judge advocate

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References

18 U.S.C. § 209

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

USE OF GOVERNMENT OWNED VEHICLES (GOVS)

- AFI 24-301, *Vehicle Operations*, governs use of government owned vehicles (GOV)

- GOVs should only be used for official purposes (to support authorized DoD functions, activities or operations)

  -- Decisions regarding questions of authorized GOV support will be resolved in favor of strict compliance with AFI 24-301 "to preclude any negative public perception"

- GOVs should not be provided to any employee based solely on grade, position, or personal convenience

- When vehicle transportation is essential to the performance of official business, the following methods shall be considered in the following order:

  -- DoD scheduled bus service

  -- Scheduled public transportation

  -- DoD-owned or leased GOV

  -- Voluntary use of privately owned vehicle (POV) on a reimbursable basis

Permanent Party and Temporary Party Use

- Use for Permanent Party Travel:

  -- GOVs are not authorized for command picnics, holiday parties, or other unofficial events

  -- GOVs are authorized for public ceremonies, parades, retirements and changes of command (for official participants)

- Use for Temporary Duty (TDY) Travel:

  -- Between workplace or lodging and eating establishments, drug stores, barber shop, places of worship, laundry or dry cleaning facility, and similar places of sustenance

  -- If off-base, the establishment must be reputable business within reasonable proximity to the installation (e.g., 5 miles should be used as a guide)

    - On-base places of recreation including fitness centers, bowling centers and clubs
    - No off-base recreation facilities
- Family Members:
    - Transportation for family members is the sponsor's personal responsibility
    - Dependents may accompany their sponsor in a GOV on a space-available basis when there is no additional cost to the Air Force, no official travelers are displaced, and no larger vehicle is required as result
    - Detours to pick up or drop off family members are not authorized

Command and Control Vehicles (CACV) and Domicile to Duty (DTD) Transportation

- CACV are for commanders with overall responsibility for operations or installation security needing 24/7 emergency communication support
    - MAJCOM/CC (may be delegated in writing to MAJCOM/CV) is the approval level
- CACV authority is not authority for DTD transportation
    - CACV should **NOT** be taken to the employee's residence even for brief, incidental stops
- DTD transportation, per 31 U.S.C. 1344, is only authorized for:
    - Secretary of the Air Force (SecAF) and Chief of Staff of the U.S. Air Force (CSAF)
    - Field work (e.g., recruiters, medical officers performing outpatient service away from military treatment facility (MTF)
    - Intelligence, counterintelligence, protection services, or law enforcement duty
    - Emergent circumstances
        - Highly unusual circumstances that present a clear and present danger
        - Emergency situations
        - Other compelling operational considerations

- SecAF must approve DTD transportation
  - The initial determination is not to exceed 15 days in duration
  - The initial determination period may be extended for up to 90 days, twice
  - Congress must be notified when DTD transportation is authorized

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References

31 U.S.C. § 1344
DoDD 4500.09E, *Transportation and Traffic Management* (11 September 2007)
DoDD 4500.36-R, *Acquisition, Management, and Use of Non-Tactical Vehicles* (7 July 2015)
AFI 24-301, *Vehicle Operations* (5 May 2016)

USING GOVERNMENT FUNDS FOR MEMENTOS AND GIFTS

Air Force policy is that appropriated funds cannot be used to purchase gifts for military members, employees, or private citizens unless specifically authorized by law. The only authority to use Air Force appropriated funds for gifts is AFI 65-603, *Official Representation Funds*, which specifies the circumstances and the individuals to whom gifts (or "mementos") may be presented. Generally, nonappropriated funds cannot be used when appropriated funds are authorized, whether such funds are available or not. The use and limits on the use of nonappropriated funds is outlined in AFI 34-201, *Use of Nonappropriated Funds (NAFs)*.

Impermissible Use of Funds

- You cannot use ***appropriated*** funds to purchase permanent change of station (PCS) or retirement mementos for either military or DoD civilian personnel

- You cannot use ***nonappropriated*** funds to purchase PCS mementos for either military or DoD civilian personnel

- In general, you cannot use ***nonappropriated*** funds to purchase trophies and awards that are used to recognize either mission accomplishment or individual achievements that contribute to military effectiveness. Nonappropriated funds may be used to purchase trophies and make nominal monetary awards for winners under the individual recognition program provided appropriated funds are not available or not authorized.

- You cannot use mission accomplishment recognition funding to honor PCS or retiring personnel. AFI 36-2803, *The Air Force Awards and Decorations Program*, and AFI 36-1001, *Managing the Civilian Performance Program*, provide for appropriate recognition in these circumstances.

Permissible Use of Funds

  -- You can use ***nonappropriated*** funds in support of a ***retirement*** ceremony to purchase light refreshments and mementos ($20 limit) for retiring military and DoD civilian personnel

  -- You can use ***appropriated*** funds to purchase special trophies and plaques that are used to recognize mission accomplishment, such as personnel of the quarter awards

-- You can use ***appropriated*** funds, e.g., Official Representation Funds (ORF), to purchase mementos/gifts for distinguished citizens of foreign countries, and prominent U.S. citizens who are not DoD employees under certain circumstances

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References

DoDI 7250.13, *Use of Appropriated Funds for Official Representation Purposes* (30 June 2009)
AFI 34-201, *Use of Nonappropriated Funds (NAFs)* (17 June 2002)
AFI 36-1001, *Managing the Civilian Performance Program* (1 July 1999)
AFI 36-2803, *The Air Force Military Awards and Decorations Program* (18 December 2013), incorporating Change 1 (22 June 2015)
AFI 65-603, *Official Representation Funds* (24 August 2011)

USE OF GOVERNMENT COMMUNICATIONS SYSTEMS

With the explosion of the information age, government employees now have access to computers, copier machines, fax machines, cellular phones, Internet, and electronic mail. Under the Joint Ethics Regulation (JER) the use of government resources and communications systems are for **official** and **authorized** use only.

Policy

- Monitoring: All usage of government communications is subject to being monitored, and no classified information may be communicated using unclassified means

- Downloads: To protect against downloading viruses from the Internet and introducing potential risk to the Air Force networks, check all downloaded files for viruses and do not download any files directly to a network or shared drive

- Hardware and Software: Government-provided hardware and software are for official and authorized purposes only

  -- Appropriate officials may authorize personal uses consistent with the requirements of the JER after consulting with their ethics counselor. Such policies should be explicit.

- Violations: Failure to comply with the prohibitions and mandatory provisions by military personnel is a violation of Article 92, UCMJ. Violations by civilian employees may result in administrative disciplinary actions. See AFMAN 33-152, *User Responsibilities and Guidance for Information Systems*.

Authorized Limited Personal Use

- Examples of **authorized** limited personal use include, but are not limited to:

  -- Notifying family members of official transportation or schedule changes

  -- Exchanging important and time-sensitive information with a spouse or family member, such as scheduling doctor, automobile, or home repair appointments, brief Internet searches, or sending directions to visiting relatives

  -- Educating or enhancing the professional skills of employees

  -- Sending messages on behalf of a chartered organization, such as unit booster club, base top 3, or company grade officers association

-- Limited use by deployed members for morale, health, and welfare purposes

-- Searching for a job if related to separations or retirements

Internet–based Capabilities

- Internet-based capabilities include collaborative tools such as short message service (SMS), social media, blogs and discussion forms

  -- These tools may be used in an official capacity to distribute publically releasable DoD information

  -- They may not link to or contain any non-public DoD data

  -- Posts using these tools are official government records and are subject to the Federal Records Act

- All official use of Internet–based capabilities must be approved by SAF/PA and meet Air Force branding requirements. They must also contain:

  -- A privacy act statement

  -- Comment policy; with moderated comments

  -- Link to an Air Force public facing web site

  -- Link to an official Air Force e-mail account

Security Measures—Digital Signatures and Encryption

- Digitally signing and encrypting e-mails are two measures to secure the network

- <u>Digital Signatures</u>:

  -- Are not required when the message contains only unofficial information and does not contain an embedded hyperlink and/or an attachment

- <u>Encryption</u>: Should be used to protect the following types of information:

    --- For official use only (FOUO)

    --- Privacy Act information

---- Personally identifiable information (PII)

---- Personal health information (PHI), DoD payroll, finance, logistics, personnel management, proprietary, and foreign government information

---- Operations security (OPSEC) information

---- Other information which required encryption by area of responsibility

-- Encryption will not protect classified information

- The number of e-mail recipients should be kept to a minimum

Prohibited Uses

- Uses that would adversely reflect on the DoD or the Air Force such as chain letters, unofficial soliciting, or selling except on authorized Internet-based capabilities established for such use

- Unauthorized storing, processing, displaying, sending, or otherwise transmitting prohibited content

  -- Prohibited content includes: pornography, sexually explicit or sexually oriented material, nudity, hate speech or ridicule of others on the basis of a protected class (e.g., race, religion, color, age, gender, disability, national origin), gambling, illegal weapons, militancy/extremist activities, terrorist activities, use for personal gain, and any other content or activities that are illegal or inappropriate

- Uses that would be deemed partisan political activity under the Hatch Act

- Storing or processing classified information on any system not approved for classified processing

- Using copyrighted material in violation of the rights of the owner of the copyrights. Consult with the servicing staff judge advocate (SJA) for fair use advice.

- Unauthorized use of the account or identity of another person/organization

- Viewing, changing, damaging, deleting, or blocking access to another user's files or communications without appropriate authorization or permission

- Attempting to circumvent or defeat security or modifying security systems without prior authorization or permission (such as for legitimate system testing or security research)

- Obtaining, installing, copying, storing, or using software in violation of the applicable license agreement

- Permitting an unauthorized individual access to a government-owned or government- operated system

- Modifying or altering the network operating system or system configuration without first obtaining written permission from the administrator of that system

- Copying and posting of FOUO, controlled unclassified information (CUI), critical information (CI), and/or PII on any information system not authorized for that type of information including but not limited to publically accessible sites

- Downloading and installing freeware/shareware or any other software product that has not been approved by an Air Force authorizing official

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References

The Hatch Act, 5 U.S.C. §§ 7321-7326
Federal Records Act, 42 U.S.C. § 2203, *et seq.*
UCMJ Art. 92
DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011
AFMAN 33-152, *User Responsibilities and Guidance for Information Systems* (1 June 2012)
AFI 33-115, *Communications and Information* (16 September 2014), including AFI33-115_AFGM2015-01, 29 October 2015
AFI 33-200, *Cyber Security Program Management* (31 August 2015), certified current 16 February 2016
AFI 33-332, *Air Force Privacy and Civil Liberties Program* (12 January 2015)
AFI 33-401, *Communication and Information* (17 May 2011), incorporating Change 1, 22 December 2015
OMB Memo 10-23, *Guidance for Agency Use of Third-Party Websites and Applications* (25 June 2010)

OFFICIAL REPRESENTATION FUNDS (ORF)

- ORF is one type of emergency and extraordinary expense fund allowed by 10 U.S.C. § 127

- The purpose of ORF is to extend official courtesies of the United States to foreign and domestic dignitaries

ORF Ratios

- Invite the minimum number of guest to extend proper courtesies

- In parties of less than 30 persons, at least 20% of the guests are required to be non-DoD

- In parties of more than 30 persons, at least 50% of the guests are required to be non-DoD

Authorized ORF Recipients

- Members of Congress and Cabinet members

- Prominent U.S. citizens

  -- Retired O-10s are automatically considered prominent U.S. citizens

- Foreign distinguished citizens, military personnel, and government officials

- The Secretary of the Air Force, (SecAF) Undersecretary of the Air Force (USecAF), Chief of Staff of the Air Force (CSAF), Vice Chief of Staff of the Air Force (VCSAF), certain other Office of the Secretary of Defense (OSD) members

Authorized Use of ORF

- AFI 65-603, *Official Representation Funds*, governs the use of ORF

  -- May be used for meals, receptions and refreshments

  -- Reasonable gratuities for services rendered by non-government personnel

- -- Recreation events such as sporting activities, sightseeing tours, and concerts for authorized personnel
- -- Floral and candle centerpieces for receptions and meals
- -- Mementos, modest welcome baskets, and the cost of the gift wrapping, paper or bows
- -- Alcohol at evening events

Unauthorized Use of ORF

- Unless specifically approved by SAF/AA the following uses are not allowed:
  - -- Personal items such as toiletry articles, hair and beauty care, souvenirs, and personal clothing items (unless the article of clothing bears the command or unit logo and is given as a memento)
  - -- Personal phone calls or transportation when official duties are not involved
  - -- Expenses for support staff (e.g., aides, executive officers, official drivers, and protocol personnel). These individuals are not considered members of the official party.
  - -- Gifts, flowers, or wreaths for presentation by authorized guests
  - -- Seasonal greeting and calling cards
  - -- Cost of music/entertainment for social hours, receptions, and dinners
  - -- DoD members' (and spouses') cost for recreational activities
  - -- Membership fees or dues

References

10 U.S.C. § 127
DoDI 7250.13, *Use of Appropriated Funds for Official Representation Purposes* (30 June 2009)
AFI 65-603, *Official Representation Funds* (24 August 2011)

OFF-DUTY EMPLOYMENT

Air Force members may participate in off-duty employment, subject to the limitations and prohibitions stated in the Joint Ethics Regulation (JER). Medical providers should consult applicable guidance from AF/SG prior to engaging in off-duty employment.

- Personnel should inform their supervisor prior to engaging in outside employment. Although the Air Force does not require an individual to complete AF IMT 3902, *Application and Approval for Off-Duty Employment,* individuals should be aware there is frequently a local or command policy to do so.

- Financial disclosure filers shall obtain prior approval before working for a prohibited source. For more information on who is required to file financial disclosures, see your servicing staff judge advocate.

- Personnel may not engage in outside employment, with or without compensation, that:

  -- Interferes with or is not compatible with performing their government duties

  -- May reasonably be expected to bring discredit upon the government or the Department of Defense

  -- May tend to create a conflict of interest

  -- Will detract from readiness or pose a security risk

- Personnel are encouraged to engage in teaching, writing, or lecturing

  -- Such activities must not depend upon information gained as a result of government service, unless available to the public or with approval from the Secretary of the Air Force (SecAF)

  -- Civilian presidential appointees may not accept anything of monetary value for imparting information substantially relating to responsibilities, programs, or operations of the Air Force, or for official ideas which have not been made public

  -- Generally, federal employees may not receive payment for articles or speeches related to their official duties

References

Wolfe v. Barnhart, 446 F.3d 1096 (10th Cir. 2006)

5 C.F.R. § 2635, subpart H

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

AFI 36-703, *Civilian Conduct and Responsibility* (18 February 2014)

AF Form 3902, *Application and Approval for Off-Duty Employment* (March 1995)

KEY SPOUSE PROGRAM

DoD components can accept volunteer services in accordance with (in accordance with) 10 U.S.C. § 1588, as implemented by DoDI 1100.21, *Voluntary Services in the Department of Defense.*

Volunteer Services

- Commanders can accept volunteer services for programs including:
  - -- Providing services for military members and their families in accordance with AFI 36-3009, *Airman and Family Readiness Centers*
  - -- Supporting morale, welfare, and recreation (MWR) programs in accordance with AFI 34-101, *Air Force Morale, Welfare and Recreation Programs and Use Eligibility*
  - -- Medical and dental services
  - -- Child Development Center (CDC) and youth programs
  - -- Library and education programs
  - -- Religious programs
  - -- Housing referral programs
  - -- Funeral honors details
  - -- Legal assistance to service members and retirees and their families
  - -- Proctor for Armed Services Vocational Aptitude Battery tests
  - -- Foreign language interpretation

Key Spouses

- All key spouses should be appointed by the unit commander
- Once appointed, they should:
  - -- Complete key spouse training

  - Sign a DD Form 2793, *Volunteer Agreement*

  - Complete necessary information security training, if they will be given access to Air Force information technology systems

- Key Spouses May Not:

  - Serve in a policy making position

  - Supervise paid employees or military personnel

  - Perform inherently governmental functions

  - Obligate government funds (either appropriated funds (APF) or nonappropriated funds (NAF))

  - Be accountable for the management, quality, financial solvency, and health/safety of an installation program or activity

- Key spouses are supervised the same way as compensated employees providing like services

- Key spouses receive Federal Tort Claims Act (FTCA) protections for injuries or damage they may cause when they perform official duties as volunteers

- Key spouses receive Federal Employee Compensation Act (FECA) protections for injuries they may incur when they perform official duties as volunteers

- Key spouse members can use government facilities, desk space, computers, e-mail, telephones, smart phones, tablets, supplies, equipment, access to Privacy Act protected information, and use of government vehicles as needed to perform their assigned duties

  - They should complete the same training required of any compensated employee or military member who will have access to these resources

  - For purposes of DoDI 4500.36R, *Management, Acquisition, and Use of Motor Vehicles,* key spouses are considered federal employees

- AFI 36-3009 places responsibility with Airman and family readiness centers to provide training to key spouse members on a quarterly basis or as requested

- If key spouses engage in fundraising (e.g., as a member of a spouses' club), either on or off-base, they must adhere to AFI 36-3101, *Fundraising in the Air Force,* and AFI 34-223, *Private Organization Program*, and ensure it is clear that they are not acting in their official capacity as the commander's key spouse

- An overview of the program can be found at https://www.usafservices.com. Look under *Key Spouse Program: Commander and First Sergeant Reference Guide.*

References

Federal Employee Compensation Act, 5 U.S.C. § 8107

10 U.S.C. § 1588

Federal Tort Claims Act, 28 U.S.C. § 1346

DoDI 1100.21, *Voluntary Services in the Department of Defense* (11 March 2002), incorporating Change 1, 26 December 2002

DoDI 4500.36-R, *Management, Acquisition, and Use of Motor Vehicles* (7 July 2015)

AFI 34-101, *Air Force Morale, Welfare and Recreation Programs and Use Eligibility* (28 March 2013), including AFI34-101_AFGM2015-01, 28 October 2015

AFI 34-223, *Private Organization Program* (8 March 2007), incorporating Change 1, 30 November 2010, certified current 4 April 2011

AFI 36-3009, *Airman and Family Readiness Centers* (7 May 2013) including AFI36-3009_AFGM2016-01, 18 February 16

AFI 36-3101, *Fundraising in the Air Force* (12 July 2002)

DD Form 2793, *Volunteer Agreement* (May 2009)

UTILIZATION OF ENLISTED AIDES (EAs)

Authorized EA Duties

- An EA is assigned to assist the general officers (GOs). They are not assigned to assist the GO's spouse, family, or staff.

- Examples of Permissible EA Duties Include:

  -- Cleaning of common areas in GO quarters (GOQ) and general lawn care

  -- Care of military uniforms and civilian attire worn for qualifying representational events (QREs)

  -- Receiving guest at QREs

  -- Planning, preparation and conduct of QREs, receptions, and parties

  -- Preparation of daily meals for the GO (and those immediate family members that eat with the GO)

  -- Packing of uniforms and professional items and books in permanent change of station (PCS) move

  -- Assisting the GO with errands that have a substantive connection to the GO's official responsibilities

- EAs are assigned to support assigned GOs and relieve them of routine duties so the GO can focus on military duties

Unauthorized EA Duties

- Any form of care for family, personal guest, or pets

- Maintenance of any privately owned vehicle (POV) or private recreational equipment

- Personal services or errands for the sole benefit of the GO's family or unofficial guests

- Landscaping in areas not used for QREs

- Skilled maintenance of GOQ or cleaning of private family areas

Sharing of EAs

- GOs can loan EAs to another GO who is authorized use of EAs in order to support a QRE

- GOs can assign another GO or GO's spouse to host a QRE that has direct connection to the GO's official duties

  -- This includes events when the spouse is hosting and events attended by spouses of U.S. dignitaries, foreign dignitaries or foreign military officers when the GO is separately meeting with those individuals

Permissible and Impermissible EA Assignments

- DoDI 1351.09, *Utilization of Enlisted Aides (EAs) on Personal Staffs of General and Flag Officers (G/FOs),* enclosure 4, contains examples of permissible and impermissible EA assignments in support of QREs

- Permissible QREs Include:

  -- Events to honor local government, congressional personnel, and foreign dignitaries

  -- Customary unit morale events such as hail and farewell gatherings and holiday parties

  -- Events to welcome peers and subordinates

  -- Official events in support of family readiness programs

- Impermissible non-QREs Include:

  -- Purely social events for family, friends and peers

  -- Spouse-hosted social events for unit spouses

References

DoDI 1315.09, *Utilization of Enlisted Aides (EAs) on Personal Staffs of General and Flag Officers (G/FOs)* (6 March 2015)

AFI 36-2123, *Management of Enlisted Aides* (2 October 2008)

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CHAPTER FIFTEEN: CIVILIAN PERSONNEL AND FEDERAL LABOR LAW

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Civilian Employee Workplace Searches 701
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Equal Employment Opportunity (EEO) Complaint Process 719
Whistleblower Protection Act 726
Family and Medical Leave Act (FMLA) 729
Unemployment Compensation 732
Fair Labor Standards Act 735

OVERVIEW OF THE CIVILIAN PERSONNEL SYSTEM

The area of labor and personnel relations is covered by an assortment of statutes, executive orders, and regulations. It is administered by a myriad of administrative bodies located in a variety of federal departments and independent agencies and is a complicated area of the law.

The Workforce Structure

- Six categories that offer varying degrees of protection from adverse personnel actions:
  - -- Competitive Service
    - --- All positions not specifically exempted
    - --- Most employees enter federal service after passing a competitive exam
  - -- Excepted Service
    - --- Usually excepted from competition by OPM regulations
  - -- Senior Executive Service (SES)
    - --- Reserved for federal civilian employees above GS-15
    - --- Considered general officer equivalents
  - -- Probationary Employees
  - -- Hybrid Military/Civilian
    - --- National Guard technicians
    - --- Air Reserve technicians
  - -- Nonappropriated Fund (NAF) Employees
    - --- Morale, welfare and recreation employees

Pay Systems

- Appropriated Fund Employees
  - -- General Schedule (GS)
    - --- Divided into 15 grades, GS-1 through GS-15
    - --- Statutory: same base pay scale nationwide, plus varying levels of locality pay
    - --- Automatic pay increases for "acceptable" performance
  - -- Executive Schedule
    - --- Statutory—same basic pay nationwide
    - --- Merit pay increases
  - -- Federal Wage Survey
    - --- Wage Grade (WG)/Wage Leader/Wage Supervisor
    - --- Pay reflects private sector pay rates in locality for same type of work
    - --- Manner of computing pay set by statute
- Nonappropriated Fund (NAF) Employees
  - -- Pay rates determined by management and may be negotiable with unions

Administrative and Adjudicative Bodies

- Merit Systems Protection Board (MSPB)
  - -- Adjudicate cases brought by the Office of Special Counsel, such as whistleblower claims, allegations of mismanagement, and requests by SES members for performance deficiencies and for informal hearings
  - -- Hears appeals by certain civilian employees of agency actions in performance or misconduct cases where the employee was disciplined by reduction in grade, removal, suspension for more than 14 days or furloughed for 30 days or less for misconduct

-- Possesses authority to mitigate or completely reverse agency adverse actions, but cannot mitigate performance based actions taken under 5 U.S.C., Chapter 43

-- Hears appeals concerning reduction-in-force (RIF)

- Equal Employment Opportunity Commission (EEOC)

  -- Adjudicates claims of unlawful discrimination based on race, religion, national origin, sex (including sexual orientation), color, disability, or age, and claims of unlawful reprisal

  -- If illegal discrimination is found, it may order back pay, retroactive personnel actions, correction of records, reinstatement, promotion, payment of attorney fees, and compensatory damages

- Federal Labor Relations Authority (FLRA)

  -- Administers the interaction between federal agencies, labor organizations and employees

  -- Decides unfair labor practice (ULP) cases filed by either the agency or the union

  -- Decides appeals of certain arbitration awards and negotiability appeals

  -- Has authority to direct the Air Force to comply with its orders

- Federal Service Impasses Panel (FSIP): Resolves negotiation impasses between agencies and labor organizations

- Federal Mediation and Conciliation Service (FMCS): Aids federal agencies and labor organizations in resolving negotiation impasses; provides parties with lists of arbitrators; provides mediators for alternative dispute resolution

- Office of Personnel Management (OPM): Addresses personnel management issues such as civil service retirement programs, insurance, examinations, and classification appeals

- Office of Special Counsel: Investigates and prosecutes allegations of violations of merit principles; prohibited personnel practices; fraud, waste and abuse; and violations of the Hatch Act

Litigation Responsibilities

- Administrative litigation (FLRA, MSPB, EEO, unemployment compensation, etc.)

  -- Installation staff judge advocate (SJA)

    --- Provides legal advice to the commander, managers, Civilian Personnel Section, and EEO officials concerning all labor and employment law issues

    --- Represents management in arbitrations, agency and negotiated grievance proceedings, unemployment compensation hearings, and workers' compensation hearings

    --- Requests assistance from the AFLOA Labor Law Field Support Center (LLFSC)

  -- LLFSC

    --- Established in July 2007 to provide labor and employment law advice and litigation support to installation legal offices

    --- Main office is located at Joint Base Andrews, Maryland with seven field offices in the United States

    --- Air logistics centers and certain other locations are excluded from LLFSC coverage

      ---- These include Tinker Air Force Base, Robins Air Force Base, Hill Air Force Base and Wright-Patterson Air Force Base, as well as Air Reserve Bases with an active duty judge advocate assigned

      ---- Regardless, of support received from the LLFSC, the installation SJA remains the legal counselor to the commander

    --- Provides representation before the MSPB, the EEOC, the FLRA, and Federal Court, unless specifically delegated to installation

    --- Handles **ALL** class complaints of discrimination before EEOC

    --- Provides legal advice, assistance, and training to judge advocates, civilian attorneys and to personnel experts

- Federal court litigation (any case filed within the U.S. federal court system)

  -- The Department of Justice "has the statutory responsibility to represent the Air Force and Air Force officials who are being sued in their official capacities…. This responsibility extends to litigation in foreign courts." AFI 51-301, AFI 51-301, *Civil Litigation* (20 June 2002), para. 1.2.

  -- AFLOA or HQ USAF/JAC, on behalf of The Judge Advocate General (TJAG), ordinarily determines who may appear as an attorney or counsel for the Air Force in a civil judicial or administrative action, foreign or domestic

  -- Chief, General Litigation Division, Office of Judge Advocate General, is designated to accept service of process for the Department of the Air Force

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References

5 U.S.C. §§ 1201-1204
5 U.S.C. §§ 5101-5115
5 U.S.C. § 9902
Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135
5 C.F.R. Part 1201
29 C.F.R. Part 1614
AFI 36-701, *Labor Management Relations* (27 July 1994)
AFI 36-704, *Discipline and Adverse Actions* (22 July 1994)
AFI 36-706, *Administrative Grievance System* (22 May 2014)
AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011
AFI 51-301, *Civil Litigation* (20 June 2002)

OVERVIEW OF FEDERAL LABOR MANAGEMENT RELATIONS

Used technically, labor law concerns relationships among management, employees, and unions. Generally, it covers the rules that govern how employees and managers should work together to accomplish the mission. The statutory and regulatory basis for these rules and their interpretation are described below.

- The Civil Service Reform Act of 1978 (CSRA) is the foundational authority that governs the rights and privileges of federal employees. Others include:
  - -- Title VII: Federal Service Labor-Management Relations Statute (FSLMRS)
    - --- FSLMRS covers certain civilian employees of the Air Force. Among others, the statute excepts the following categories:
      - ---- Active duty members
      - ---- Supervisors and management officials, and
      - ---- Aliens or non-U.S. citizens employed outside the United States
  - -- Air Force Guidance: AFI 36-701, *Labor Management Relations*

Employee Rights

- FSLMRS recognizes certain employee rights
  - -- The right to form, join or assist any union, or to refrain from any such activity, freely and without fear of penalty or reprisal (no right to strike)
  - -- Serve as representative of union
  - -- Present union views to management
  - -- Engage in collective bargaining about conditions of employment (COE) through chosen representatives

Management Rights

- FSLMRS similarly recognizes certain rights that are reserved to management. When the agency exercises a reserved management right, the agency is not required to bargain over the substance of that decision. However, the agency is required to bargain over any legitimate proposals that the union submits concerning the impact or implementation of the agency's decision to exercise a reserved management right. Some of the reserved management rights include the right to:

  -- Determine agency mission

  -- Determine agency budget

  -- Determine agency organization

  -- Determine number of employees

  -- Determine internal security practices

  -- Hire, assign, direct and retain employees

  -- Suspend, remove, reduce in grade or pay, or take disciplinary action

  -- Assign work

  -- Make determinations on outsourcing

  -- Determine which personnel will conduct agency operations, and

  -- Fill positions and promote employees

Union Representation Rights and Duties

- A union is entitled to negotiate a collective bargaining agreement (CBA) covering employees in unit

  -- Installation represented by base negotiating team

  -- Both sides must negotiate in good faith (duty to approach negotiations with sincere resolve to reach agreement)

  -- A union may designate its representative during the negotiations

- A union is entitled to be present during *formal discussions* between one or more representatives of the Air Force and one or more employees in the bargaining unit (or their representatives) concerning any grievance or any personnel policy or practices or other general conditions of employment

  -- There are a number of factors that can be considered to determine if the discussion is ***formal***. Some of the factors include:

    --- Who held the meeting

    --- Where the meeting was held

    --- How long the meeting lasted

    --- Was there a formal agenda

    --- Whether attendance was mandatory

    --- How the meeting was conducted

  -- Please note, some meetings may become formal even though they were not intended to be when they were originally planned

  -- ***Discussion*** is synonymous with ***meeting*** and does not require debate or argument

  -- Check with the civilian personnel sections (CPS) and the SJA before conducting such discussions to see if the union should be notified

- A union is entitled to be present during an investigatory interview of a bargaining unit employee if the employee reasonably believes that the examination may result in disciplinary action against the employee, **AND** the employee requests representation

  -- This is known as receiving *Weingarten Rights* after a Supreme Court case, Nat'l Labor Relations *Board v. Weingarten*, 420 U.S. 251 (1975)

  -- Generally, management does not have to advise the employee of these rights at the beginning of each interview unless the collective bargaining agreement between management and the union requires it

- A union is entitled to information "normally maintained by the agency in the regular course of business" that is "reasonably available and necessary" for full and proper negotiation and not prohibited from disclosure by law

-- Need not request pursuant to Freedom of Information Act (FOIA). The standard for releasing information is different from the FOIA standard.

--- The union must demonstrate a particularized need for the information sought (use to which it will be put, how that use relates to representation, why needed)

--- Undue delay, failing to explain a denial, or failing to advise the union that the information does not exist, may be grounds for an unfair labor practice (ULP)

-- The union cannot be charged for the information

-- Need not release information if it contains guidance to management officials relating to bargaining

-- Must provide the information to the union even if readily available from another source

-- May assert that countervailing interests outweigh union's need

- A union's duty of fair representation

-- When the union decides to represent unit employees in any manner that affects the COE, it must represent them fairly. No discrimination allowed.

-- Must represent all employees in bargaining unit whether or not they are union members

Union Right to Official Time

- Union representatives are entitled to wages when on official time to negotiate collective bargaining issues

-- The union has a statutory right to official time for as many negotiators as are on the management negotiating team, although the union has the right to negotiate official time for additional negotiators as well

-- Official time for all negotiations

--- Ground rules negotiations

--- CBA negotiations

--- Mid-term negotiations

--- Impact and implementation bargaining

- No official time for internal union business (collecting dues, soliciting new members, etc.)

- Official time must be granted for any employee participating in any phase of a Federal Labor Relations Authority (FLRA) proceeding if the FLRA determines the employee's presence is necessary

- Official time for other purposes is bargainable and the CBA should outline who is entitled to the official time and how much time they are entitled to receive

Union Right to Dues Allotments

- The Air Force must process dues allotments in a timely fashion or it will be considered an ULP

- If the Air Force fails to do so, it must reimburse the union and the Air Force cannot recoup money from the employee

Agency Unfair Labor Practices

- Most common unfair labor practices charges against the agency include:

  -- To interfere with, restrain, or coerce employees in exercising their FSLMRS rights. Lack of illegal motivation or anti-union animus is not a defense.

  -- To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment

  -- To sponsor, control, or assist a union

  -- To discipline or otherwise discriminate against an employee for filing a ULP or testifying in a ULP proceeding

  -- To refuse to bargain in good faith

  -- To fail or refuse to cooperate in impasse procedures or decisions

-- To enforce a rule or regulation which conflicts with a preexisting CBA

-- To otherwise fail or refuse to comply with any provision of FSLMRS

Union Unfair Labor Practices

- Major commands have the responsibility to authorize ULP charges against a union, however, AFI 36-701 permits this authority to be delegated to installations

  -- Not frequently used by Air Force

  -- ULPs by union are similar to agency ULPs, and include

    --- To coerce, discipline, or fine a union member as punishment to hinder or impede employee's work performance

    --- To discriminate regarding union membership on basis of race, creed, color, sex, age, handicap, marital status, national origin, or political affiliation

    --- To call, participate in, or condone a strike, work stoppage, or slowdown; nondisruptive informational picketing is permitted

    --- To refuse to bargain in good faith

    --- To fail or refuse to cooperate in impasse procedures or decisions

    --- To otherwise fail or refuse to comply with any provision of FSLMRS

Unfair Labor Practice Procedures

- Charge filed with FLRA regional office

- Investigation by FLRA regional office attorney/agent

  -- Investigation conducted in person or by interviewing witnesses over the phone

  -- Air Force must make bargaining unit employees available for interview

  -- Investigators are not always neutral and detached

    --- Often they will amend charges to conform to their investigation

--- **NEVER** permit management officials to be interviewed without notifying the legal office. With the exception of some bases within AFMC, the Air Force Legal Operations Agency/General Litigation Division (Labor Law Field Support Center (LLFSC)) is designated as the agency representative for ULP charges. For those cases in which the LLFSC is designated as the agency representative, the LLFSC must be notified before management officials are interviewed by the FLRA.

-- Legal counsel can present a written or oral position statement and explore settlement options

- Regional director of the FLRA determines whether to issue a complaint

- Hearing before administrative law judge (ALJ)

  -- FLRA General Counsel represents charging party (generally the union) and has burden of proof

  -- Except at air logistics centers, the LLFSC represents the base

  -- ALJ issues written decision (may take 6 months or longer)

- Exceptions to ALJ decision

  -- Appeal is taken to FLRA in Washington D.C.

  -- FLRA decision may be appealed to either U.S. Court of Appeals for the D.C. Circuit or the circuit having geographic jurisdiction over the installation

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References

Federal Service Labor Management Relations Statute, 5 U.S.C. §§ 7101-7135
NLRB v. Weingarten, 420 U.S. 251 (1975)
AFI 36-701, *Labor Management Relations* (27 July 1994)

COLLECTIVE BARGAINING

The Federal Service Labor-Management Relations statute (5 U.S.C. §§ 7101-7135) is contained in the Civil Service Reform Act of 1978. This Act grants certain federal employees the right to join or form labor unions and to engage in collective bargaining through their chosen representatives. Air Force labor-management relations policies and procedures are set forth in AFI 36-701, *Labor Management Relations*.

- The Air Force **must bargain** with bargaining unit employees through their duly elected representative (union) over all conditions of employment (COE), which are defined as personnel policies, practices, and matters affecting working conditions

- The Act **does not require bargaining** with appropriated fund employees over the following subjects:

  -- Matters *specifically* regarding certain political activities

  -- Classification of positions

  -- Matters provided for by federal statute, including but not limited to:

    --- Pay

    --- Vacations

    --- Health benefits

    --- Holidays

    --- Retirement plans

  -- Proposals that conflict with government-wide rules or regulations

  -- Proposals that conflict with "reserved management rights" under the Act, including among other things, the mission of the agency, the budget, internal security practices, the number of agency employees, the assignment of work, the ability to hire, fire and discipline employees

- Management is not required to bargain over matters already covered in the contract (or CBA)

  -- To the extent a matter arises concerning a COE that is not covered in the contract, the union can engage management in mid-term bargaining

  -- Union may not engage management in mid-term bargaining if the collective bargaining agreement contains a "zipper" clause that bars such during the life of the agreement

- Air Force must bargain in good faith, including having negotiators who have authority to bind the activity

- Must bargain before changing COE even if the change is made during life of CBA

- Parties may establish a COE by consistently, over an extended period of time, engaging in a certain practice, and a labor contract clause can be modified or even overturned by such a COE created in this manner (often called a "past practice")

  -- This refers to matters that are already considered conditions of employment and the past practice has merely changed the way the condition of employment was originally handled

  -- It is not possible for a past practice to create a condition of employment where the subject matter underlying the practice does not pertain to a COE

Bargaining Situations

- Bargaining can occur in one of three contexts:

  -- Bargaining leading to a "labor contract" of fixed duration and covering a variety of topics or bargaining in the absence of a CBA when one party wants to change a COE

  -- Impact and Implementation (I & I) Bargaining*:*

    --- I & I bargaining concerns the procedures to be used in exercising management's rights (i.e., right to determine agency mission) and the appropriate arrangements for employees affected by exercise of management's rights

---- But the change must have more than a minimal foreseeable impact (often called a *de minimus* impact) on the group of employees that would be affected by the change

---- Several things may require I & I bargaining, such as a change in procedures for turning in leave slips, a change in employee duty hours, or overtime pay issues

--- Procedure: Give the union notice in writing of the change in COE and afford it a reasonable period of time to submit written I & I proposals

-- Mid-term Bargaining: Union demand to bargain over a condition of employment that has not already been addressed in the collective bargaining agreement

Permissive Bargaining

- Under the Civil Service Reform Act, management is allowed to determine whether to bargain on certain subjects. If management refuses to bargain, this decision is unilaterally binding on the union.

- "Permissive" subjects include:

  -- Management's right to determine the numbers, types, and grades of employees assigned to any subdivision, project, or tour of duty

  -- Management's right to determine the technology, methods, and means of performing work

Determining Whether an Issue is Bargainable

- Determining whether an issue is bargainable is often a confusing and highly complex matter in the federal sector labor law arena

  -- If commanders are presented with a demand that a dispute or issue be dealt with through formal bargaining, the safe response is merely to advise the union representative that he/she will ask the civilian personnel section (CPS) and staff judge advocate to review the request. This area is sufficiently sensitive that wing staff organizations will coordinate a decision to declare a proposal "nonnegotiable" with MAJCOM DPC and AFLOA/JACL CLLO should also be notified of any decision to declare a proposal nonnegotiable.

- -- Depending on the substance of the proposal, it could be determined to be outside the duty to bargain or nonnegotiable for several reasons. For example, it could be inconsistent with law (outside the duty) or affecting a reserved management right (nonnegotiable).

- When management declares a proposal "nonnegotiable," the union may appeal to the Federal Labor Relations Authority (FLRA)

  - -- 15-day time limit to appeal

  - -- Agency has 30 days to submit its position or withdraw its decision not to negotiate

  - -- Decision by the FLRA is often made based on the written submission of the parties without a hearing

- Regardless of whether negotiations are deemed "substantive" or "I & I," union negotiators who are also federal employees have a right to be in an "official time" status during the negotiations (receive pay and benefits even though not "working") in equal number with the management negotiators

  - -- Unions may negotiate for additional official time for representational activities (grievances, etc.)

  - -- Unions may not use official time for internal union business such as collecting dues, soliciting new members, etc.

References

5 U.S.C. §§ 7101-7135
AFI 36-701, *Labor Management Relations* (27 July 1994)

AIR FORCE CIVILIAN DRUG TESTING PROGRAM

Executive Order 12564, *Drug-Free Federal Workplace* (1986), formally announced the President's policy that the federal workplace would be free from drugs.

- President's Statement of Policy: Federal employees required to refrain from the use of illegal drugs; use of illegal drugs by federal employees, on- or off-duty, is contrary to the efficiency of the service; persons who use illegal drugs are not suitable for federal employment; each agency will develop a plan to achieve objectives of the Executive Order

- Air Force Policy: The Air Force, as a result of its national defense responsibilities, and the sensitive nature of its work, has a compelling obligation to eliminate illicit drug use from its workforce. Civilian employees of the Air Force must refrain from illicit drug use whether on or off-duty. Performing duties under the influence of illicit drugs adversely affects personal safety, risks damage to government property, significantly impairs day-to-day operations, and exposes sensitive information to potential compromise. Use of illicit drugs is inconsistent with the high standards of performance, discipline, and readiness necessary to accomplish the Air Force mission.

- Air Force plan was approved by SecAF on 24 January 1990

- In January 1995, USAF Chief of Staff directed Air Force Surgeon General (AF/SG) to assume responsibility for the civilian (and military) drug testing program

- AFI 90-508, *Air Force Civilian Drug Demand Reduction Program* (28 August 2014), certified current 18 December 2015, governed the Air Force civilian drug testing plan

- Required elements of a civilian drug testing plan include:

  -- Appointment of an overall program manager for each installation

  -- Drug testing to detect and deter illegal drug use

  -- Initiation of personnel actions if illegal drug use is discovered

  -- Establishing an employee assistance program (EAP) to provide education and counseling that includes referral to rehabilitation and treatment programs available in the local community

- Air Force policy is based on federal criminal statutes on controlled substances and is not affected by any State laws legalizing use of marijuana or other controlled substances, even if for medical use

- Specimens are tested for evidence of the consumption of certain drugs as authorized by the Department of Health and Human Services. With prior approval, drugs not on the panel of substances routinely tested can be requested.

Types of Drug Testing

- Random Drug Testing:

  -- Only employees in "sensitive positions," which are also known as testing designated positions (TDP), are subject to random drug testing

    --- TDPs include positions that involve work that impacts national security and public health or safety

    --- Any testing requirement must be identified in a position description and vacancy announcement

    --- Applicants for such positions are also subject to testing after tentative selection

  -- If a position becomes a TDP, 30 day notice must be provided to the employee before testing may begin

- Voluntary Testing:

  -- For Air Force employees not in TDP positions

  -- Employee can volunteer to be included in pool for random drug testing

  -- Employee remains in TDP pool until the employee notifies the personnel office of withdrawal at least 48-hours prior to being scheduled for a random test

- Reasonable Suspicion Testing:

  -- All Air Force employees can be tested based on reasonable suspicion that an employee has engaged in illicit drug use and that evidence of such use is presently in the employee's body

    --- Reasonable Suspicion: An articulated belief that an employee has used illegal drugs drawn from specific and particularized facts and from reasonable inferences based on those facts

    --- Examples of evidence that may be reasonable suspicion:

      ---- Direct observation of drug use, possession, and/or physical symptoms of being under the influence of an illegal drug, including behavior, speech, appearance and body odors of the employee

      ---- A pattern of abnormal conduct or erratic behavior consistent with the use of illegal drugs

      ---- Evidence of drug-related impairment supported by hearsay from identified or unidentified sources supported by corroboration from a manager or supervisor with training and experience in the evaluation of drug-induced job impairment

      ---- Recent arrest or conviction for drug-related offense; or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking

      ---- Information provided by a reliable and credible source or independently corroborated

      ---- Evidence that the employee has tampered with or avoided a recent or current drug test

    --- Employee can be tested if a reasonable suspicion develops that the employee used illicit drugs, regardless of whether that illicit drug use was while the employee was on or off-duty

-- Procedure for reasonable suspicion testing includes:

--- Supervisor gathers all information, facts, and circumstances supporting the suspicion and documents it

--- Supervisor coordinates with the staff judge advocate, civilian personnel section, and the functional chain of command

--- Proper notification to employee is required. This **MUST** be done in writing.

- Consent Testing:

  -- All Air Force employees may be asked to consent to be tested for illicit drug use

  -- Often requested if reasonable suspicion does not exist or before employee is ordered to test based on reasonable suspicion

  -- Employee consent must be knowing and voluntary

  -- Positive test results are not exempt from disciplinary actions

- Following Accident or Safety Mishap:

  -- Air Force policy is to test all employees after an accident or safety mishap when the member's supervisor reasonably concludes an employee's conduct may have caused or contributed to the mishap

- Rehabilitation (Follow-up) Testing:

  -- Employees referred for counseling or treatment for illicit drug use will be subject to unannounced testing for a minimum of one year

Testing Procedures

- Testing procedures are different from those used for testing military members

  -- The use of Department of Health and Human Services guidelines for drug testing is required

  -- The Air Force collects the sample and sends it to the Army Forensic Toxicology Drug Testing Laboratory, Fort Meade, Maryland for testing

  -- Samples suspected of being adulterated are also sent to lab

- Normally civilian employees are not directly observed when providing samples, unless:
  - -- Reason to believe employee has in the past adulterated or will attempt to adulterate a sample
  - -- Testing related to rehabilitation program
- Medical Review Officer (MRO) verification of positive test results is required
  - -- Interviews employee to determine if there is a medical reason for the test result
  - -- MRO makes final determination of positive, adulterated, diluted, substituted or negative result
- Failure of an employee to appear for a test may be considered refusal to participate in testing and may subject an employee to the full range of administrative and/or disciplinary actions, including but not limited to removal

Confidentiality Requirements

- Absent employee consent or a statutory exception, results of a drug test may not be disclosed
  - -- Drug test results can be disclosed for the following reasons:
    - --- To the MRO for medical review
    - --- To administrator of EAP
    - --- To management official, e.g., supervisor, for disciplinary action
    - --- Where required to defend against any challenge to a disciplinary action
- Results cannot be used for law enforcement purposes
- Can disclose for security requirements, e.g., clearances

Personnel Actions on Finding of Illegal Drug Use

- Required actions upon finding of illegal drug use (e.g., MRO certification of positive drug test result, direct observation of drug use, evidence obtained from an arrest or criminal conviction, employee admission)
  - -- Removal from TDP
  - -- Disciplinary action may be initiated under AFI 36-704, *Discipline and Adverse Actions*, and other applicable guidance
  - -- Consider safe harbor provisions. Final disciplinary action generally not permitted if employee:
    - --- Voluntarily admits drug use prior to identification;
    - --- Goes to counseling or rehabilitation;
    - --- Signs agreement (called last chance agreement) to refrain from further drug use; **AND**
    - --- Refrains from further use of illegal drugs
  - -- Referral to EAP for counseling/rehab as appropriate
- The range of disciplinary actions includes:
  - -- Reprimand to removal for drug use or possession or failure to take test
  - -- Mandatory removal
    - --- For refusing or unsuccessfully completing rehabilitation or counseling
    - --- If second drug offense
    - --- If involves sale or transfer of drug
    - --- If employee altered or attempted to alter sample
- As with any kind of disciplinary action taken against a civilian employee, staff judge advocate (SJA) involvement may be necessary

References

Anti-Drug Abuse Act of 1988, 21 U.S.C. § 1501 *et seq.*

Executive Order 12564, *Drug-Free Federal Workplace* (15 September 1986)

U.S. Office of Personnel Management Memorandum for Heads of Executive Departments and Agencies, *Federal Laws and Policies Prohibiting Marijuana Use* (26 May 2015)

DoDD 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (2 January 1992), administrative reissuance incorporating through Change 4, 20 April 1999

DoDI 1010.09, *DoD Civilian Employee Drug-Free Workplace Program* (22 June 2012)

AFI 31-101, *Integrated Defense* (FOUO) (8 October 2009)

AFI 31-501, *Personnel Security Program Management* (27 January 2005), incorporating through Change 2, 29 November 2012, including AFI31-501_AFGM2015-01, 20 November 2015

AFI 36-704, *Discipline and Adverse Actions* (22 July 1994)

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (8 July 2014)

AFI 90-508, *Air Force Civilian Drug Demand Reduction Program* (28 August 2014), certified current 18 December 2015

AFI 91-204, *Safety Investigations and Reports* (12 February 2014), corrective actions applied on 10 April 2014, including AFI91-204_AFGM2016-02, 11 January 2016

CIVILIAN EMPLOYEE WORKPLACE SEARCHES

The general rule is that a government search of private property without proper consent is unreasonable and unconstitutional under the Fourth Amendment unless the search has been authorized by a valid search warrant. However, the government employer can in some instances conduct a warrantless search of an employee's workplace for "work-related" purposes, such as to retrieve government property or to investigate work-related misconduct.

- In the leading case on workplace searches, *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Supreme Court recognized that government employees may have a reasonable expectation of privacy in their work areas which may be protected from warrantless searches by a government employer and law enforcement

- An employee's expectation of privacy depends on how much control he or she exercises over his workplace. The more control the employer exercises, the lower the employee's expectation of privacy, the lower the resulting right to privacy, and the less need there would be for the employer to obtain a search warrant in order to conduct a search.

- All workplace searches must be reasonable under all the circumstances. Reasonableness depends upon (1) whether the action was justified at its inception and (2) whether it was reasonably related in scope to the circumstances that prompted the search.

- In order to determine if the action is justified, employers must determine if the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. Employers frequently need to enter the offices and desks of employees for legitimate, work-related reasons wholly unrelated to illegal conduct.

- Whether the search is a non-investigatory, work-related intrusion or an investigatory search for evidence of suspected work-related employee misconduct, the proper approach for civilian employee workplace searches is to balance the employee's legitimate expectations of privacy against the government's need for supervision, control, and efficient operation of the workplace

Bottom Line

- Government offices are provided to employees for the purpose of facilitating the work of an agency. Employees may avoid exposing personal belongings at work by simply leaving them at home.

- Government searches to retrieve work-related materials or to investigate violations of workplace rules do not violate the Fourth Amendment. Hence, supervisors are generally not required to obtain a search warrant whenever they wish to enter an employee's desk, office, or file cabinet.

- Personal handbags, luggage, and briefcases are not usually considered part of the workplace and, therefore, a search warrant or authorization is required before searching them

- Consult the staff judge advocate before proceeding with any search and seizure action

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Reference

U.S. Const. Amend. IV

O'Connor v. Ortega, 480 U.S. 709 (1987)

UNACCEPTABLE PERFORMANCE BY CIVILIAN EMPLOYEES

The Civil Service Reform Act (CSRA) of 1978 was enacted to improve government efficiency, give authority to supervisors and managers, and adequate protection to employees. AFI 36-1001, *Managing the Civilian Performance Program*, implements a program to evaluate the performance of civilian employees. The CSRA and AFI 36-1001 require:

- The appraisal and rating of employees' job performance to be based on written performance elements and standards

- The performance appraisal rating to be used as a basis for decisions to pay, reward, assign, train, promote, retrain, or remove employees

Appeals and Grievances

- The substance of performance elements and performance standards **MAY NOT** be appealed to the Merit Systems Protection Board (MSPB) or grieved under the Air Force grievance system provided for in AFI 36-706, *Administrative Grievance System*, except to the extent that the employee alleges the standards in and of themselves violate the statutory requirements pertaining to them

  -- Similarly, disputes concerning the identification of the critical elements of a position and establishment of performance standards are nongrievable and nonarbitratable under negotiated grievance and arbitration procedures

- Employees who are not members of a bargaining unit resolve disputes on ratings pursuant to AFI 36-706

- Bargaining unit employees resolve disputes on ratings through the negotiated grievance procedure of the local collective bargaining agreement (CBA)

- Most employees may appeal a demotion or removal for unacceptable performance to the MSPB. Bargaining unit employees must choose either to appeal to the MSPB or use the CBA's grievance procedure, but cannot do both.

- Allegations of discrimination may be processed under either AFI 36-2706, *Equal Opportunity Program Military and Civilian*, or the negotiated grievance procedure, but not both

Performance and Appraisal Process

- Development of the Performance Plan:

  -- Most employees are required to have a performance plan

  -- AF Form 860, *Civilian Performance Plan*, is completed within 30 days of accession and documents the critical position performance elements and standards for evaluation of overall performance for the position. AF Form 1003, *Core Personnel Document*, can also be used for this purpose.

  -- Each performance plan must contain the critical elements to describe the performance requirements of the position

    --- A critical element is a job responsibility so important that failure to perform that element would make the employee's overall performance unacceptable

    --- As a general rule, seven elements should be sufficient, though there must be at least one in the performance plan

  -- Performance standards must be developed for each critical performance element, describing, at a minimum, acceptable performance—to include characteristics such as quality, quantity, timeliness, and behavior

  -- Additional non-critical performance elements and performance evaluation requirements to judge the performance are also included in the plan

  -- Although the employee should be given an opportunity to provide feedback, the supervisor makes the ultimate decision about what is included in the performance plan

  -- Once the plan is approved, the employee is informed of the job requirements and the plan, given an opportunity to sign the performance plan, and given a copy

- Annual Performance Appraisal:

  -- The normal appraisal period for most employees starts on 1 April and ends 31 March

  -- At the beginning of the appraisal period the supervisor and the employee meet to discuss the performance elements and standards in the plan

-- At least one progress review, usually at the midpoint of the period, is also required and must be documented on the AF IMT 860B, *Civilian Progress Review Worksheet*. This review is kept confidential between the reviewer and employee.

-- If the rating official or the employee is newly assigned, the performance plan will be reviewed and discussed, normally within 30 days

-- A copy of any such review is provided to the employee

-- At the end of the appraisal period (within 30 calendar days), the supervisor must complete the rating form, AF IMT 860A, *Civilian Rating of Record*

-- The supervisor evaluates the employee's performance on each critical element to determine if "meets standards" or "does not meet standards." A rating of "does not meet standards" on any critical element results in an overall rating of unacceptable performance. The employee is entitled to a copy of the form.

Dealing with Performance Problems

- All supervisors should conduct periodic performance reviews

  -- Performance reviews are accomplished at the end of the cycle or "out-of-cycle"

  -- The employee must have been in the position for 90 days or more before an out-of-cycle evaluation can be done

- At any time during the performance cycle that a non-probationary employee's performance in one or more critical elements becomes unacceptable, the supervisor must inform the employee of the critical element for which performance is unacceptable, in what way it is unacceptable, and what is required to bring it back to an acceptable level

  -- This notice should be accomplished in writing (check with Civilian Personnel Section (CPS) and SJA for preparation and review) and provide the employee a period of time within which to improve

    --- Called the performance improvement period (PIP) or opportunity period

    --- The employee's performance must be unacceptable; it is impermissible to place an employee on a PIP when their work has been only marginal

    --- The length of the PIP depends on the duties involved and the nature of the deficiencies; generally, 30-60 days will be sufficient

-- An employee may have the right to appeal an appraisal to the next higher level supervisor but the reconsideration must comply with proper grievance procedures

-- The supervisor must help the employee improve during the PIP through counseling, coaching, on the job training (OJT), and other methods

- When unacceptable performance in one or more critical elements continues after the PIP has expired, demotion or removal is authorized

- If performance on a PIP rises to an acceptable level, then a new rating is completed and forwarded in accordance with instructions

- If the employee's performance improves during a PIP, but thereafter falls to unacceptable levels again, another PIP may be initiated within one year after the date of the beginning of the previous PIP

- Probationary employees are covered by different procedures

-- The standards and procedures for probationary employees can be found in AFI 36-1001, Chapter 3, and for supervisors and managers in Chapter 4

-- The probationary period for an employee is one year

--- The supervisor certifies performance in writing no later than the tenth month of probation

--- Failure to complete certification on time may result in the employee passing probation by default

--- If the supervisor recommends not keeping the employee, the Civilian Personnel Section (CPS) must be contacted before the end of the period concerning the proper course of action

---- Written notification is required if the employee does not pass the probationary period

---- The employee is permitted a reasonable period of time to respond and submit supporting documentation

-- The probationary period for a supervisor or manager is no more than one year

--- The probationary period is required whenever a civilian employee first assumes either a supervisory or management position. There are exceptions to this requirement based on the individual's previous experience as a supervisor or manager.

--- Advanced notice of the probationary period must be given to the would-be supervisor or manger and a performance plan concerning the probationary period is also required

--- If the probationary period is not successfully completed, the employee is returned to a non-managerial or non-supervisory position

---- They must be given written notice of this decision which must include the facts and reasons that motivated the decision and information on how the Air Force will deal with the employee's placement rights

---- When an employee is returned to a non-supervisory or non-managerial position, ensure that the appropriate procedures are followed concerning grade and pay

Procedural Requirements

- Commander and supervisor actions to remove or reduce the grade of an employee who is not performing adequately are called Chapter 43 cases because the procedures for these actions can be found in Chapter 43 of Title 5 of the United States Code. Certain procedures must be followed.

  -- The supervisor should coordinate with CPS first

  -- The employee is entitled to 30 calendar days advance written notice of the proposed action, which includes:

  --- Specific instances of unacceptable performance

  --- The critical elements of the position the employee failed to perform properly

  -- The employee has the right to be represented by an attorney or other representative

  -- The employee must be given a reasonable period of time to provide a written or oral response

-- Within 30 days after the expiration of the notice period, the employee must be informed of the decision in writing. The supervisor can extend this period for another 30 days.

--- The final decision must specify the unacceptable performance on which the reduction in grade or removal is based

--- A higher level manager must concur with the final decision

--- It must inform the employee of his/her appeal rights and whether he or she is eligible for disability or retirement

- After demoting or removing an employee, pertinent documents are kept in accordance with the Records Disposition Schedule, located in the Air Force Information Management System, and must be available for review by the employee or his representative. Included among those documents are:

  -- A copy of the notice of proposed action

  -- The employee's reply and/or a summary of the oral reply

  -- Notice of the decision and the reasons therefore

  -- Documentation supporting the personnel action

Action Required when a Medical Condition Affects Performance

- Supervisors will not always know whether the employee's health is impaired or whether it is causing a performance problem. If the supervisor suspects the employee's performance is affected by drugs or alcohol abuse, or by some other medical condition, follow the provisions of AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*.

- When a medically based performance problem exists or might exist, the supervisor must inform the employee his/her performance is suffering, advise the employee to supply medical documentation of the condition that is or could be affecting work, and explain what documents are required and when they should be provided

  -- The employee will be informed as to exactly what documentation is required and the amount of time granted to provide it. If not provided on time, the supervisor may grant an extension or proceed with the process. Medical documentation is defined in 5 C.F.R. Part 339, Sec. 339.102.

-- Any documentation provided will be reviewed by the supervisor and an Air Force or other federal medical officer

-- The employee should provide the needed documentation

--- Based on the length of service and position of the employee, the employee will be furnished information concerning disability retirement

--- The information will be reviewed by the supervisor and a qualified physician; such a review may lead to a medical examination

- The Air Force follows the rules set forth in 5 C.F.R. Pt. 339 for medical examinations. Basically, Air Force directed medical examinations are severely limited and may be ordered **ONLY WHEN**:

  -- The employee occupies a position that has physical/medical standards, also known as fitness for duty exams

  -- The Air Force needs to determine whether employee who claims worker's compensation may be accommodated in another job, or

  -- The Air Force needs to determine qualifications of employee for reassignment rights because of a reduction in force (RIF)

- The Air Force may always offer a medical exam to supplement medical documentation, but acceptance is optional with the employee

- The Air Force always has an obligation to reasonably accommodate a handicapped employee. Supervisors must coordinate with the appropriate Civilian Personnel Section (CPS), installation's Disability Program Manager (DPM) and staff judge advocate (SJA) prior to taking any action.

References

5 U.S.C. §§ 4301-4315
5 C.F.R. Part 339
AFI 36-704, *Discipline and Adverse Actions* (22 July 1994)
AFI 36-1001, *Managing the Civilian Performance Program* (1 July 1999)
AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011
AFI 36-706, *Administrative Grievance System* (22 May 2014)
AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (8 July 2014)

CIVILIAN EMPLOYEE DISCIPLINE

Federal law and Air Force instructions enable commanders to take disciplinary action against civilian employees for misconduct that affects the workplace or mission accomplishment. Certain adverse actions create appeal rights for the employee.

Introduction

- Disciplinary action or adverse action must be taken without regard to marital status, political affiliation, race, color, religion, sex, national origin, or age. Adverse action based on physical handicap is not taken when the employee can effectively perform assigned duties.

- Disciplinary action or adverse action must be taken only when necessary, and then promptly and equitably

  -- Disciplinary actions and adverse actions are personal matters and are carried out in private

  -- An adverse action is an action giving a civilian employee a right to appeal. They include: removals, suspensions for more than 14 days, furloughs for 30 days or less, and reductions in grade or pay.

    --- Adverse actions may or may not be for disciplinary reasons—for example, it is possible to take adverse action for unacceptable performance

    --- Nonappropriated fund (NAF) employees do not have the right to appeal, regardless of the type of action taken

  -- Disciplinary action not subject to appeal includes: admonishments, reprimands, and suspensions for 14 days or less

Authority and Requirements

- All Air Force commanders (and supervisors) are delegated authority to take disciplinary and adverse action when necessary

  -- AFI 36-704, *Discipline and Adverse Actions*, covers all competitive and excepted service employees

  -- AFI 34-301, *Nonappropriated Fund Personnel Management and Administration*, covers nonappropriated fund employees

- Management may take a disciplinary or adverse action only for such cause as will promote the efficiency of the service, unless the action is being taken for unacceptable performance, in which case different standards apply

- Management may not take an action that would result in a prohibited personnel practice. A prohibited personnel practice is an adverse action taken against an employee for an illegal or inappropriate reason, such as reprisal or discrimination.

- Burden of Proof: Management must be prepared to support disciplinary and/or adverse action by a preponderance of the evidence, i.e., more likely than not, and must be capable of proving, before the Merit Systems Protection Board (MSPB) or a federal sector arbitrator, the following:

  -- The reason for the action taken, i.e., that the alleged misconduct occurred and the action was taken in response to that misconduct

  -- How the action taken promotes the efficiency of the service

  -- A connection between the misconduct and the employee's job

    --- Known as the "nexus" and it must be shown in each case

    --- There has to be a connection between what the employee did and the ability of the Air Force to do its job. In other words, the Air Force has to show what the employee did was harmful or that the action taken to discipline the employee was necessary to help the Air Force do its job.

  -- The penalty imposed is appropriate to the offense

Procedures

- Management procedures (unless there is a local collective bargaining agreement that contains other provisions)

  -- Gather the facts. Interview the employee if necessary, but a bargaining unit employee has rights (called *Weingarten Rights*) to have union representation if the employee believes disciplinary action could result from questioning from his/her employer and he/she requests a union representative

  -- Consult with the Civilian Personnel Section (CPS) and the staff judge advocate (SJA) to consider options and determine what action is appropriate

- Civilian Personnel Section will prepare and the Labor Law Field Support Center (LLFSC) will review the notice letter of adverse and/or disciplinary action for signature by the "proposing official" (normally a first or second level supervisor)

  -- The local SJA will work with the LLFSC during this review. The LLFSC is composed of a group of 40-50 labor lawyers and paralegals headquartered at Joint Base Andrews, MD, as well as other field offices throughout the continental United States (CONUS). Its mission is to assist local SJAs in labor law matters and to provide representation in most administrative and all judicial tribunals. The base SJA remains the advisor to the commander.

  -- The notice letter must be signed by the proposing official and inform the employee of the following. Some of the items listed below are considered non-mandatory, but prudent practice dictates the inclusion of all of these items.

    --- Notice of the precise action being proposed, e.g., suspension or removal

    --- The reason for the action, which includes the type of misconduct and a brief factual description of the misconduct. Keep it simple and straightforward; there are additional specific requirements when the proposed action is furlough.

    --- A statement of the employee's right to review the material or evidence relied upon to support the reason for action

    --- A description of the arrangements the employee can make to review the evidence or include a copy of the evidence

    --- Date the proposed action is to take place

    --- Notice of the right to respond orally, in writing or both, and to furnish documentary evidence. Include the name and office of the person to whom the response should be sent.

    --- Amount of official time for preparation of a response

    --- Right to representation (union representative, private attorney, or other person)

    --- Additional non-mandatory information mentioned in the instruction as might be necessary based on the particular situation or that might be necessary pursuant to the collective bargaining agreement

-- The notice must include all aggravating factors considered by the proposing official, e.g., prior discipline, poor performance, seriousness of the alleged offense

-- The **employee** gets a reasonable amount of time, but not less than 7 days to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer

- The **"deciding official"** makes the final decision

  -- Usually the supervisor one level up from the proposing official (but may be the same person)

  -- In most cases, the final decision is made 30 days after the notice is given to the employee

    --- Must be in writing (prepared by CPS and reviewed by SJA) and served on the employee. It must include, among other things:

      ---- The specific decision

      ---- The specific reasons for the decision

      ---- The date of the decision and the effective date of the action

      ---- Information concerning the employee's appeal rights

      ---- The signature of the deciding official

      ---- Additional non-mandatory information described in the instruction may also be included if the situation dictates or that might be necessary pursuant to the collective bargaining agreement

  -- The deciding official must consider employee's response

  -- The deciding official must also document his/her consideration of the *Douglas Factors* governing appropriate penalty selection. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

    --- *Douglas Factors* are those factors that management must consider before taking disciplinary action. They include, for example, the seriousness of the misconduct, the work record of the employee, and other similar considerations. See AFI 36-704.

---- Use the CPS and SJA to assist in preparation

-- A decision letter must be sent to the employee

Appeals

- If the employee is a bargaining unit (union) member, he/she may file a grievance under the negotiated grievance procedure of the local collective bargaining agreement

- Regardless of bargaining unit status, an employee may file:

  -- An equal employment opportunity (EEO) complaint if the employee is alleging discrimination. This applies to competitive, excepted service, and nonappropriated fund employees.

  -- An appeal within 30 days with the regional office of the Merit Systems Protection Board (MSPB), but the action must involve:

    --- A removal

    --- Suspension for more than 14 days

    --- Reduction in grade or pay

    --- Furlough of 30 days or less

- Appeals can result in an administrative, trial-type hearing before:

  -- A federal sector arbitrator

  -- The MSPB

  -- The Equal Employment Opportunity Commission (EEOC)

- If an appeal is filed, Air Force management officials will probably be required to testify

- Failure to meet the burden of proof described above could result in mitigation and/or reversal of the penalty imposed along with the employee receiving back pay, reinstatement, and/or attorneys' fees

- The LLFSC will provide representation during hearings on these matters. While the LLFSC will provide a substantial amount of litigation support, the local SJA will remain the commander's advisor.

Air Reserve Technicians (ARTs)

- ARTs are "dual status" federal civilian employees and members of the Selected Reserve. As a condition of federal civilian employment, ARTs must maintain membership in the Selected Reserve. ART positions within the Selected Reserve span a broad spectrum to include command billets.

- ARTs who are in the military status performing duty for pay/points are subject to the UCMJ

- ARTs that are in federal civilian employee status are not subject to the UCMJ; however, they are subject to all civilian employee disciplinary measures discussed in this section. Additionally, an ART in civilian employee status may be subject to military administrative actions such as letters of counseling, admonishment, reprimand (LOC/LOA/LOR), demotion and discharge.

- Military discharge of an ART will lead to the loss of an ART's civilian employee position

- ART commanders must be in military status when taking certain actions such as preferral/referral of charges, Article 15 actions, urinalysis testing and command directed investigations. Consult with your local SJA for guidance regarding actions in which military status is required.

References

5 U.S.C. § 9902
AFI 34-301, *Nonappropriated Fund Personnel Management and Administration* (16 April 2013)
AFI 36-704, *Discipline and Adverse Actions* (22 July 1994)

CIVILIAN EMPLOYEE INTERROGATION

In 1975, the U.S. Supreme Court, in *N.L.R.B. v. Weingarten*, 420 U.S. 251 (1975), established a right for an employee to have union representation if the employee believed disciplinary action could result from questioning by his employer and if the employee requested the presence of a union representative. In the federal sector, employees have the right for labor union representation as well. This section outlines the employee's rights during an interrogation. These rights are commonly known as *Weingarten Rights*.

- The union's and the employee's right to union representation in connection with an investigation is applicable when four conditions are present:
  - -- A meeting is held in which management questions a bargaining unit employee
  - -- The examination is in connection with an investigation (need not be a Security Forces or other formal investigation)
  - -- The employee reasonably believes that discipline could result from the examination; and
  - -- The employee requests representation
- Other guidelines concerning this rule:
  - -- It does **NOT** apply to an actual counseling session
  - -- The role of the union representative during the interview is to
    - --- Clarify the facts and the questions
    - --- Help the employee express his/her views
    - --- Suggest other avenues of inquiry
    - --- Suggest other employees who may have knowledge of the facts
    - --- Insure the employer does not initiate or impose unjust punishment
    - --- There may also be a right for the union representative and the employee to confer in private, but this depends on the nature of the case

-- Agencies must announce this right on an annual basis at all places where employees normally receive employment information

-- Individuals being investigated may not serve as representatives for other employees being investigated until their own investigations are completed

-- An employee may waive his/her *Weingarten Rights*

-- Executive Order 12171 exempts Air Force Office of Investigations (AFOSI), when acting under its independent mandate to conduct criminal and security investigations, from the Federal Labor Management Relations Statute. In such criminal investigations, AFOSI is not obligated to honor an employee's request for representation.

- Management cannot tell a union representative to remain silent or not to offer advice. Employer may place reasonable limitations on union representative's role to prevent adversarial confrontation, but aggressive, unreasonable management behavior interferes with right to union representation. This is an unfair labor practice (ULP).

- Once an employee requests a union representative, management may:

  -- Grant the request

  -- Suspend the interview

  -- Give the employee the choice of having an interview without a union representative or having no interview

- Civilian employees also have a legal obligation to account for the performance of their duties, and a failure to provide desired information can serve as a basis for removal under certain circumstances

  -- An employee cannot be discharged simply because he/she invokes his/her Fifth Amendment privilege against self-incrimination; nor can statements coerced by a threat of removal be used against the employee in a subsequent prosecution

  -- An employee can be removed for not replying if he/she is adequately informed both that he/she is subject to discharge for not answering and that his/her replies cannot be used against him/her in a criminal case

    --- If the commander/supervisor suspects criminal activity on the part of the employee, the best course is to call the staff judge advocate (SJA)

-- Any desire to offer immunity to an employee must be coordinated with the SJA who will consult with (and possibly get approval from) the Department of Justice and/or U.S. Attorney

- An employee also has the right to be advised of the consequences of participating or not participating in an interview for a third party proceeding (unfair labor practice hearing, arbitration, Merit Systems Protection Board (MSPB) hearing, etc.), and failure to do so can be a Unfair Labor Practice (ULP) by management. These rights are known as *Brookhaven* rights, from *IRS and Brookhaven Service Center,* 9 F.L.R.A. 930 (1982), and the employee must be advised of:

  -- The purpose of the interview

  -- That no reprisal will take place if the employee refuses to participate; and

  -- Participation is voluntary

- The interview cannot be coercive in nature. Questions must not exceed the scope of the legitimate purpose of the inquiry and cannot otherwise interfere with the employee's statutory rights.

References

5 U.S.C. §§ 7114(a)(2)(B); 7116(a)(1)
NLRB v. Weingarten, 420 U.S. 251 (1975)
Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968)
Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973)
IRS and Brookhaven Service Center, 9 FLRA 930 (1982)

EQUAL EMPLOYMENT OPPORTUNITY (EEO) COMPLAINT PROCESS

There are two ways to process an Equal Employment Opportunity (EEO) complaint—informally or formally. The decision on which process to pursue is made by the complaining individual

Informal Complaint

- Timing: Persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, or disability, or who believe they have been subjected to sexual harassment or retaliated against for participating in the complaint process, must normally initiate contact with an Equal Employment Opportunity (EEO) counselor within 45 days of the date of the matter alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action

- Initial Counselor Interview: Counselors must advise individuals in writing of their rights and responsibilities. Counselors shall advise aggrieved persons that, where the agency agrees to offer alternative dispute resolution (ADR) in the case, they may choose between participation in the program and the counseling activities. If the matter is not resolved in the ADR process within 90 days of the date the complainant contacted the EEO, the complainant must be issued a notice of final interview.

- Final Interview: If the matter has not been resolved, either through ADR or the complaint process, the counselor shall inform the aggrieved person in writing, of the right to file a formal discrimination complaint within 15 days of the notice of final interview

Formal Complaint

- Written Complaint: A complaint must be submitted in writing within 15 days of final interview notice and can include a single claim or multiple claims of discrimination. Complainant may amend the complaint (with like or related claims) at any time prior to conclusion of investigation.

- Dismissals of a Complaint or Claims: Prior to a request for a hearing in a case, the agency can dismiss an entire complaint or individual claims for several reasons, such as late filing of the formal or informal complaint. However, the agency cannot dismiss a complaint based on the merits of the complaint, such as a belief that the complainant has not proven that the agency discriminated against the complainant.

- Appeal of Dismissal: A complaint dismissed in whole by the agency can be appealed, within 30 days of receipt, to the Equal Employment Opportunity Commission's (EEOC) Office of Federal Operations

- Partial Dismissals***:*** When an agency dismisses some but not all of the claims in a complaint, it must notify the complainant in writing of the rationale for the decision and shall notify the complainant that those claims will not be investigated

Investigation of Complaints

- Investigation: The Agency has **180 days** from the filing of the formal complaint to complete its investigation of the discrimination complaint and provide the investigative file to the complainant. The DoD, Defense Civilian Personnel Advisory Service, Investigations and Resolutions Division (IRD), will conduct the investigation and assemble the investigative file. The file includes exhibits provided by the agency representative and the complainant, affidavits of witnesses and the investigative report.

- Complainant Decides on Course of Action: Within 30 days of receipt of the investigative file, complainant must either:

  -- Request a final decision from the agency head based on the record, or

  -- Request a hearing and decision from an EEOC Administrative Judge (AJ), normally at the nearest EEOC District Office

  -- If complainant does not request a hearing within 30 days, the agency will issue a final decision based on the record

Final Decisions by the Agency

Written Decision: The Air Force Civilian Appellate Review Office (AFCARO) receives the investigative file and issues the Final Agency Decision (FAD) within 180 days. The FAD is appealable in the same manner as a Final Agency Action following an EEOC Hearing (discussed below).

Request for an EEOC Hearing

- Request for Hearing: Complainants make requests for a hearing directly to the EEOC office. After receiving the hearing requests, the AJ will order the agency provide the investigative file and set out procedures for litigation of the complaint. The AJ may also review any claims dismissed by the agency, any new claims and issue a ruling as to whether those new claims will be consolidated with the current complaint.

- Discovery: The AJ issues a discovery order which allows each party to develop evidence. The order requests the production of documents and questions witnesses using methods such as interrogatories, requests for admissions and depositions.

- Hearings: The AJ may issue an order for a hearing. Agencies shall provide for the attendance at the hearing of all federal government employees approved as witnesses by the AJ. The AJ takes as evidence information or documents relevant to the complaint. The hearing is recorded and the agency arranges and pays for verbatim transcripts.

Post-Hearing

- Decision: Within 180 days of receipt of the complaint file from the agency, the AJ will issue a decision on the complaint, and will order appropriate remedies and relief where discrimination is found

- Final Agency Action after Hearing: When an AJ has issued a decision, the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the AJ's decision

  -- AFCARO issues the Final Agency Action for the Air Force

- Complainant's Appeal of Final Agency Action: The complainant may appeal the agency's final action to the EEOC's Office of Federal Operations (OFO) within 30 days of receipt of the Final Agency Action

- Request for Reconsideration: Any party may request reconsideration by the full Equal Employment Opportunity Commission within 30 days of receipt of a decision of the EEOC/OFO. A decision issued by the EEOC/OFO is final unless the full Commission reconsiders the case.

Civil Action

- A complainant may sue for discrimination in federal court

- Prior to filing a civil action under Title VII or the Civil Rights Act, a complainant must first exhaust the administrative process. "Exhaustion" for the purposes of filing a civil action may occur at different stages of the process. The regulations provide that civil actions may be filed in an appropriate federal court:

  -- Within 90 days of receipt of the final action where no administrative appeal has been filed;

  -- After 180 days from the date of filing a complaint if an administrative appeal has not been filed and final action has not been taken;

  -- Within 90 days of receipt of EEOC's final decision on an appeal; or

  -- After 180 days from the filing of an appeal with EEOC if there has been no final decision by the EEOC

- Under the Age Discrimination in Employment Act (ADEA), a complainant may proceed directly to federal court after giving the EEOC notice of intent to sue. An ADEA complainant who initiates the administrative process in 29 C.F.R. Part 1614 may also file a civil action within the time frames noted above.

- Under the Equal Pay Act, a complainant may file a civil action within 2 years (3 years for willful violations), regardless of whether he or she has pursued an administrative complaint

- Filing a civil action terminates EEOC processing of an appeal

Remedial Actions

- When discrimination is found, remedial actions can be ordered, such as:

  -- Disciplinary Action: A recommendation for disciplinary action for individuals found to have engaged in intentional discrimination or retaliation;

  -- Reinstatement or Nondiscriminatory Placement: Placement of the victim in the position he/she would have occupied if the discrimination had not occurred;

-- Back Pay: Reimbursement of back pay reduced by interim earnings; employee had to have been ready, willing and able to work to be entitled to back pay;

-- Erasing Adverse Materials from Records: Erasing from the agency's records any adverse materials relating to the discriminatory employment practice;

-- Restoration of Benefits: Full opportunity to participate in the employee benefit denied, such as training, preferential work assignments, overtime scheduling; and

-- Restoration of Leave: Restoration of leave the employee was forced to take or lost as a result of the discrimination

-- Fees and Costs: Attorney's fees and costs shall apply to allegations of discrimination prohibited by Title VII of the Civil Rights Act and the Rehabilitation Act. A finding of discrimination raises a presumption of entitlement to an award of reasonable attorney's fees.

- Compensatory Damages: Compensatory damages include damages for past monetary loss (out of pocket loss), future monetary loss, and emotional loss. There is a statutory cap of up to $300,000 on future pecuniary damages, and non-pecuniary damages. The $300,000 cap does not include past pecuniary damages, back pay, front pay, attorney fees, or lost benefits. Punitive damages are not available.

- Injunctive Relief: A court order to cease a specified act or behavior

Miscellaneous

- The primary source for legal advice for informal complaints is the installation legal office

- The Labor Law Field Support Center (LLFSC) is the primary source of legal advice for formal complaints and civil actions arising from EEO claims. LLFSC personnel will coordinate on dismissals or acceptance of formal complaints, will represent the agency through the IRD investigation and any administrative hearing before the EEOC and will defend the Air Force with the U.S. Attorney in federal courts.

  -- The Air Logistics Centers and certain other locations are excluded from LLFSC coverage. Regardless, the installation staff judge advocate (SJA) remains the legal counselor to the commander.

- Official Time: Reasonable time to prepare complaints and attend hearings, ADR or meetings regarding the complaint should be allowed. Official time is normally considered in hours, not days or weeks. Witnesses for EEO complaints do not get official time to prepare, but do get it when their presence is authorized or required by Commission or agency officials in connection with a complaint.

- Alternative Dispute Resolution (ADR): Air Force policy is to use ADR to the maximum extent practicable. ADR is voluntary and can be used at any time throughout the EEO process.

- Settlement of Complaints: Settlement discussions and settlement of a complaint can occur at any time throughout the EEO process. Settlement of a complaint normally involves coordination of any settlement terms with the designated settlement authority, LLFSC, installation SJA, AFPC and EEO Director. Entering a settlement is not an admission of wrongdoing by the Air Force.

The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (Commonly Known as the "No Fear Act")

- The No FEAR Act was enacted on 15 May 2002, and became effective 1 October 2003

- The purpose of the act is to improve agency accountability for anti-discrimination and whistleblower laws by requiring federal agencies to reimburse the Treasury's Judgment Fund for settlements and judgments paid to employees as the result of such complaints, and by establishing extensive agency reporting requirements. Previously most settlements and judgments in favor of federal employees who sued agencies in discrimination and whistleblower cases were paid from a government-wide "judgment" fund.

- Agencies must provide to their employees written notification of discrimination and whistle-blower protection laws

- Federal agencies and the EEOC must disclose and publish statistical complaint data

References

Equal Pay Act of 1963, 29 U.S.C. § 206

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*

Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*

Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, 29 U.S.C. §§ 621-634

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

29 U.S.C. § 206

29 U.S.C. § 255

29 C.F.R. § 1614

AFI 36-2706, *Equal Employment Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011

AFI 51-1201, *Conflict Management and Alternative Dispute Resolution in Workplace Disputes* (17 March 2014)

EEO Management Directive 110 (2015)

WHISTLEBLOWER PROTECTION ACT

In 1989 Congress amended the Civil Service Reform Act of 1978 with the Whistleblower Protection Act (WPA) of 1989. The Act substantially strengthened the protection for whistleblowers in the federal government. In 2012, Congress again amended the WPA with the Whistleblower Protection Enhancement Act in order to eliminate judicial exceptions that had been created over time.

- The Act made the Office of Special Counsel (OSC) independent of the Merit Systems Protection Board (MSPB) and specifically charged the OSC with protecting employee-whistleblowers

- If the OSC fails or refuses to act on the complaint, the individual has an independent right to bring the case him/herself before the MSPB as an Independent Right of Action (IRA) appeal

- A prevailing whistleblower has a right to obtain attorney's fees and costs associated with litigation

Individual Actions, Protections, and Burden of Proof

- Employees (including former employees and applicants) who believe they have suffered reprisal (a negative or prohibited personnel action in some form) for disclosing matters of gross mismanagement, gross waste of funds, abuse of authority, a substantial and specific danger to public safety, or a violation of law, rule or regulation, must first seek the assistance of OSC before bringing an individual action. These types of disclosures are referred to as "protected disclosures."

    -- If OSC notifies the employee that its investigation is over and that the OSC will not act, the employee has 60 days to file an appeal alleging reprisal with MSPB

    -- If requested by the OSC, the MSPB will grant a 45-day postponement ("stay") of a personnel action (such as a removal) taken against a whistleblower

    -- If the employee receives no notice from OSC within 120 days of filing a complaint, the employee then may file an appeal with the MSPB

- The following employees are protected by the WPA:
  - -- Persons who make protected disclosures
  - -- Persons who suffer a retaliatory personnel action because they are believed to have made a protected disclosure, even if they have not actually done so
  - -- Persons who suffer a retaliatory personnel action because of their relationship to someone who has made a protected disclosure
- To establish a basic (*prima facie*) case of whistleblowing, the employee (or OSC acting for the employee) must prove by a preponderance of the evidence that the whistleblowing was a contributing factor in the personnel action taken or threatened against that employee
  - -- Preponderance of the evidence means "more likely than not"
- If a *prima facie* case is established, then the agency must prove by clear and convincing evidence that it would have taken the same personnel action regardless of the whistleblowing
  - -- Clear and convincing is defined as that measure or degree of proof that will produce in the mind of the fact-finder a firm belief or conviction as to the truth of the allegation. This standard falls somewhere between preponderance of the evidence and beyond a reasonable doubt, which is the highest standard of proof and only used in a criminal context.
- Mere harassment and threats, even without any formally proposed personnel action, can constitute a prohibited personnel action, triggering the protection of the Whistleblower Protection Act

Outcomes

- An individual who has committed a prohibited personnel practice by taking a reprisal action against a whistleblower may be disciplined
  - -- OSC files written complaint with MSPB and acts as a prosecutor
  - -- The employee is entitled to a hearing before the MSPB

-- MSPB may impose the following sanctions on the individual that took the prohibited personnel action:

--- Removal

--- Reduction in grade

--- Debarment from federal service for up to 5 years

--- Suspension

--- Reprimand

--- Civil penalty not to exceed $1,000

-- An employee disciplined under these provisions may appeal an adverse decision to U.S. Court of Appeals for the Federal Circuit

- The whistleblowers who win their cases may have the retaliatory personnel action, for example the suspension, demotion, or removal overturned

- OSC may recommend disciplinary action against a member of the Armed Forces to the head of that member's branch of service

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References

The Whistleblower Protection Act of 1989, 5 U.S.C. § 1201, *et seq.*
5 U.S.C. § 2302
The Civil Service Reform Act (CSRA) of 1978, 5 U.S.C. § 7101, *et seq.*

FAMILY AND MEDICAL LEAVE ACT (FMLA)

The Family and Medical Leave Act of 1993 (FMLA) is intended to balance the demands of the workplace and the needs of families, and to promote the stability and economic security of families, thereby promoting the national interest in preserving family integrity. The FMLA seeks to accomplish these goals by allowing employees to take reasonable amounts of unpaid leave for various medical and personal reasons.

- FMLA is available to full-time and part-time employees. An employee must have completed 12 months of service before applying for FMLA. However, this service does not have to be recent or consecutive.

- Federal employees are covered by the FMLA. It does not apply to active duty military personnel or to intermittent or temporary employees.

Leave Entitlement Under the Act

- Entitlements under the Act may not be diminished by any collective bargaining agreement (CBA) or any other employee benefit plan. Conversely, an agency must comply with any employment policy or collective bargaining agreement that provides for a greater family or medical leave entitlement than under the FMLA.

- Each employee may use up to 12 work weeks of unpaid leave during any 12-month period for specified reasons

  -- May be taken in conjunction with, or substituted with, other available paid time off (annual leave, sick leave, advanced leave, or other leave without pay)

  -- May be taken as a block or intermittently (under certain conditions)

  -- Less detailed documentation required than for sick leave

- Procedures for determining the type of leave to be used are complicated, making consultation with the staff judge advocate (SJA) crucial

- FMLA entitlement may be used for the following purposes:

  -- The birth and care of a child of the employee

  -- The placement of a child with the employee for adoption or foster care

-- The care of a spouse, child, or parent who has a serious health condition

-- A serious health condition of the employee that makes the employee unable to perform the essential functions of his/her position

Notice of Intent to Use Leave Under the FMLA

- Barring emergency situations, the employee must provide notice to supervisor not less than 30 days prior to when the need for leave is foreseeable. If circumstances preclude providing the 30-day notice, it is the employee's responsibility to give the agency as much notice as possible.

- Notice may be provided in person, in writing, by telephone, by any electronic means, or in emergencies, through a third party such as a spouse or other responsible person

Medical Certification

- Supporting documentation must include a statement that the employee is "needed to care for" the individual, the patient requires assistance for care, safety, or transportation needs and the employee's presence would be beneficial or desirable for the care of the individual

- In the case of leave for his/her own serious health condition, the Air Force can require medical certification from the employee's health care provider, which must include, among other things, a statement that the employee has a serious health condition that makes it impossible to perform the essential functions of the position. The Air Force can also require periodic reports as to the employee's status and intent to return to work.

- If the agency doubts the certification, it may require a second medical certification; however, it must select and pay for the services of the health care provider. If the second opinion differs, the agency and employee must jointly agree on a third provider who will provide a final and binding opinion.

- If the employee is unable to provide the certification prior to commencing the leave, then the agency must grant leave on a provisional basis. If ultimately the employee is unable to provide the required certification, then the leave granted should be charged to the employee's paid leave account.

Return to Work

- An employee, absent from work under the FMLA, is entitled to be returned to the same position or to an equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment

- If the employee has not fully recovered at the time they return to work, additional leave may be taken, to include annual or sick leave, leave under the Federal Employees Family Friendly Leave Act, donated leave, or additional leave without pay

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References

5 U.S.C. §§ 6381-87
Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.*
5 C.F.R. § 630.401
5 C.F.R. §§ 630.1201-1211
AFI 36-815, *Absence and Leave* (8 July 2015)

UNEMPLOYMENT COMPENSATION

Introduction

Since 1955, federal employees have been eligible for state unemployment benefits. This section outlines the authority for the program and the procedures that should be followed.

- Benefits are paid by the states, applying applicable state unemployment compensation law, **but**:

  -- Department of Labor (DOL) reimburses the states on a quarterly basis

  -- Federal agencies reimburse the DOL for payments to state agencies

  -- Air Force pays approximately $5 million annually in unemployment compensation

The Concern

- If an employee is successfully removed because of either misconduct or unsatisfactory performance, the Air Force may still be required to pay unemployment compensation

- Eligibility:

  -- MONETARY ELIGIBILITY: To qualify for unemployment benefits, an employee must have earned a certain amount during a certain period of time

  -- SEPARATION: The employee must have been separated through no fault of his own; however, separation for performance, versus conduct, may not preclude receiving benefits

  -- AVAILABILITY: Applicant must be able and available to accept work, and must be actively seeking work

- It takes a team effort of the SJA, Civilian Personnel Section, AFPC and Accounting and Finance to defeat meritless unemployment compensation claims

Procedures

- While varying from state to state, the procedure for claims of unemployment compensation generally is as follows:

  -- A form (SF-8, *Notice to Federal Employees about Unemployment Insurance*) is given to employee by the Civilian Personnel Section upon separation

  -- A claim is filed by the former federal employee with the appropriate state agency

    --- The former employee may file a claim anywhere, if he/she chooses, but benefits are paid by the state of the employee's last duty assignment

    --- If the employee was overseas, he/she must return to the United States to file, and his state of residence will pay any appropriate benefits

  -- The state agency sends a Form ES-931, *Request for Wages and Separation Information*, to the federal agency requesting "federal findings," i.e., the facts reported by a federal agency pertaining to an individual as to:

    --- Whether the individual performed federal civilian service for the agency,

    --- The period of such service,

    --- The individual's wages, and

    --- The reasons for termination

  -- The Air Force has 4 workdays after receipt to:

    --- Return the forms correctly completed or give notice that the time limit cannot be met and provide an estimated completion date

    --- Retrieve retired records

  -- If federal findings are not received within 12 days, the state agency may make an entitlement determination without the findings (subject to redetermination if subsequently received)

--- Federal findings are **NOT** binding on the state agency. The forms should be completed in a manner that maximizes the likelihood that the Air Force's views will be adopted with respect to eligibility, ineligibility, and disqualification.

--- Delays in completing the forms could hurt the Air Force's ability to appeal the state's determination

-- The state agency makes an initial determination

--- Either party may appeal and request a hearing

--- At the hearing, the Air Force may have to re-litigate the basis for the termination, even if the Air Force's position has already been upheld by the Merit Systems Protection Board (MSPB) or by an arbitrator

--- Witnesses are often necessary. In other words, a commander who removed the employee may have to testify as to his/her reasons for that action.

--- If a party fails to appear for the hearing, the other party **MAY** win by default, although some states require the employer to put on its case proving misconduct even when the claimant fails to appear

-- Examiner issues a written decision

-- An administrative appeal can be made from examiner's decision

-- Judicial review held in state court

- Time limits in state unemployment compensation cases are usually very short and strictly enforced

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References

5 U.S.C. § 8501, *et seq.*
20 C.F.R. Parts 604, 609
DoDI 1400.25, Volume 850, *DoD Civilian Personnel Management System: Unemployment Compensation* (December 1996), incorporating through Change 13, 9 January 2002, administratively reissued 6 April 2009

FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA) is the federal law that establishes a national minimum wage, and sets rules for payment of overtime. Compensation claims filed under the FLSA have considerable potential for civilian personnel controversy and costly litigation.

Introduction

- The FLSA is a federal statute that was signed into law in 1938 by President Franklin Roosevelt

  -- Established a national minimum wage, prevented minors from being employed in oppressive child labor and, most importantly for purposes here, set the 40-hour work week and guaranteed 'time-and-a-half' overtime compensation for certain jobs

  -- Federal employees were exempt from FLSA until 1974, when Congress enacted legislation to apply the FLSA to the federal sector

  -- The FLSA as it pertains to the federal government protects employees from management misuse of overtime and seeks to ensure covered employees receive proper compensation. The FLSA requires federal agencies to exercise appropriate controls to ensure that only work for which the employer intends to make payment is performed.

  -- While the Department of Labor has ultimate responsibility for overseeing FLSA developments and insuring all provisions of the law are properly implemented, the Office of Personnel Management (OPM) has responsibility for applying the FLSA to federal employees and preparing regulations that address the specific circumstances of federal employment

General Principles

- There are two types of positions under the FLSA: Exempt and Non-Exempt

  -- Non-Exempt positions **ARE** covered by the provisions of FLSA and therefore entitled to the Act's protections

  -- Exempt positions **ARE NOT** covered by the provisions of FLSA. Employees in those positions can still work overtime and be compensated, but the rules applicable to them are different.

-- The FLSA presumes that all employees are covered, unless the position meets the criteria for at least one of the Act's exemptions. The three most-commonly encountered exemptions are:

--- Executive Exemption: Management personnel responsible for the hiring, firing, advancement, promotion, and directing the work of at least 2 full-time civilian employees

--- Administrative Exemption: Personnel whose work relates to the management or general business operations, and who exercise discretion and independent judgment

--- Professional Exemption: Personnel who perform work requiring advanced knowledge typically acquired by prolonged course of specialized intellectual instruction

-- FLSA exemption status is **NOT** the same as the Bargaining Unit status. FLSA exemption status is determined by the duties performed by the employee, while Bargaining Unit status is determined by the local agreement and regulations.

-- The best way to determine an employee's FLSA status is to use his or her position description (PD) or Core Personnel Document. The FLSA exemption status ("N" for non-exempt or "E" for exempt) will typically be listed at the top of the front page along with other essential information about the position.

-- FLSA exemption status is determined by Air Force classifiers, with the expectation that the PD/Core Personnel Document reflects the duties actually being performed. Supervisors are responsible for certifying that the PD accurately reflects the duties performed.

- An agency that violates the FLSA's overtime provisions may be liable to the employees affected for the amount of the unpaid overtime compensation, plus an additional equal amount as liquidated damages. If a claim for back pay is established, the claimant will be entitled to pay for a period of up to 2 years (3 years for a willful violation) from the date the claim was received, which is why it is important for managers and supervisors to keep an accurate account of the actual hours an employee has worked.

Differences in Treatment of FLSA Non-Exempt (Covered) Employees and Exempt Employees

- Non-Exempt Positions:

  -- Must be compensated for all overtime (OT) hours for which the agency accepted the work

  -- Must always be offered OT pay

    --- For example, the employee cannot be compelled to accept compensatory time as payment for overtime hours worked

  -- All OT is paid at 1 ½ times the employee's regular pay

  -- OT work need not be approved in advance

    --- For example, a non-exempt employee may file claim for overtime that is "suffered or permitted"

  -- "Suffer or Permit OT" is a type of overtime applicable to those employees covered by the FLSA. Covered employees must be compensated for all hours of work they perform that is "suffered or permitted" to occur by management. Overtime work by FLSA non-exempt employees is "suffered or permitted" if:

    --- The employee performs work for the agency's benefit that was neither ordered nor approved in advance by management

    --- Management is aware that the employee is performing the work, or had reason to believe that it was being performed

    --- Management had an opportunity to prevent the work from being performed, but failed to act in a reasonable time to stop the employee from performing the work (e.g., telling employees to go home at the end of the day)

    --- To be credited and paid for irregular and occasional overtime work, whether it is authorized and approved or "suffered and permitted" work, the employee must perform this work in excess of his or her basic forty-hour workweek

- Exempt Positions:

  -- Compensatory time can be compelled, if pay exceeds GS-10, step 10

  -- One and half times salary OT pay is capped at GS-10 step 1 OT rate

  -- OT **MUST** be approved in advance

Manager and Supervisor Responsibilities

Managers and supervisors have very specific and important responsibilities within the FLSA process.

- Management:

  -- Responsibility to develop, apply, and communicate clear and consistent overtime policies that comply with the requirements of the FLSA

  -- Ensure all supervisors know the exemption status of their employees, and train supervisors on how to treat exempt vs. non-exempt employees

  -- Ensure retention of accurate records on employee hours worked for at least 3 years

- Supervisors:

  -- Responsibility to understand and apply the appropriate overtime rules to all employees whether exempt or non-exempt. This is important so that supervisors can ensure they are complying with the provisions of the FLSA and so they can properly inform employees of their FLSA rights.

    --- Non-exempt employees have certain entitlements under FLSA and it is imperative that supervisors advise them of these rights

  -- Supervisors should also work to control employees' work hours

    --- Supervisors must be aware of the hours employees are working, so that employees are only performing work for which the agency or office plans to compensate them

    --- Supervisors should keep accurate records of actual hours worked by non-exempt employees

---- Such an account may be crucial if a non-exempt employee files an FLSA claim for uncompensated overtime hours worked

---- Burden of proof is on management to prove that proper compensation was allocated. If the employee has better record keeping of his or her hours than that of management, the likelihood the agency will have to pay for that "uncompensated overtime" increases.

-- Supervisors should know the exemption status of all employees and communicate the overtime policy and rules to all employees

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References

Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219
5 C.F.R. Part 550
Pay Administration for the Fair Labor Standards Act, 5 C.F.R. pt. 551

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CHAPTER SIXTEEN: ENVIRONMENTAL LAW

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ENVIRONMENTAL LAWS: OVERVIEW

Federal, state, and local environmental laws and regulations are intended to protect human health and the environment. While carrying out this function, these laws and regulations frequently also limit commander options. Failure to comply with applicable environmental laws and regulations will frequently inhibit full mission accomplishment and can severely impact installation resources. Moreover, commanders can be held criminally liable for violations. Familiarization with this chapter is crucial to a commander's ability to minimize negative impacts to the mission and to the environment.

Environmental Statutes

- Federal statutes now cover virtually all major environmental issues

  -- Exemptions from federal statutes and rules are rare because they usually require personal action by the President or the Secretary of Defense

  -- Most major federal environmental statutes waive federal government immunity from state and local pollution control regulations (including permitting and procedural requirements) and substantive pollution control standards

    --- Most statutes subject the Air Force to state and local enforcement

    --- The Air Force is also subject to state and local fines and penalties for violations of requirements related to hazardous waste, underground storage tanks, drinking water, lead-based paint, and others

  -- Most statutes subject Air Force personnel to criminal liability for violations of environmental laws and regulations

- Federal environmental statutes usually establish a joint federal-state system of pollution control. In addition, state authority allows delegation to local regulatory agencies.

  -- The typical role of the federal government is to establish the basic pollution control standards and to ensure that the states achieve those standards

  -- Most states have been delegated authority to establish standards for particular sources of pollution, integrate the individual controls into an overall plan to achieve the federal standards, and enforce controls on a daily basis

Enforcement Authority

- Three levels of enforcement authority typically apply:

  -- U.S. Environmental Protection Agency (EPA): Retains authority to enforce when it has not delegated that authority to the relevant state or when it learns of violations not being prosecuted or otherwise dealt with by a delegated state

  -- State or Local Enforcement Agencies: Have primary responsibility for taking administrative or judicial actions for most violations

  -- Private Citizens: When federal, state, or local enforcement authorities have failed to abate violations, most environmental statutes allow private citizens to initiate civil enforcement proceedings in a federal district court

Assistance

- The base has a number of offices with expertise in environmental matters. These offices typically include civil engineering, legal/staff judge advocate (SJA), bioenvironmental engineering, medical, safety office, and others.

- Required meetings of the installation Environment, Safety and Occupational Health Council (ESOHC), which is normally chaired by the vice commander, will assist leadership in addressing environmental issues and instilling base-wide stewardship values

- *The Military Commander and the Law* (this book) is published every 2 years in hard copy and is also available online in a more frequently updated edition. This Chapter is a great place for commanders to start to understand complex base environmental matters.

References

AFI 32-1067, *Water and Fuel Systems* (4 February 2015)
AFI 32-7001, *Environmental Management* (16 April 2015), incorporating Change 1, 8 April 2016
AFI 32-7020, *The Environmental Restoration Program* (7 November 2014), incorporating Change 1, 18 April 2016
AFI 32-7040, *Air Quality Compliance and Resource Management* (4 November 2014)

AFI 32-7042, *Waste Management* (7 November 2014)
AFI 32-7044, *Storage Tank Environmental Compliance* (18 August 2015), incorporating Change 1, 22 April 2016
AFI 32-7047, *Environmental Compliance, Release and Inspection Reporting* (22 January 2015)
AFI 32-7061, *The Environmental Impact Analysis Process* (12 March 2003), certified current, 28 March 2014
AFI 32-7063, *Air Installations Compatible Use Zones Program* (18 December 2015)
AFI 32-7064, *Integrated Natural Resources Management* (18 November 2014), incorporating Change 1, 22 February 2016
AFI 32-7065, *Cultural Resources Management* (19 November 2014)
AFI 32-7066, *Environmental Baseline Surveys in Real Property Transactions* (26 January 2015)
AFI 32-7086, *Hazardous Materials Management* (4 February 2015)

ENVIRONMENTAL TORT CLAIMS

Environmental tort claims, typically demanding large monetary payments, are based on allegations the Air Force has damaged property or human health as a result of base activities. The classic example results from on-base use of hazardous, but useful, chemicals which have migrated off-base because of a spill or cumulative use. Claims for asbestos and toxic mold exposure are also treated as environmental tort claims. Potential environmental claims should be brought to the attention of the staff judge advocate (SJA).

Statutory Authority

- Environmental tort claims are asserted against the Air Force under the Federal Tort Claims Act (FTCA) or the Military Claims Act (MCA). Generally, the FTCA applies within the continental United States (CONUS), and the MCA applies worldwide.

- These claims are distinct from other types of liability cases arising under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), and others acts. However, these tort claims may arise from the same set of facts and circumstances.

- Liability of the United States for environmental torts is determined in accordance with the law of the state where the alleged act(s) or omission(s) causing the damage occurred

- In addition to state law defenses to negligence, federal agencies can assert additional defenses such as "discretionary function"

Processing

- Environmental tort claims are submitted, usually to the SJA, using Standard Form 95, *Claim for Damage, Injury, or Death*

- In accordance with AFI 51-501, *Tort Claims,* bases receiving environmental tort claims will be responsible for investigating and processing those claims which arise in their assigned geographic area

- Unlike laws such as CERCLA and RCRA, environmental tort claims filed under the FTCA or MCA do not provide for personal liability against the installation commander

- Depending on the amount of the claim, environmental tort claims are paid by the installation or MAJCOM out of operations & maintenance (O&M) funds or out of the Department of Treasury's Judgment Fund

References

Military Claims Act, 10 U.S.C. §§ 2731–2740
The Federal Tort Claims Act, 28 U.S.C. § 1346(b)
28 U.S.C. §§ 2671–2680
28 C.F.R. Part 14
32 C.F.R. §§ 842.40–842.54
Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*
Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*
AFI 51-501, *Tort Claims* (15 December 2005)
Standard Form 95, *Claim for Damage, Injury, or Death*

SOVEREIGN IMMUNITY AND ENVIRONMENTAL CHARGES

The federal government, as a sovereign, is not subject to state, interstate, or local laws or to lawsuit by these entities. The only exception is when Congress expressly waives sovereign immunity. It is important to understand why some state and local environmental regulations apply to your base, while others do not. Complying with environmental regulations, when there is no waiver, may be a fiscal law violation. Additionally, failure to comply when there is a waiver could impact mission accomplishment and the bases' budget.

Waivers of Sovereign Immunity

- Only Congress can waive sovereign immunity and it must do so "clearly and unequivocally"

- Waivers are strictly construed in favor of the United States, and entities (state, interstate, and local) cannot regulate federal facilities absent a clear, unequivocal waiver by Congress

- The following are not waivers:

  -- Executive orders

  -- Federal regulations

  -- Failure to object to a state requirement

  -- Compliance agreements

  -- Base commander agreements or actions

- Waivers of sovereign immunity are included in most of the major federal statutes regarding at least part of the statutory requirements (e.g., Clean Air Act (CAA), Resource Conservation and Recovery Act (RCRA)-waste management, RCRA-Underground Storage Tanks (USTs), Clean Water Act (CWA), and Safe Drinking Water Act (SDWA)). Consult other sections in this chapter regarding waivers in specific acts.

Paying Bills to Nonfederal Regulators

- Waivers of sovereign immunity allow the Air Force to pay reasonable environmental fees (also referred to as "service charges") and fines under a number of statutes, however, waivers do not allow the federal government to pay state and local taxes (with two exceptions below) or interest for late payments

  -- Fees: Charges (often annual) for services provided by state or local governments in administering their environmental programs (e.g., fees for environmental permits, underground storage tank registration, and hazardous waste generation). Fees may be paid when there is an applicable waiver of sovereign immunity.

  -- Fines/Penalties: Charges by regulators for failure to comply with environmental regulations or with permit terms. Again, fines are payable when there is an applicable waiver of sovereign immunity.

  -- Taxes: Revenues collected (often annually) to provide for the general support of the entire community. Taxes are not payable, with two statutory exceptions.

    --- Exception in 42 U.S.C. § 2021d(b)(1)(B), allows bases to pay taxes on low-level radioactive waste owned or generated by the federal government that is disposed of at a regional disposal facility or a non-federal disposal facility within a state that is not a member of a regional compact

    --- Exception in 33 U.S.C. § 1323 (c)(1)(B) permits state or local authorities to assess reasonable service charges, including taxes, for payment or reimbursement of cost associated with stormwater management programs

  -- Interest: Charges by regulators for failure to pay a fine, fee, or tax in a timely manner. Interest is never payable.

- Any person who uses appropriated funds for a purpose not authorized by Congress violates the Anti-Deficiency Act (ADA), 31 U.S.C. § 1341 ("limitations on expending and obligating amounts"), and may be subject to appropriate adverse action

Distinguishing Between Fees and Taxes—Always Consult the Staff Judge Advocate (SJA)

- Generally easy to determine whether a charge is a fine/penalty or interest, however, distinguishing between a fee and a tax is challenging. Always seek assistance from the SJA in making this determination.

- An existing test for determining whether a charge is a fee or a tax is incorporated in DoDI 4715.6, *Environmental Compliance*. A fee is not a tax if the charges:

  -- Do not discriminate against Federal functions;

  -- Are based on a fair approximation of use of the system; and

  -- Are structured to produce revenues that will not exceed the total cost to the state of the benefits to be supplied

- However, there is some question whether the test above, known as the *Massachusetts test* (based upon the Supreme Court's decision in *Massachusetts v. U.S.*, 435 U.S. 444 (1978)) should be used

  -- The Comptroller General, in opinion B-306666, and some federal Courts of Appeal specifically reject the *Massachusetts* test in the context of federal immunity from state taxation

  -- Any legal analysis of an environmental fee assessed by a state or local entity should consider the Comptroller General opinion as well as relevant decisions within the applicable circuit court

- Clearly, this is a complex analysis and should be accomplished by your SJA with assistance from the Regional Environmental Counsel and the Environmental Law Field Support Center. To achieve geographic consistency, environmental attorneys from other services may also be consulted.

References

31 U.S.C. § 1341
33 U.S.C. § 1323
42 U.S.C. § 2021
Massachusetts v. U.S., 435 U.S. 444 (1978)
Comp. Gen. B-306666, *Matter of Forest Service-Surface Water Management Fees* (5 June 2006)
DoDI 4715.06, *Environmental Compliance in the United States* (4 May 2015)
DoD 7000.14-R vol. 10, ch. 6, *Financial Management Regulation: Contract Payment Policy* (December 2015)
AFI 51-301, *Civil Litigation* (20 June 2002)

CONTROLS ON AIR FORCE DECISION-MAKING: NEPA

The National Environmental Policy Act (NEPA) requires federal agencies to evaluate environmental impacts as part of their overall planning and decision-making process. It also requires the public be informed of, and involved in, the decision-making process. Failure to properly follow NEPA planning may result in a court halting the project until the NEPA process is complete. This section is limited to NEPA procedural requirements within the jurisdiction of the United States and United States territories.

Process

- Within the Air Force, NEPA's mandates are carried out through the Environmental Impact Analysis Process (EIAP). Before any final decision on a proposed action is made, the Air Force EIAP (found at 32 C.F.R. Part 989), requires the Air Force to:

  -- Determine if a Categorical Exclusion (CATEX) applies. CATEXs define those categories of actions that do not individually or cumulatively have potential for significant effect on the environment, therefore, no further environmental analysis is necessary (see 32 C.F.R. Part 989, Appendix B, for a list of CATEXs)

  -- <u>Documentation</u>:

    --- Normally, an AF Form 813, *Request for Environmental Impact Analysis* will be used to document a CATEX; or

    --- Prepare an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI); or

    --- Prepare an Environmental Impact Statement (EIS) and a Record of Decision (ROD)

- Within EIAP and in accordance with other requirements, certain unique circumstances (e.g., wetlands, floodplains) dictate additional documentation and MAJCOM approval

- Air Force must also complete EIAP for a private action essentially under Air Force "control" (e.g., actions requiring Air Force permission)

- Failure to follow EIAP can result in the action being delayed by litigation challenging the adequacy of the NEPA documentation

- Presence of classified information does not exempt the Air Force from its NEPA responsibilities, but it may modify the public's right to participate in the NEPA process. Unclassified portions of the required analysis are shared with the public.

- Generally, the Air Force may not irretrievably commit money or resources for any proposed action until the EIAP is completed

Environmental Assessment (EA) or Environmental Impact Statement (EIS)

- If a proposed action does not lead to a CATEX, the Air Force must determine whether to prepare an EA or an EIS

- EAs and EISs are similar, in that they both consider alternatives and impacts, but the EIS is substantially more in-depth and has greater opportunities for public comment/ participation

- An EIS is required for any "major federal action significantly affecting the quality of the human environment." If the action does not rise to the level of an EIS, an EA is required to analyze appropriate alternatives to recommended courses of actions.

  -- "Major" refers to impact on the environment, not to the size of the project; thus, even a small project can qualify as "major"

  -- Proponents consider whether environmental effects are significant based on context and intensity

  -- A reviewing court's focus will be whether the Air Force has taken a "hard look" and made a good faith assessment of potential impacts to the environment and whether reasonable alternatives were considered

  -- The term "human environment" includes the natural and physical environment, as well as the relationship of people with that environment

    --- A particularly important area for Air Force actions is the potential impacts on air quality

      ---- The Air Force is prohibited from supporting or taking any action affecting air quality (e.g., construction, weapon system bed-down, mission realignment, training exercise, etc.) which does not conform to a State Implementation Plan (SIP)

---- This requirement is called "general conformity," and requires the Air Force to demonstrate the proposed action will not hinder attainment or maintenance of air quality standards. "General conformity" is also discussed in the Clean Air Act section of this manual.

-- Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,* requires federal agencies to consider effects of proposed projects on minority and low-income populations

-- The heart of NEPA is the identification and analysis of alternatives. Furthermore, a range of reasonable alternatives satisfying the purpose and need of the proposed action must be analyzed, including a "No Action" alternative.

NEPA is a Procedural Law

- The Air Force must ensure environmental concerns are given "appropriate consideration," but NEPA does not require the Air Force to rank environmental concerns above mission goals

- The Air Force must ensure all reasonable measures are taken to mitigate adverse environmental impacts associated with an action it has chosen to implement

  -- An EIS or EA/FONSI should clearly identify mitigation measures

  -- A ROD must state whether all practical means to avoid or minimize environmental harm from the alternative selected have been adopted or, if not, why they were not

  -- If mitigation measures are proposed, proponents must prepare a mitigation plan and submit it to HQ USAF/A7CI for each FONSI or ROD containing mitigation measures

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References

National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*
40 C.F.R. Parts 1500-1508
32 C.F.R. Part 989
Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (11 February 1994)
AFI 32-7061, *The Environmental Impact Analysis Process* (12 March 2003), certified current 28 March 2014

ENVIRONMENTAL MANAGEMENT SYSTEM (EMS), ENVIRONMENTAL INSPECTIONS, AND ESOH COUNCIL

The Air Force environmental management system (EMS) is a framework for establishing processes and rules for managing environmental risk and should be thought of as a business perspective. The Air Force environmental inspection process assists commanders in assessing the overall performance of their installation's EMS and identifying and tracking solutions to remedy environmental issues. The Environment, Safety, and Occupational Health (ESOH) Council is a steering group which establishes goals, monitors progress, and advises installation senior leadership. Inspections and ESOH Council activities are part of EMS.

EMS

- EMS incorporates business processes and business rules for managing and reducing environmental risk. All personnel have a role in their installation's EMS.
    - -- EMS drives continuous improvement for all Air Force environmental programs
    - -- EMS is a management tool for focusing resources and accomplishing core goals of mission sustainability and readiness
    - -- Requires periodic evaluation of compliance with applicable requirements and conformance with the EMS model
    - -- EMS is based on the International Organization for Standardization (ISO) 14001, *Environmental Management Systems*, standard
    - -- A "Plan, Do, Check, Act" approach (see Figure 16.1 on page 757, *Interaction of EMS, Environmental Inspections, and ESOH Council*) is used in EMS
    - -- eDASH, an Internet-based document control system maintained by the Air Force Civil Engineer Center (AFCEC), implements EMS across the Air Force
        - --- eDASH can be accessed by the following link: https://cs1.eis.af.mil/sites/edash/Lists/AFLOA%20Legal%20and%20Other%20Requirements/AllItems.aspx
        - --- eDASH provides Air Force users with collaboration tools, workspaces, calendars, and web sites and enables assignment and tracking of tasks through workflow

--- A component of eDASH, ANSR (Accessible Knowledge for Sustainable Resources), allows users to post environmental program questions which are answered by Air Force environmental Subject Matter Experts (SMEs), Program Managers, and Subject Matter Specialists

- EMS Contains a Number of Key Features Including:

  -- Development of an installation Environmental Policy Statement

  -- Identification of installation environmental risks (elements of organization activities, products, or services that interact with the environment)

  -- Establishment of objectives and targets for significant risk(s) and inclusion of them in an Environmental Action Plan and/or Environmental Management Plan

  -- Focus of resources on limiting installation negative impacts on the environment (reducing or eliminating environmental risks)

  -- Assessment of environmental performance through the Air Force Inspection System and use of established tools to track and correct identified deficiencies

  -- Use of management reviews to monitor performance and evaluate continual program and process improvements

Environmental Inspections

- The environmental inspection process provides commanders an assessment of the performance status of their EMS and identifies and tracks solutions to environmental issues

- Three different inspections, conducted in accordance with AFI 90-201, *The Air Force Inspection Program*, evaluate compliance with applicable requirements and conformance with the EMS model

  -- Internal Shop-level Inspections: Performed as part of the Commander's Inspection Program (CCIP)

    --- Inspections are performed by shop-level supervisors or assessors at a frequency set by the Installation Commander

    --- Self-Assessment Communicators: Easy-to-answer questions focused on daily operations at the shop level, are utilized

---- Findings, root cause analysis for each finding, and corrective actions are entered and updated in the installation Inspector General's (IG's) Management Internal Control Toolset (MICT)

-- Internal Program-level Inspections: Performed as a part of the CCIP and through compliance checks accomplished in accordance with DoD instructions

---- The CCIP part of the program-level inspections is performed at a frequency determined by the Installation Commander in accordance with AFI 90-201

---- MICT is utilized for these inspections to track findings, root causes, and corrective actions

---- Compliance checks under DoDI 4715.06, *Environmental Compliance in the United States*, and DoDI 4715.05, *Environmental Compliance at Installations Outside the United States* occur at least annually for each environmental protocol

---- Compliance checks utilize Internal Compliance Check, which is the Finding Tracker Tool on eDASH

---- Installation Environmental Branch Chief and/or EMS Coordinator ensure completion of internal compliance checks

-- External Management System Evaluations: Performed by the MAJCOM IG

---- Accomplished as a part of the MAJCOM IG Unit Effectiveness Inspection (UEI) Capstone Event, this is a one-week, on-site visit at the end of each UEI cycle

---- AFCEC provides a team of IG-certified inspectors to support the inspection, but MAJCOM functional SMEs may be augmented if necessary

---- Inspectors record deficiencies, recommended improvement areas, and strengths in the Inspector General Evaluation Management System

Release of Environmental Inspection Documents and Information

- Inspection documents and information must be managed and protected in accordance with applicable laws, regulations, and policies

-- The Freedom of Information Act (FOIA), 5 U.S.C. § 552; DoD 5400.7-R, *DoD Freedom of Information Act Program*; DoD 5400.7-R_AFMAN 33-302, *Freedom of Information Act Program*; and AFI 90-201 govern release of inspection records

- -- AFI 90-201, para. 2.18, addresses classification, marking, and release of IG inspection reports from CCIPs and MAJCOM UEI Capstone Events

- The Air Force Environmental Law Field Support Center (AFLOA/JACE) routinely assists installation and MAJCOM legal offices in the preparation of legal opinions regarding the release of inspection-related materials

ESOH Council

- The ESOH Council is the cornerstone of the Environment, Safety, and Occupational Health (ESOH) program and provides senior leadership involvement and direction at all levels of command

  - -- Assists leadership in meeting the requirement for senior leader involvement and commitment to ESOH matters

  - -- Annually, the council establishes goals, measures, objectives, and targets on ESOH matters

  - -- Provides ESOH guidance to subordinate and tenant organizations

  - -- At installation-level, the council oversees the environmental inspection process, including internal shop-level inspections and internal program-level inspections

  - -- A cross-functional composition at installation-level includes group commanders, each 2-letter office, and all tenant organizations

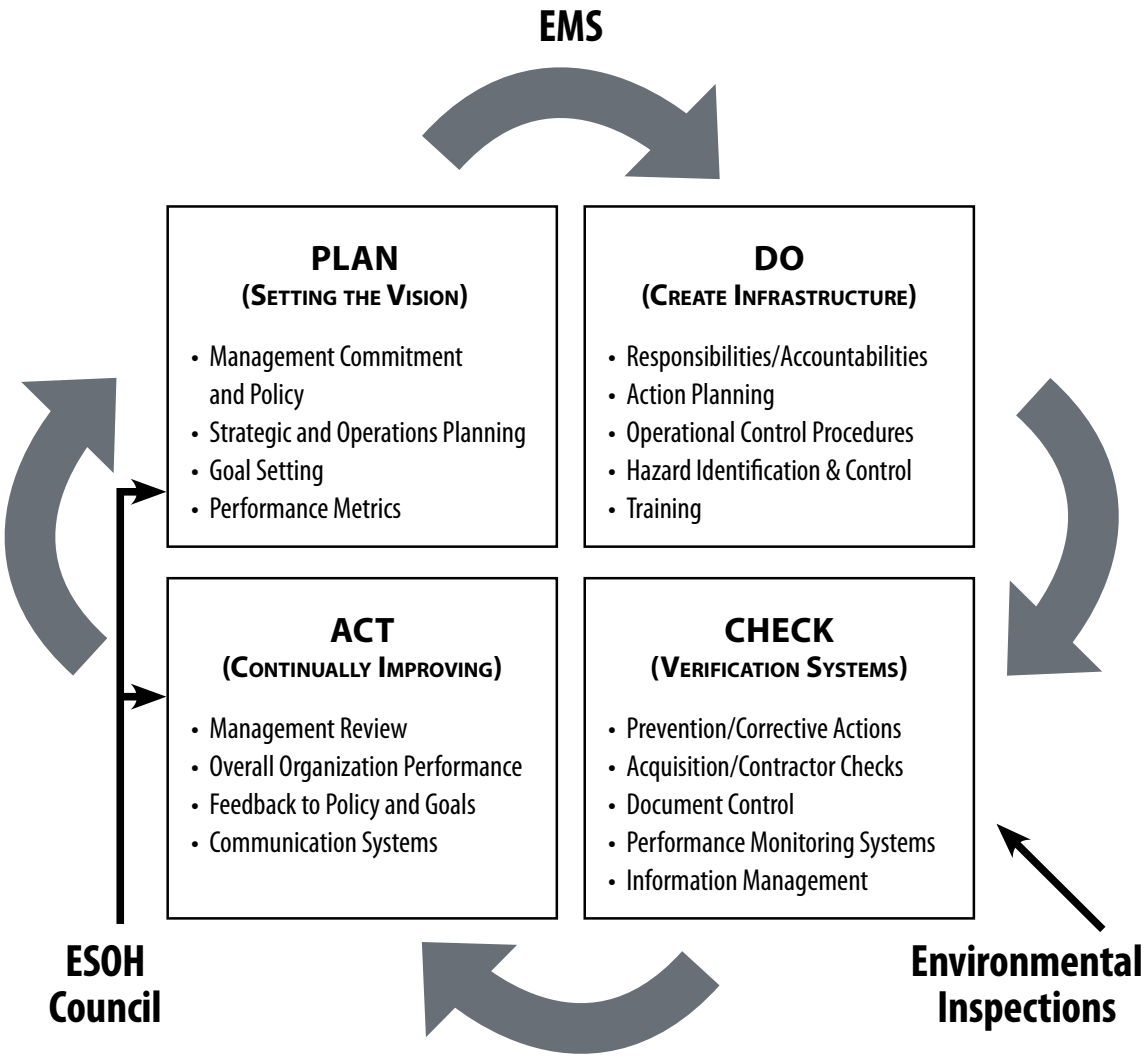
  - -- Chaired at installation-level by the wing commander unless delegated to the vice wing commander

- Ensures a systematic, interdisciplinary approach to ESOH and ensures core mission areas integrate this approach into planning, budgeting, and decision-making

- Also ensures progress toward ESOH sustainment goals and mission readiness, and it fosters a culture of compliance

- Meets at least semi-annually at all levels of command

Figure 16.1. Interaction of EMS, Environmental Inspections, and ESOH Council



References

Freedom of Information Act, 5 U.S.C. § 552 (2015)

DoDI 4715.05, *Environmental Compliance at Installations Outside the United States* (1 November 2013)

DoDI 4715.06, *Environmental Compliance in the United States* (4 May 2015)

DoDI 4715.17, *Environmental Management Systems* (15 April 2009)

DoD 5400.7-R, *DoD Freedom of Information Act Program* (4 September 1998), incorporating Change 1, 11 April 2006

DoD 5400.7-R_AFMAN 33-302, *Freedom of Information Act Program* (21 October 2010), incorporating through Change 2, 22 January 2015

AFI 32-7001, *Environmental Management* (16 April 2015), incorporating Change 1, 8 April 2016"

AFI 90-201, *The Air Force Inspection System* (21 April 2015), incorporating Change 1, 11 February 2016

AFI 90-801, *Environment, Safety, and Occupational Health Councils* (25 March 2005), certified current 29 December 2009"

ISO 14001:2015(E), *Environmental Management Systems–Requirements with guidance for use* (15 September 2015)

INTERACTION WITH OSHA

The federal Occupational Safety and Health Administration (OSHA) establishes occupational safety and health (OSH) standards to ensure safe and healthful conditions in workplaces throughout the United States. OSHA enforces its standards through inquiries, inspections, investigations, and issuing citations for violation of OSHA standards.

Applicability of OSHA standards

- Federal agencies must provide safe and healthful working conditions for employees
- Federal agencies must establish and maintain OSH programs that obey OSHA standards or approved alternate standards
  - -- Does not apply to workplaces that use or handle DoD equipment, systems, and operations that are unique to national defense mission
    - --- E.g., military aircraft, ships, early warning systems, tactical vehicles, field maneuvers, naval operations, and flight operations
  - -- "Military unique" workplaces and places where only military members work do not have to obey OSHA standards
- AFI 48-145, *Occupational and Environmental Health Program*, specifies Air Force occupational and environmental health standards that apply to all military and civilian personnel
- AFI 91-203, *Air Force Consolidated Occupational Safety Instruction*, provides Air Force industrial and ground safety policy that implements OSHA standards

Contact from OSHA

- There are four typical contacts a base may have with OSHA:
  - -- Inquiry
  - -- Inspection
  - -- Investigation
  - -- Citation

- Inquiry: Process that occurs in response to a complaint from a non-employee or when a complaint alleges a violation occurred, but there is no present danger to workers

  -- OSHA Area Director asks agency to immediately investigate, determine if the complaint information is valid, and make any needed corrections or changes

  -- Air Force normally has 5 working days to respond by letter or e-mail

  -- OSHA will close the case if it is satisfied with the response (e.g., the hazard was or is being properly addressed)

- Inspection: On-site evaluation of workplace(s) that can be scheduled ahead of time or conducted unannounced under some circumstances

  -- Inspections are triggered when OSHA receives a complaint from an employee or an employee's representative, and OSHA believes a violation exists that exposes employees to risk of physical harm

  -- Inspections are also triggered when OSHA receives a complaint that alleges imminent danger of death or serious injury exists

    --- An inspection is not required if the OSHA Area Director believes there is no reasonable grounds that violation or hazard exists

  -- Inspections can result if OSHA is not satisfied with the installation's response to an inquiry

- Investigation: In-depth look into a fatality or catastrophe (defined as an incident resulting in hospitalization of three or more employees) caused by a workplace hazard

  -- Goal of an investigation is to determine the cause of the incident, whether a violation of OSHA standards occurred, and any relationship between the violation and the incident

  -- Air Force must investigate the incident and, upon request, provide OSHA with a report of the investigation's findings

  -- OSHA Area Director decides if OSHA will conduct an investigation of the incident

    --- OSHA may conduct an independent investigation or participate in the Air Force's investigation

- Citation: Is a Notice of Unsafe or Unhealthful Working Conditions (OSHA-2H form)
  - -- Issued by OSHA Compliance and Safety Health Officer (inspector) or OSHA Area Director
  - -- Notifies agency of violations of OSHA standards, alternate standards, and/or 29 C.F.R. Part 1960
    - --- A copy of the citation must be posted at or near the location of each violation addressed in the citation
    - --- The copy must remain posted until the violation is abated or 3 working days, whichever is later

Responses to OSHA

- Inquiry and Citation: The Air Force reply should be responsive, respectful, timely, and sincere
  - -- Answer OSHA's questions and address OSHA's concerns
  - -- Don't be argumentative or aggressive
  - -- If a violation occurred, specify what has been done—or will be done—to fix it and prevent a repeat problem
  - -- Express appreciation for OSHA's concerns
  - -- Assure OSHA safe and healthy working conditions are priorities
  - -- Obey time limitations or request extensions
- Inspection and Investigation: During inspections and investigations, Air Force representatives should be cooperative, respectful, and interested
  - -- Be open; facilitate site visits, interviews, and document reviews
  - -- Don't be argumentative or aggressive
  - -- Assure OSHA that safe and healthy working conditions are priorities
  - -- Provide escorts for inspectors and investigators

  - Take pictures of whatever inspectors or investigators take pictures of and take samples of whatever OSHA samples

- Ensure the servicing legal office knows about and provides support regarding all OSHA contacts and responses

  - The Office of the Staff Judge Advocate (JA) can advise on OSHA processes

  - JA can ensure replies to OSHA are responsive and more likely to build trust than distrust

More on Citations

- Each specified violation normally will be categorized as willful, serious, or other-than-serious

  - Willful Violation: Exists when the employer knowingly failed to comply with a legal requirement or acted with plain indifference to employee safety

  - Serious Violation: Occurs when a workplace hazard could cause an accident or illness that would most likely result in death or serious physical harm and the employer knew of the hazard or could have known of the hazard

  - Other-than-serious Violation: Occurs when a hazardous condition exists but would most likely not cause death or serious physical harm

- A repeated violation exists where a facility has been cited previously for the same or a substantially similar condition within the past 3 years

- Within 15 days after receiving a citation, the installation may request an informal conference with the OSHA Area Director to:

  - Get better explanation of cited violations

  - Get better understanding of the standards cited

  - Discuss ways to correct violations

  - Discuss problems with abatement dates set out in a citation

  - Resolve disputed violations

- An installation can appeal a citation or a failure of an informal conference to resolve issues
    - -- Appeal is submitted in writing to OSHA's Office of Federal Agency Programs (OFAP)
    - -- There is no judicial review of OFAP rulings
- OSHA cannot impose fines or penalties for violations by DoD Components
    - -- Federal agencies (except the United States Postal Service) do not pay fines or penalties for their violations of OSHA standards
    - -- Despite the fact fines and penalties cannot be imposed, installations may still be found to be in violation of OSHA standards

State OSH Regulations and Regulators

- Generally speaking, state OSH laws and regulations do not apply to Air Force workplaces
    - -- However, consult your servicing legal office if an issue arises
        - --- State OSH requirements may apply to contract workers in an Air Force workplace located on property over which the state exercises regulatory jurisdiction (known as concurrent or proprietary jurisdiction)
- Air Force contractors are subject to federal and state OSH requirements
    - -- However, consult JA to determine if contractors are working solely on installation property over which exclusive federal jurisdiction exits
        - --- Lack of state regulatory jurisdiction may impact the applicability of state OSH requirements to contract workers
- Cooperate with state OSH authorities who are inspecting or investigating contractor workplaces

Bottom Line

- Contact your servicing legal office for advice about addressing issues involving state OSH requirements and regulators

References

Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78
29 C.F.R. Part 1960
29 C.F.R. Part 1975
OSHA Instruction CPL 02-00-159, *Field Operations Manual (FOM)* (1 October 2015)
DoDD 4715.1E, *Environment, Safety, and Occupational Health (ESOH)* (19 March 2005)
DoDI 6055.01, *DoD Safety and Occupational Health (SOH) Program* (14 October 2014)
DoDI 6055.05, *Occupational and Environmental Health (OEH)* (11 November 2008)
AFMAN 48-146, *Occupational & Environmental Health Program Management* (9 October 2012), incorporating Change 1, 5 December 2012
AFPD 90-8, *Environment, Safety & Occupational Health Management and Risk Management* (2 February 2012)
AFPD 91-2, *Safety Programs* (24 July 2012)
AFI 48-145, *Occupational and Environmental Health Program* (22 July 2014), incorporating Change 1, 27 August 2015
AFI 90-801, *Environment, Safety, and Occupational Health Councils* (25 March 2005), certified current through 29 December 2009
AFI 91-203, *Air Force Consolidated Occupational Safety Instruction* (15 June 2012), including AFI91-203_AFGM2015-04, 17 September 2015

ENVIRONMENTAL ENFORCEMENT ACTIONS

Environmental regulators issue enforcement actions to notify bases they have violated environmental requirements, what must be done to achieve compliance, and whether the base will be fined/penalized for the violation. Enforcement actions can be serious and costly, and trigger various immediate reporting requirements.

Receiving an Enforcement Action

- Enforcement actions may be issued by various regulatory agencies at all levels:

  -- Federal (e.g., Environment Protection Agency, U.S. Army Corps of Engineers, Occupational Safety and Health Administration, etc.)

  -- State (e.g., Texas Commission on Environmental Quality, Massachusetts Department of Environmental Protection, South Carolina Department of Health and Environmental Control, etc.)

  -- Local (e.g., Hillsborough County Environmental Protection Commission, Stormwater Management Division of the Prince George's County Department of the Environment, etc.)

- Enforcement actions are sometimes called EAs, notices of violation (NOV), notices of non-compliance (NON), notices of deficiency (NOD), compliance agreements (CA), or consent orders (CO)

- Enforcement actions are often issued after an inspection, with or without notice

- Enforcement actions can be issued without an inspection based upon reports filed with the regulator (e.g., effluent limitations, spills, etc.). Also, a failure to report can result in an enforcement action.

- Depending on the nature of the violation, fines and penalties may be assessed

- Regulators may seek injunctions to shut down operations

- Violations can lead to criminal penalties, such as imprisonment and fines

- Violations can lead to more frequent inspections by regulators

- Installations may be issued enforcement actions for acts of non-Air Force personnel such as AAFES employees, contractor employees, property lessees, other agency personnel, etc.

Reporting & Tracking Enforcement Actions

- The base Civil Engineer, Installation Management Flight (CEI) must timely notify the installation commander, the installation staff judge advocate (SJA), and AFCEC/CZ of any written notice of a non-compliance by a regulatory agency. Overseas locations notify AFCEC/CF and Air National Guard installations notify NGB/A7AN.

- Base CEIs shall report all written notices, e-mail messages, field citations, and other correspondence from regulatory agencies pertaining to non-compliance with applicable environmental requirements within one business day through the Enforcement Actions, Spills and Inspections (EASI) database. Additionally, base CEIs must:

  -- Upload the written enforcement action and additional data into the database

  -- Provide real-time status updates until the enforcement action is officially closed

- The base SJA or representative shall notify the Regional Compliance Officer and the base CEI within one business day of receiving any notice of a non-compliance or obtaining knowledge of any potential non-compliance. The base SJA should copy the MAJCOM Environmental Liaison Officer and the AFLOA/JACE-Field Support Center on the notification.

- Bioenvironmental engineers (BEs) must notify MAJCOM/BEs of any violation of potable water quality sampling within one business day and immediately implement public notification procedures required by the regulator

- High visibility enforcement actions for each base are tracked in a monthly report for the Deputy Assistant Secretary of the Air Force (Environment, Safety and Infrastructure) (SAF/IEE)

- SAF/IEE reports enforcement action data to the Under Secretary of Defense (Acquisition, Technology and Logistics) for inclusion in the Defense Environmental Programs Annual Report to Congress

Responding to an Enforcement Action

- Respond in a timely manner, in writing, to the regulator who issued the enforcement action. Some may include a required response date. Continue good communication with the regulator throughout the process.

- Cooperate with the regulator. Professional, responsive, and considerate interactions help the base build and continue good relationships with regulators. Your

relationship could impact how much you must do to resolve the enforcement action or how the regulator treats you in the future.

- Do not assume the base is subject to the rule or law you allegedly violated or that you are required to do what the regulator is telling you to do (like pay a fine or penalty). You must seek legal advice from your SJA to determine the validity of the EA.

- Regulators may propose a compliance agreement or other early resolution of the violation. Do not agree to anything without coordinating with your SJA and AFLOA/JACE.

Enforcement Action Process

- An Environmental Protection Agency (EPA) "complaint" triggers a very formal administrative process

  -- The base **MUST** file an answer within 20 days

  -- Failure to respond to any given allegation is an admission of its truth

  -- Ensure a coordinated effort is made to preserve evidence and document site conditions, as it may be some time before the hearing

  -- Settlement efforts should be pursued while the hearing is pending

- The base should follow state or local rules if it receives an enforcement action from those agencies

  -- Usually a written response is required within 30 days of receipt, but it may be less

  -- The base should take corrective action as soon as practicable

  -- Informal resolution may be an option except in Clean Air Act cases, and may require coordination with AFLOA/JACE, SAF/GCN, SAF/IEE, and the Department of Justice (DOJ) prior to negotiation

  -- Civil fines or penalties assessed as part of an enforcement action normally are the funding responsibility of the installation. Payment of fines or penalties must be approved by the AFLOA/JACE Division Chief a minimum of 10 business days prior to payment.

Avoiding Enforcement Actions in the Future

- Enforcement actions are not a foregone conclusion. Attention to certain details may avoid violations.

- Stress the importance to unit personnel of complying with all environmental and safety instructions (e.g., AFIs, DoD regulations, permits, material safety data sheets (MSDS), etc.)

- Be prepared for inspections by regulators

  -- Conduct regular self-inspections

  -- Know your weak areas

  -- Complete the "easy fixes;" do not wait to be directed

  -- "Neatness" in environmental operations and in record-keeping really does count

  -- Have a no-notice inspection response plan ready to activate, and exercise it

  -- Select and prepare a knowledgeable and professional escort team to respond and accompany inspectors during even no-notice inspections and during non-duty hours

  -- Treat environmental inspections seriously and inspectors respectfully

  -- It is typical practice to allow regulators/inspectors to come onto the installation to conduct inspections. If the base is not subject to regulation by the agency requesting admittance, call the SJA for assistance.

  -- While you may need to verify and vet inspectors to ensure installation security, be courteous and cooperative. You do not want to irritate them before they get started!

  -- Know the areas most likely to produce violations:

    --- Hazardous waste management plans

    --- Personnel training records

--- Documentation of "cradle-to-grave" management of hazardous waste, to include return manifests showing wastes destined for disposal sites actually arrived

--- Labeling and condition of hazardous waste barrels

--- Contingency plans and emergency procedures

--- Inconsistencies between air and water discharge monitoring reports and actual permit limitations

Bottom Line

- Preparation is the key to avoiding enforcement actions

- Prompt, cooperative response is the key to resolving enforcement actions

- Consult with the base SJA , CEI, and BE immediately upon receiving an enforcement action and before signing anything

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References

AFI 32-7047, *Environmental Compliance, Release and Inspection Reporting* (22 January 2015)
AFI 51-301, *Civil Litigation* (20 June 2002)

PERSONAL AND ORGANIZATIONAL LIABILITY UNDER ENVIRONMENTAL LAWS

Individual employees, as well as the Air Force itself, may be held liable for violating environmental laws. While the Air Force is subject to civil and administrative liability, individuals may also be held criminally liable in their personal capacities.

Environmental Statutes

- Major environmental statutes such as the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and Comprehensive Environmental Response, Compensation, and Liability Act, either contain immunity provisions for federal employees acting "within the scope of their employment," or have been held by courts to grant such immunity

- Immunity does not apply for violations of environmental statutes when individual's actions are not considered "within the scope of employment"

  -- This generally occurs when an employee knowingly or willfully violates the law or has wanton disregard of the law or public safety

  -- In such cases, immunity only applies to the United States, and not the employee

- Most statutes authorize the enforcement of civil or criminal fines, penalties, or fees when an organization or individual violates the statute

- Most statutes also allow the Environmental Protection Agency (EPA) to delegate its civil and criminal enforcement authority to qualified states as long as the state requirements are at least as stringent as federal requirements

Commander/Leadership Liability

- Direct participation in the violation of an environmental statute is not required for a commander or leader to be subject to prosecution

- Under the "responsible corporate officer doctrine," supervisors may be criminally liable for the acts of subordinates despite a lack of knowledge regarding the specific violations

- By not acting promptly to correct an environmental violation, or circumstances leading to such violations, a commander or leader may also be subject to prosecution

- If a violation of an environmental law or regulation occurs, immediately consult the base civil engineer (CE) and the staff judge advocate (SJA). It is important to notify the regulator to establish good faith in the compliance resolution process.

Individual Civil Liability

- Department of Justice (DOJ) representation may be available to an individual who commits a violation while acting "within the scope of employment"

- Representation is not automatic. The individual must submit a written request to DOJ, and DOJ will determine whether it is in the interest of the United States to provide representation.

- If an individual is not represented by DOJ, they must obtain their own attorney. In these situations, attorney's fees are the responsibility of the individual.

- If DOJ does represent the individual, often, the United States is substituted for the individual as the defendant. In these cases, the individual is released from personal liability.

Individual Criminal Liability

- Every major environmental law has criminal provisions that can be applied individually to active duty members, reservists, guardsmen, civilian personnel, and contractors

- Individual criminal liability generally applies to knowing or willful violations or wanton disregard of the law or public safety. In some cases, negligence can form the basis for criminal charges. In both situations, the individual is considered to be acting "outside the scope of employment," and is not immune from prosecution or provided a DOJ defense counsel.

- Possible sanctions resulting from criminal conviction include monetary fines and jail

- Military members may also be subject to UCMJ prosecution; however, they are entitled to a military defense counsel

- In 1990, an Army SES-4, GS-15, and GS-14 were all found guilty of improperly storing and disposing hazardous wastes in knowing violation of the Resource Conservation and Recovery Act (RCRA) and sentenced to three years of probation each

  -- In this case, "knowing" meant the senior employees were aware subordinate employees were improperly disposing of harmful substances. The prosecutor did

not have to show the senior employees knew the substances were "hazardous wastes" (as defined under the regulation), or that the disposal violated the law.

  - DOJ did not provide representation and forbade the Army from doing so. Attorney's fees reached $108,000 for each defendant.

- There have been other criminal prosecutions of military members and civilian employees, with the majority of the prosecutions resulting in convictions

  - For example, the manager of an Army wastewater treatment plant who was convicted of nine felony counts for violating a permit and falsifying reports received an eight-month jail sentence

  - A Navy fuels division director repeatedly instructed subordinates to pump fuels through a line he knew would leak. He was sentenced to ten months of confinement.

  - An Airman was convicted by court-martial of dereliction of duty after he caused an overflow of jet fuel and attempted to conceal his mistake. He was sentenced to a one-month restriction to base and a reprimand.

- In addition to prosecution by DOJ or under the UCMJ, individuals may be prosecuted by states under state law

- As discussed earlier, supervisors may be held liable for the actions of their employees as well as their own actions. Factors DOJ considers in deciding whether to prosecute include:

  - Voluntary disclosure of violation before regulators discover it

  - Cooperation with regulators

  - Use of a good faith self-auditing program

  - Internal disciplinary action taken

  - Subsequent compliance efforts

Organizational Liability

- Regulators assessing administrative fines and penalties also enforce those fines and penalties

- A civil penalty is imposed through a court order

- Bases should never pay fines and penalties without consulting with their staff judge advocate. If sovereign immunity has not been waived by Congress for payment of particular fines or penalties, payment would violate fiscal law.

- Negotiations over environmental enforcement actions must be coordinated with AFLOA/JACE (generally the Regional Environmental Counsel). Any resolution involving the payment of a fine or penalty or a request for a supplemental environmental project (SEP) must be approved by the AFLOA/JACE Division Chief.

- Base fines and penalties must be paid out of base Operational & Maintenance (O&M) Funds

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References

United States v. Carr, 880 F.2d 1550 (2d Cir. 1989)
Meyer v. United States Coast Guard, 644 F. Supp. 221 (E.D.N.C. 1986)
AFI 51-301, *Civil Litigation* (20 June 2002)
AFI 65-601, vol 1, *Budget Guidance and Procedures* (16 August 2012), incorporating Change 1, 29 July 2015, including AFI65-601V1_AFGM2016-01, 16 May 2016
SAF/IEE, *Air Force Policy on Payment of Fines and Penalties for Violations of the Clean Air Act* (17 July 2002)

MEDIA RELATIONS AND ENVIRONMENTAL CONCERNS

The Air Force develops public engagement programs to build sustained public understanding and trust and support for Air Force missions and people. Public Affairs (PA) activities are to inform and include audiences during critical decision-making windows, and to communicate the Air Force's commitment to environmental excellence. Major areas of PA involvement are discussed below.

Environmental Impact Analysis Process (EIAP) PA Responsibilities

- Ensure all PA aspects of EIAP actions are conducted in accordance with 32 C.F.R. Part 989 of the Code of Federal Regulations, and with AFI 35-108, *Environmental Public Affairs*

- Review and clear environmental documents in accordance with AFI 35-101, *Public Affairs Responsibilities and Management* and AFI 35-108, prior to public release

- Assist Air Force judge advocates in planning and conducting public hearings

- Advise the Environmental Planning Function (EPF) and the action proponent on PA activities on proposed actions and reviewing environmental documents for public involvement issues

- Advise the EPF of issues and competing interests that should be addressed in the EIS or EA

- Assist in preparation of and attending scoping and other public meetings or media sessions on environmental issues

- Prepare, coordinating, and distributing news releases and other public information materials related to the proposal and associated EIAP documents

- Notify the media (television, radio, newspaper) and purchasing advertisements when newspapers will not run notices free of charge. The project proponent will fund the required advertisements.

- Determine and ensure Security and Policy Review requirements are met for all information proposed for public release (see AFI 35-102, *Security and Policy Review Process*)

Installation Restoration Program (IRP) PA Responsibilities

- Serve as the focal point for PA aspects of proposed IRP actions
- Advise on the PA aspects of the base's development, participation in, and support of the Restoration Advisory Board, a community based advisory board
- Ensure all concerned community parties are in the communication channel
- Prepare an IRP community relations plan and announcing the availability and location of information repositories (often called the Administrative Record)

Air Installation Compatible Use Zone (AICUZ) Program PA Involvement

- Base Community Planner (BCP) generally manages the AICUZ program. PA assists the BCP in preparing for public meetings.
- PA will handle noise complaints directly and provide timely, responsive, and factual answers to maintain good media and community relations. PA will refer all claims for damages to the base legal office.

References

32 C.F.R. Part 989
AFI 35-101, *Public Affairs Responsibilities and Management* (12 January 2016)
AFI 35-102, *Security and Policy Review Process* (4 May 2016)
AFI 35-108, *Environmental Public Affairs* (14 July 2015)

CLEANUP OF CONTAMINATION FROM PAST ACTIVITIES

The Air Force has used—and continues to use—a number of hazardous and toxic substances. There are instances in which those substances have been released to the environment, resulting in contamination or otherwise posing a threat to human health. Several laws provide a framework for addressing these releases, apportioning the costs for the cleanup, and protecting human health from the released contaminants.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

- Also known as "Superfund," CERCLA provides a means of and process for investigating and responding to releases of hazardous substances into the environment, assessing parties responsible for such releases, and authorizing the Environmental Protection Agency (EPA) to order those parties to clean up the contamination. The law can also be used to force responsible parties to reimburse the Superfund for cleanup costs expended by the United States.

- CERCLA establishes "strict" liability for (1) current owners and operators of facilities where hazardous substances are released; (2) owners and operators of facilities at the time the hazardous substances were disposed; (3) persons who arranged for disposal or treatment of such substances; and (4) persons who accepted such substances for treatment or disposal

    -- Most courts have ruled any responsible party can be required to pay the total cost of cleanup, regardless of the amount a liable party contributed to the contamination; however, responsible parties can seek cost recovery and contribution from other responsible parties

    -- Responsible parties are also liable under CERCLA for damages assessed for injury to, destruction of, or loss of natural resources. The definition of natural resources is broad in scope (e.g., land, wildlife, fish, biota, air, water, groundwater, drinking water supplies), though it is limited to those resources owned, held in trust, or otherwise controlled by a federal or state government agency or an Indian tribe, thus excluding damages to private property.

- CERCLA's waiver of sovereign immunity subjects the Air Force to CERCLA substantive, procedural, and liability requirements

- Primary EPA regulations implementing CERCLA are contained in the National Contingency Plan (NCP) in 40 C.F.R. Part 302

    -- 40 C.F.R. Part 302 lists hazardous substances subject to CERCLA

  - EPA has also issued numerous guidance documents further implementing CERCLA; however these are not legally binding

- For releases at or migrating from Air Force facilities, the President has designated the Air Force as lead agency authority to investigate, and then plan, select, and implement response actions, to be exercised consistent with CERCLA

- CERCLA provides for local, state, and federal (usually EPA) regulator involvement in DoD cleanup

- CERCLA and the NCP require extensive public participation opportunities throughout the response process, including the creation of a publicly accessible administrative record and information repository

- <u>CERCLA Response Action Stages Include</u>:

  - Discovery of release

  - Removal evaluation and action—immediate or short term actions to address imminent and substantial endangerment or other risks that warrant a relatively prompt action

  - Preliminary assessment and site inspection—to determine the basic nature of the release and if further investigation or action is necessary

  - Remedial investigation—to determine the nature and extent of contamination and determine whether the release constitutes an unacceptable risk to human health or the environment so as to necessitate remedial action

  - Feasibility study—develops and assesses alternative remedies to permanently address site risks

  - Proposed plan—to present remedial alternatives assessed and rationale for the preferred alternative, and to obtain regulator and public comment

  - Record of decision—the formal decision selecting the cleanup method to be implemented

  - Remedy implementation/execution—includes remedial design, remedial action, operation and maintenance (usually monitoring), remedy completion, and closeout

National Priorities List (NPL)

-- The EPA evaluates DoD facilities for possible placement on the NPL, which is a list of the most seriously contaminated sites

-- For sites on the NPL, CERCLA requires the Air Force to enter into Federal Facility Agreements (FFAs) with EPA; states are encouraged to sign FFAs

--- In 1988, to implement the FFA requirement, DoD and EPA agreed on model language provisions, which were last revised in 2009. Deviation from the model is not permitted without approval from SAF/IE and DoD.

-- For sites not on the NPL, the state provides the primary regulatory oversight

Defense Environmental Restoration Program (DERP)

- Through DERP, Congress granted DoD complementary authority under CERCLA to administer an environmental restoration program at DoD facilities

- Response actions under DERP must be consistent with, and in accordance with, CERCLA

-- In addition to CERCLA response actions, Congress authorized DoD to correct other environmental damage that may present an imminent and substantial endangerment to public health or the environment. This authority and DERP, 10 U.S.C. § 2710, are used by DoD to conduct military munitions clean-ups.

-- DERP requires the restoration program be conducted in consultation with EPA and requires notice and opportunity to comment be provided to EPA and state and local regulators on most restoration phases

-- In recognition of the importance of public involvement at military installations, DERP requires, where practicable, installations form restoration advisory boards (RABs)

--- The RAB is composed of members from the local community and representatives from DoD, the state, and EPA, as appropriate. Community members selected for membership should reflect the diverse interests within the local community.

--- The RAB provides an expanded opportunity for ongoing community input and participation in all phases of installation restoration activities, but not actual decision-making

--- Under a DERP program known as the Defense State Memorandum of Agreement (DSMOA), DoD funds state services that assist DoD in the conduct of DERP, to include RAB participation, review, and comments on restoration documents

Third Party Site (TPS) Program

- The Air Force's TPS program resolves CERCLA claims by EPA, states, and private parties against the Air Force resulting from Air Force disposal of hazardous substances and waste at off-base properties not owned or operated by the federal government (now or in the past)

- AFLOA/JACE determines the Air Force's share, if any, of the hazardous substances disposed of at the site, and negotiates settlements of the Air Force liability based upon the Air Force's allocated share of the total cleanup cost for the site

- In virtually all cases, settlements of Air Force liabilities are paid by the Department of Justice from the Judgment Fund, not from Air Force funds

Affirmative Cost Recovery (ACR) Program

- Under CERCLA, DoD agencies may affirmatively recover the costs expended by DoD to clean up hazardous substances released onto DoD property by contractors and other non-federal entities, including costs for study, sampling, analysis, monitoring and surveying programs, and other planning and engineering services

- Base personnel should alert their Air Force Civil Engineer Center (AFCEC) and Regional Counsel Office counterparts where there is a potential cost recovery action against a third party

Resource Conservation and Recovery Act (RCRA) Corrective Action

- RCRA establishes federal cradle-to-grave requirements for the management, storage, treatment, and disposal of hazardous waste. Most states are authorized to administer the program in lieu of EPA under state laws that are equivalent and at least as stringent and broad in scope as RCRA.

- Facilities that store hazardous waste over 90 days, treat, or dispose of hazardous waste **MUST HAVE** a Treatment, Storage, and Disposal permit, which contains requirements for corrective action to address release of hazardous wastes and constituents into the environment

-- If your installation is considering obtaining either a new RCRA permit, or renewing a lapsed permit, consult with both CE and JA about the corrective action implications for the installation before initiating the permit process

-- Where corrective action is concerned, be aware of the challenge posed by pesticides (often applied to the foundation of the home during construction) if a residential construction project is planned

--- Plan on managing the pesticide-tainted soil as a potentially hazardous waste

--- Do not assume that because the pesticide was applied legally, the contaminated soil is not hazardous

- RCRA corrective action requirements largely parallel CERCLA, while terminology for cleanup phases differ

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References

Defense Environmental Restoration Program, 10 U.S.C. §§ 2701 *et seq.*
Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*
Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.*
40 C.F.R. Part 300
40 C.F.R. Parts 260-282
Executive Order 12580, *Superfund Implementation* (23 January 1987)
AFI 32-7020, *Environmental Restoration Program* (7 November 2014)
AFI 32-7042, *Waste Management* (7 November 2014)
DoDM 4715.20, *Defense Environmental Restoration Program (DERP) Management* (9 March 2012)

NATURAL AND CULTURAL RESOURCE PRESERVATION LAWS

Federal law requires agencies to preserve and protect natural and cultural resources, and federal statutes contain both substantive and procedural requirements. Consultation required by these laws provides information that is essential to the Environmental Impact Analysis Process (EIAP) in identifying, evaluating, and mitigating adverse impacts. Mitigation measures developed through consultation are incorporated into National Environmental Policy Act (NEPA) decision documents. Failure to comply with consultation requirements may indicate that the Air Force has not satisfactorily completed EIAP.

Natural Resources Conservation

- Sikes Act: Requires each installation, in cooperation with the United States Fish and Wildlife Service (USFWS) and the appropriate state fish and wildlife agency, to develop an Integrated Natural Resources Management Plan (INRMP)

  -- These detailed plans are the principal tool for managing military installation natural resources, and they operate as an agreement between the parties on how natural resource conservation needs will be integrated with military requirements

  -- Chapter 3 of AFI 32-7064, *Integrated National Resources Management*, contains guidance for implementing INRMPs in the Air Force

  -- Installations are open to the public for use of natural resources (hunting, fishing, etc.) subject to safety and security requirements

  -- The USFWS will not designate any DoD land as "critical habitat" if that land is addressed in an INRMP and the INRMP provides a benefit to threatened or endangered species that inhabit it

- Endangered Species Act (ESA): Requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of any threatened or endangered (T&E) species, or to destroy or adversely modify their critical habitat

  -- T&E species are those that are identified on a list published by USFWS (for land species) and the National Marine Fisheries Service (NMFS) (for aquatic species). The animal list is found at 50 C.F.R. § 17.11; the plant list at 50 C.F.R. § 17.12

  -- Protections afforded threatened species are similar to the protections afforded endangered species

- Migratory Bird Treaty Act (MBTA): Prohibits intentional killing of migratory birds without a permit

  -- No permit is necessary for the unintentional killing of migratory birds during military readiness activities

  -- DoD has a memorandum of understanding (MOU) with USFWS covering conservation measures.

  -- The MBTA does not prohibit harassment of migratory birds. AFPAM 91-212, *Bird/Wildlife Aircraft Strike Hazard (BASH) Management Techniques*, contains recommended methods. If harassment is insufficient to reduce risk, killing of migratory birds must be done in accordance with a depredation permit issued by USFWS.

Consultation Requirements for Threatened or Endangered Species

- ESA Section 7 requires federal agencies to consult with the USFWS (for land species) and/or NMFS (for aquatic species) whenever an action may affect T&E species. Consultation procedures are set out in 50 C.F.R. Part 402 and the USFWS/NMFS's *Endangered Species Consultation Handbook* (1998).

- Consultation is not required when no T&E species is present in the area where the proposed action is taking place. For these actions, the Air Force makes a "no effect" determination.

- Consultation may be required even when a proposed action would otherwise qualify for an EIAP categorical exclusion

- Consultation is required when a T&E species is present in the area where the proposed action will take place

  -- Not Likely to Adversely Affect: When the Air Force determines that the action "is not likely to adversely affect" a T&E species, it may use informal consultation procedures (telephone calls, e-mail, letters, etc.). Consultation is complete when the USFWS and/or NMFS concur in writing with the Air Force's determination.

  -- Is Likely to Adversely Affect: When the Air Force determines that the action "is likely to adversely affect" a T&E species, it must use the formal consultation procedures set forth in 50 C.F.R. § 402.14. This will typically require a written analysis known as a Biological Evaluation or Biological Assessment (BA). Consultation is complete when the USFWS and/or NMFS issue its written Biological Opinion (BO). This is known as a "no jeopardy opinion."

--- The BO will contain an Incidental Take Statement (ITS) that protects Air Force personnel from criminal prosecution if the action harms T&E animal species. In addition, the BO contains mandatory "reasonable and prudent measures" and "terms and conditions" that the Air Force must take to protect the species.

--- Plants receive less protection under the ESA; the BO may contain voluntary recommendations to protect the species

- Jeopardy Opinion: Although rare, USFWS or NMFS may find that an agency's action will jeopardize the continued existence of a T&E species, or destroy or adversely modify its critical habitat. This is known as a "jeopardy" opinion. In these cases, USFWS or NMFS will recommend "reasonable and prudent alternatives" to the agency action that are economically and technologically feasible, and which will not jeopardize a T&E species.

Cultural Resources Conservation

- National Historic Preservation Act (NHPA): Does not require preservation. However, NHPA requires federal agencies to consult with the State Historic Preservation Officer (SHPO), the Advisory Council on Historic Preservation (ACHP), when appropriate, and Indian tribes when an action ("undertaking") is the type of action that could adversely affect a historic resource.

  -- Historic resources are those districts, sites, buildings, structures, or objects that are included in, or are eligible for inclusion in, the National Register of Historic Places (NRHP). The NRHP is administered by the National Park Service (NPS).

  -- Eligible properties are those that are associated with events that have made a significant contribution to history or are associated with lives of persons significant in our past. Eligible properties also are those that embody distinctive characteristics of a type or method of construction or representation of a master's work, possess high artistic values (architecture); or have potential to yield information important to history or prehistory (archeology).

  -- Generally, properties less than 50 years old are not eligible for listing unless they are of "exceptional significance"

  -- Properties that the NPS has designated National Historic Landmarks are given special protection. Agencies are required, "to the maximum extent possible," to minimize harm to a landmark.

- Archaeological Resources Protection Act (ARPA): Protects archaeological sites on federal land. Archaeological sites are those that are over 100 years old and contain scientific information.

  -- Archaeological sites are identified in each installation's Integrated Cultural Resources Management Plan (ICRMP)

    --- To prevent damage, destruction, or vandalism, the location of archeological sites should not be disclosed to the general public. Such information is exempt from disclosure under FOIA exemption 3.

    --- Both ARPA and NHPA permit withholding of this information

  -- Unauthorized excavation is prohibited

    --- The Base Civil Engineer may issue ARPA permits that allow excavation by qualified individuals

    --- While Air Force contractors do not need permits, all contracts should contain ARPA language for protecting archeological resources

    --- Installations must notify any tribe, in advance, before issuing an ARPA permit allowing excavation of a site of religious or cultural importance to the tribe

    --- Any artifacts recovered remain the property of the United States Government. Artifacts that have historic significance must be properly curated.

    --- ARPA does not prohibit the collection of fossils, surface collected arrowheads, rocks, coins, bullets or minerals. However, this does not mean individuals have permission to collect these materials on Air Force installations.

Consultation Requirements for NRHP-Eligible Properties

- NHPA consultation procedures are set out in 36 C.F.R. Part 800 and chapter 3 of AFI 32-7065, *Cultural Resources Management*. Consultation with SHPOs is generally conducted by the installation cultural resources program manager. Consultation with Indian tribes recognizes tribal sovereignty and is conducted on a government-to-government basis; it must be initiated by the installation commander.

- Consultation may be required even for actions that qualify for an EIAP categorical exclusion

- Consultation is **NOT** required when:

  -- The type of action proposed does not have the potential to adversely affect a cultural resource (for example, installing removable shelving units in a building in a way that does not alter the building); or

  -- The action only has the potential to adversely affect cultural resources that the installation and SHPO have agreed, in advance and in writing, are not eligible for listing on the NRHP (an agreement known as a "consensus determination"); or

  -- The action only has the potential to adversely affect a type of cultural resource on which the Air Force has previously completed consultation with the ACHP (such as the ACHP "program comment" on 1950s-era Wherry and Capehart housing)

- Consultation **IS** required for all other actions that have the potential to adversely affect cultural resources. Consultation is complete when:

  -- The Air Force and SHPO (and Indian tribe(s) as appropriate) agree that there are no historic properties present, or the proposed action will have no adverse effect on any that are present

    --- A disagreement over whether a particular property is historic is elevated to the "Keeper" of the NRHP (the National Park Service) for a determination

    --- The SHPO has 30 days to review and disagree with an Air Force finding of no adverse effect. These disagreements are elevated to the ACHP for a determination.

  -- The Air Force and SHPO (and Indian tribe(s) as appropriate) agree that there will be an adverse effect; and

    --- If the parties agree on mitigation to resolve the adverse effect, the parties sign a Memorandum of Agreement (MOA) or Programmatic Agreement (PA). The MOA/PA commits the Air Force to taking the mitigation measures specified in the agreement. SAF/IEE must be given the opportunity to review MOAs/PAs before they are signed by the installation commander.

    --- If the parties cannot agree on mitigation to resolve the adverse effect, the Air Force terminates consultation and raises the issue to the ACHP for its recommendations. The Air Force generally follows, but is not obligated to follow, ACHP recommendations.

- Consultation must be completed before an Environmental Assessment "Finding of No Significant Impact" (FONSI) or Environmental Impact Statement "Record of Decision" (ROD) is signed

- Foreclosure: Failure to consult before implementing the action is termed "foreclosure" because it forecloses on the ACHP's opportunity to comment on that action

  -- When ACHP believes it may have been foreclosed, it notifies the Air Force (SAF/IEE) and requests information about the consultation. SAF/IEE has 30 days to respond.

  -- If ACHP determines that foreclosure has taken place, it makes the determination available to the public and to the consulting parties

  -- Foreclosure will also likely trigger closer ACHP examination of future Air Force actions

Relations with Indian Tribes

- Federally-recognized Indian tribes are domestic dependent sovereigns. The NHPA requires that they be consulted on actions that may affect historic properties on an Indian reservation, or historic properties of cultural and religious significance on or off the installation.

- Native American Graves Protection and Repatriation Act (NAGPRA): Gives tribes ownership and control of the disposition of Indian remains, funerary objects, sacred objects, and objects of cultural patrimony found on base or in Air Force possession

  -- If human remains or cultural items are unintentionally uncovered during excavation, unless otherwise provided by agreement with the tribe(s) culturally affiliated with the base, stop the activity for 30 days and protect the items. Immediately notify the tribe(s) and begin consultation on their disposition.

- Under AFI 90-2002, *Air Force Interactions with Federally-Recognized Tribes*, installation commanders must personally initiate contact when consulting with Indian tribes

  -- The installation commander must also meet with Indian tribes at least twice yearly, as well as when consultation is necessary under the NHPA, NAGPRA, or other requirement

- -- Generally, this responsibility is not delegated, but it may be delegated subject to limitations. Commanders may also execute a consultation agreement with tribal leaders that permits delegation of the responsibility to contact and meet with tribes.

- -- Consulting early when an action may significantly affect tribal resources or rights can prevent future violations and maintain positive relationships with tribes

- The Religious Freedom Restoration Act (RFRA), American Indian Religious Freedom Act (AIRFA), and Executive Order 13007, *Indian Sacred Sites*, require federal agencies to avoid burdening the practice of traditional Indian religious practices

  - -- Installations should grant access to and allow ceremonial use of Indian sacred sites on Air Force installations (or land under Air Force control) to the maximum extent practicable with military mission, safety and security

  - -- The Air Force should avoid affecting the physical integrity of such sites and maintain confidentiality of their location, where appropriate

References

Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa – 470mm
Sikes Act, 16 U.S.C. §§ 670a – 670o
Migratory Bird Treaty Act, 16 U.S.C. §§ 703 – 712
Endangered Species Act, 16 U.S.C. §§ 1531 – 1544
Native American Graves Protection and Reparation Act, 25 U.S.C. §§ 3001 – 3013
American Indian Religious Freedom Act, 42 U.S.C. § 1996
Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb – 2000bb-4
National Historic Preservation Act, 54 U.S.C. §§ 300101 – 300321
Executive Order 13007, *Indian Sacred Sites* (May 24, 1996)
32 C.F.R. Part 989
36 C.F.R. Part 800
50 C.F.R. Part 17
50 C.F.R. Part 402
DoDI 4710.02, *DoD Interactions with Federally Recognized Tribes* (14 September 2006)
DoDI 4715.03, *Natural Resources Conservation Program* (18 March 2011)
DoDI 4715.16, *Cultural Resource Management* (18 September 2008)
AFI 32-7064, *Integrated Natural Resources Management* (18 November 2014)
AFI 32-7065, *Cultural Resources Management* (19 November 2014)
AFI 90-2002, *Air Force Interactions with Federally-Recognized Tribes* (19 November 2014)
AFPAM 91-212, *Bird/Wildlife Aircraft Strike Hazard (BASH) Management Techniques* (1 February 2004)
Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act (1998)

ENCROACHMENT MANAGEMENT

Issues regarding encroachment and sustainment challenges have the potential to directly affect both the ability of Air Force installations to accomplish their mission and the quality of life in surrounding communities. The Air Force has developed an Air Force Encroachment Management (AFEM) Program to address common issues impacting installations and integrates existing foundational programs such as noise regulation and the Air Installation Compatible Use Zone (AICUZ) Program.

Installation Encroachment Management Team (IEMT)

- The installation commander establishes an IEMT to assist in implementing the AFEM Program at an installation

- The team will be a cross-functional team with representatives from various organizations to include:

  -- Airfield Operations

  -- Airspace Management

  -- Financial Management

  -- Civil Engineer

  -- Communications

  -- Public Affairs

  -- Manpower

  -- Office of the Staff Judge Advocate

  -- Safety

  -- Surgeon General

  -- Security Forces

  -- Weather

  -- Test and Evaluation

- Goal of the IEMT:

  -- Address encroachment across the Installation Complex/Mission Footprint (IC/MF)

  -- Brief the installation commander at least annually, on encroachment, emerging threats, the status of progress on prioritized action items, and recommended encroachment management focus areas for the coming fiscal year

- Installation Complex Encroachment Management Action Plan (ICEMAP): Three volume document (Action Plan, Reference Book, and Community Brochure) which addresses current and future encroachment and sustainment challenges facing Air Force installations and their surrounding communities

Federal Noise Control Act (FNCA)

- The FNCA exempts aircraft, military weapons, and equipment designed for combat use from noise regulation under the Act

- Although the FNCA generally subjects government agencies to state and local noise control regulation, courts have determined state and local regulation of aircraft noise is preempted by FAA regulation

- The FNCA requires the Air Force to comply with state and local noise stationary source regulations to the same extent as any other person

Air Installation Compatible Use Zone (AICUZ) Program

- Local governments ordinarily establish land use regulations. The Air Force supports and encourages local zoning and other land use controls that ensure land areas surrounding bases, especially private lands adjacent to runways, remain compatible with continued Air Force operations.

- Without proper land use controls, new development near airfields may increase noise complaints and potential for injuries and damage due to aircraft accidents. Also, changes in operations, e.g., bed down of new aircraft and changes in flight paths, may result in lawsuits by private landowners claiming the Air Force has "taken" their land.

- The DoD has established the AICUZ program to assist local governments in establishing suitable land use regulations in the vicinity of bases

- The Air Force develops and provides local land use planning authorities recommendations designed to ensure continued compatibility between installations and neighboring civilian communities

  -- The first step in preparing an AICUZ proposal is to identify areas with high accident potential or affected by high noise levels from military aircraft operations

  -- The Air Force uses this information to assess compatibility of land uses with current and projected Air Force operations and to make recommendations to the local zoning authority

  -- The Air Force has no authority to implement the land use recommendations set forth in the AICUZ study or to control or regulate off-base land use. It simply presents the proposal to the local zoning authority which may approve or reject the proposal.

  -- Close coordination between the commander, the base comprehensive planner, and local zoning officials is essential. This coordination serves to educate local land use planners regarding noise and safety impacts on private lands.

  -- The installation commander must present AICUZ recommendations to local zoning officials in a professional and persuasive manner. Proper tact and discretion is essential to success in preventing incompatible land use and inconsistent development.

  -- Encroachment upon important training airspace calls for expanding the AICUZ concepts to all critical real property and airspace assets needed to sustain the installation mission. These areas may be distant from the airfield, but the surrounding communities may assist in maintaining flying capacity through prudent land use planning to avoid unnecessary incompatible and conflicting land development.

  -- Congress has provided authority to acquire property interests where necessary to prevent mission encroachment (10 U.S.C. § 2684a)

  -- Air Force representatives may not threaten the local community with reprisals if the Air Force proposal is not accepted. Air Force representatives may not appear to coerce or otherwise unduly influence local zoning officials. For example, reprisal or coercion could include linking acceptance of proposal to potential Base Realignment and Closure (BRAC) decisions.

  -- Constant consultation with the base SJA will minimize potential for lawsuits and impacts on the mission

References

Noise Control Act of 1972, 42 U.S.C. §§ 4901-18

10 U.S.C. § 2684a

DoDI 4165.57, *Air Installations Compatible Use Zones (AICUZ)* (2 May 2011), incorporating Change 1, 12 March 2015

AFI 32-7063, *Air Installations Compatible Use Zones Program* (18 December 2015)

AFI 90-2001, *Encroachment Management* (3 September 2014)

AFH 32-7084, *AICUZ Program Manager's Guide* (1 March 1999)

ENCROACHMENT AND TESTIFYING AT LOCAL HEARINGS

Unchecked growth around Air Force installations and training areas can negatively impact the Air Force's ability to conduct missions and training. Competition for natural resources and land use can cause tension between the needs of the Air Force and the needs of surrounding landowners. To guard against incompatible land uses, the Air Force has established measures to communicate and coordinate land-use planning with local communities and state government. Commanders play important roles in these efforts and should understand the processes involved in participating in state and local hearings regarding encroachment issues.

Types of Encroachment

- Encroachment can take many forms:
  - Complaints from neighboring landowners concerning noise from military flights and other training activities
  - Protected wildlife being forced onto installations due to outside civilian development activities
  - Frequency spectrum interference from broadcast towers and wind-energy turbines
  - Competition for airspace between military and civil aviation
  - Cell phone towers and other tall buildings becoming obstacles to safe flight
  - Environmental and land-use laws and regulations passed by states, municipalities, and administrative agencies
  - Light pollution from nearby communities reducing the effectiveness of night vision training
  - Competition for limited natural resources, particularly water in drought-stricken areas

Encroachment Issues at the State, Local, and Federal Levels

- Air Force responses to regulations by other federal agencies are typically handled via inter-agency coordination rather than public testimony. For more information on this topic, see AFI 90-401 *Air Force Relations with Congress*, or consult with the office of legislative liaison, SAF/LL

- Often, Air Force subject matter experts (SMEs) are asked to provide testimony before a state or local body, such as a legislative assembly or a county zoning commission

- Air Force personnel may testify at state and local hearings when the following two criteria are met: (1) there is significant Air Force interest in the relevant issues; and (2) there is no conflict of interest between the United States and the testifying Air Force personnel

- Requests to testify before state and local legislative bodies on encroachment or other environmental issues must be submitted and approved through command channels prior to testifying–normally HQ USAF/JAA (see AFI 51-301, *Civil Litigation*, para. 9.19)

  -- Contact your servicing legal office to start the process. They will assist in coordination with the Regional Counsel Office (RCO) who will begin the staffing process

    --- The RCO is part of AFLOA/JACE, and directly advises the Air Force Regional Environmental Coordinator (REC)

- The proposed testimony must accompany the request and be as detailed as possible

- You should contact the RCO for any formal or informal communication with state and local regulators (see DoDI 4715.02, *Regional Environmental Coordination*)

Ethical Considerations of Testifying at State and Local Hearings

- Commanders should engage with state and local authorities in their official capacities. They should represent Air Force positions on issues rather than expressing personal opinions.

- The purpose of testifying is to "educate and inform," not to lobby for a particular outcome

  -- For example, a commander may testify that a proposed project would interfere with flight operations, but a commander should not advocate for or against the adoption of a particular law or regulation

- Prior to testifying, Air Force personnel must coordinate with the REC (DoDI 4715.02), appropriate stakeholders (based on the subject matter), and Public Affairs to identify the Air Force official position on the issues involved

- Under the Anti-Lobbying Act (ALA) (18 U.S.C. § 1913), government employees **MAY NOT**, as part of their official work, provide administrative support to private organizations for lobbying efforts, prepare editorials or other communications without accurately disclosing the government's role in the preparation of such, or appeal to members of the public to contact elected representatives in support or opposition of legislation (i.e., conduct "grass-roots lobbying")

- It is important to comply with any relevant state laws governing lobbying that may further restrict an Airman's testimony. Check with your RCO for your state's rules.

Pre-hearing Preparation

- As a preliminary matter, commanders should determine who should testify. It is often beneficial for the installation commander or another senior installation or Air Force representative to testify about potential impacts, but technical or legal staff may also be necessary.

- If TDY funds are unavailable, telephonic or other remote appearances may be allowed by the state. However, remote appearances may not always be appropriate or effective.

- Consider meeting with members of the committee/agency or their staffers prior to the hearing to determine relevant topics to address prior to the hearing

- Pre-coordinate talking points with Public Affairs, and prepare to refer media inquiries to a specific public affairs' office, press release, or other pre-coordinated DoD information source

- Identify potential alternative language to the proposed bill that would eliminate Air Force concerns

- Due to unexpected time constraints (e.g., other speakers going long), prepare one, two, three, and five-minute versions of your speech; the key is to identify and organize the main talking points in advance

- Prepare for questions and expect interruptions, but always try to circle back to main talking points

- If possible, participate in a practice ("dry run") hearing to prepare and to know what to expect

- Arrive well in advance of the scheduled hearing as times can be adjusted unexpectedly

- Consider preparing visual aids and exhibits (such as letters of support) to augment the testimony

Advice for Testifying Personnel

- The panel should be addressed as follows:

  -- "Chair Jones," "Vice-Chair Smith," "Senator X," etc.

- Make sure to announce who you are and whom you represent—e.g., the Air Force, DoD, or just a particular installation, etc.

- State the position

  -- "The proposed bill, as drafted, would result in X, Y, and Z impact to our operations," or

  -- "The proposed bill would facilitate our adoption of X new training area, which would reduce the number of flights over Y subdivision, where we receive many noise complaints"

- Ask to have written testimony entered into the record

- Make sure to address the audience correctly, but don't be surprised if they get your rank wrong—lieutenant colonels will become lieutenants and major generals will be called majors

- Do not guess or speculate about answers you do not know; "I'll get back to you" is a better answer than guessing

- Do not allow yourself to be drawn into an argumentative debate or personal attacks; focus on the purpose of your testimony: to educate and inform

- Be respectful of panel members and other attendees, regardless of their positions or the tone of their questions/comments; you represent the Air Force, and you should not come across as being a bully, sarcastic, or condescending

- Consider reminding the panel about good points made by other regulated entities in their presentations

- Lastly, remember to thank the panel members for their time

Following Up

- Regardless of how well the hearing went, follow up to ensure, as much as possible, the Air Force position appears in the final rule or bill. As part of this effort, provide any information promised during the hearing.

- If the hearing did not go well, keep in mind, in the political arena it is possible to have second, third, and even fourth bites at the apple

  -- The bill or rule may still be defeated at a full session, in the other house of the legislature, or even pursuant to governor veto

  -- Waivers or other exceptions may still be available after the rulemaking takes effect

  -- Many state offices are on two-year election cycles, so political perspective can shift quickly. There may be other opportunities to amend a bill or rule after the next election cycle and before it starts having major negative effect on the Air Force.

References

Anti-Lobbying Act, 18 U.S.C. § 1913
DoDI 4715.02, *Regional Environmental Coordination* (28 August 2009)
AFI 51-301, *Civil Litigation* (20 June 2002)
AFI 51-902, *Political Activities by Members of the US Air Force* (27 August 2014)
AFI 51-903, *Dissident and Protest Activities* (30 July 2015)
AFI 90-401, *Air Force Relations with Congress* (14 June 2012)
AFI 90-2001, *Encroachment Management* (3 September 2014)

CLEAN AIR ACT

The Clean Air Act (CAA) (42 U.S.C. §§ 7401 to 7671(q)) is one of the most comprehensive and complicated environmental statutes. CAA questions or issues should be referred to your staff judge advocate (SJA), as this guide is only a brief introduction. Air Force installations are subject to the substantive requirements of the CAA, and failure to comply may severely impact an installation's mission and its budget.

Air Quality Emissions Limitations

- The primary air pollutants regulated by the CAA are called "criteria pollutants." Currently, there are 6 criteria pollutants: Ozone (O3), Carbon Monoxide (CO), Sulfur Dioxide (SO2), Particulate Matter (PM10 & PM2.5), Lead (Pb), & Nitrogen Oxides (NOx)

  -- The United States is divided into air quality control regions (AQCR) to control these pollutants. AQCRs usually consist of several counties but, depending on the area, it may only be one county, or even a portion of a county.

  -- For each criteria pollutant, the Environmental Protection Agency (EPA) has established a health-based national ambient air quality standard (NAAQS). This standard establishes a bright line between healthy air and polluted air.

  -- An AQCR testing lower than a NAAQS is considered to be in "attainment" for that pollutant. An AQCR testing over a NAAQS is considered to be in "nonattainment" for that pollutant.

  -- Once a nonattainment area is reduced below the standard for a particular criteria pollutant, it is considered a "maintenance area," and is subject to "maintenance plan" requirements for up to 20 years

State Implementation Plans (SIPs)

- States have primary responsibility for assuring NAAQSs are met within the state

- Each state is required to create a planning document called a state implementation plan (SIP), which sets forth the means to achieve or maintain air quality within its AQCRs. States are required to submit SIPs to EPA for approval.

  -- Once approved, SIP requirements are enforceable by both the state and EPA

  -- A state's SIP is required to set forth enforceable emissions limitations and timetables, technological or process changes, monitoring requirements, and an enforcement program

- In "nonattainment" and "maintenance areas," federal entities are prohibited from supporting or taking actions (e.g., construction activity, weapon system bed down, mission realignment, training exercise) which do not conform with an SIP, unless the facility first conducts an analysis to demonstrate the proposed action will not hinder attainment or maintenance. This requirement is called "general conformity."

New Sources of Air Emissions

- In addition to meeting emissions limits under a state's SIP, new pollution sources (or major modifications of existing sources that increase pollution emissions) must meet new source performance standards (NSPS) or new source review (NSR) requirements

- New (or modified) sources must incorporate approved, environmentally safe, equipment to restrict emissions

- Large new sources are subject to preconstruction review and must obtain permits

- The nature of the permitting requirement varies depending on whether the new source is a "major" or "minor" source, which is determined by whether the source is in an "attainment" (clean) or "nonattainment" (dirty) area and the source's potential to emit (PTE). It is the PTE, not the actual or planned level of emissions, that triggers the permit requirement.

  -- In attainment areas, a "major" source, for purposes of permitting new or modified sources, is typically one with the PTE up to 250 tons per year (tpy) of any one criteria pollutant

  -- In a nonattainment area, PTE as little as 10 tpy may make a source "major" and, thus, require a permit

Hazardous Air Pollutants (HAPS)

- In addition to the regulation of emissions of criteria pollutants, the Clean Air Act also regulates the emission of HAPs, also referred to as air toxics. These pollutants cause or may cause cancer or other serious health effects, such as reproductive effects or birth defects, or adverse environmental and ecological effects.

- Under the 1990 amendments to the Clean Air Act, 189 specific air toxics are to be regulated. Examples of HAPs include benzene, which is found in gasoline; perchlorethlyene, which is emitted from some missile operations; and methylene chloride, which is used as a solvent and paint stripper by depots and a number of other industrial sources.

- Any stationary source having a potential to emit 10 tpy of a listed HAP or 25 tpy of any combination of HAPs is considered a "major source" subject to regulation, including permits

- Major HAP sources must install technology that will result in the maximum degree of HAP emission reduction that is achievable. This technology is called maximum available control technology (MACT) standards.

Operational Permits

- Title V of the Clean Air Act Amendments of 1990 requires an operational permit be obtained for any "major" stationary source of a criteria or hazardous air pollutant

- Title V requires federal permit applications, certifications of compliance, emergency reports, and required semi-annual emissions reports to be signed by the installation commander as the "responsible official." This responsibility cannot be delegated or assumed by an "acting" commander in the absence of the installation commander.

- Installations must comply with permit requirements of state and local permits as well. Some states and localities may identify the installation commander as the "responsible official," and delegability is up to that state or locality.

Mobile Sources

- In addition to addressing stationary sources of pollution (e.g., boilers, fueling systems, and heat plants), the CAA addresses mobile sources such as cars, trucks, buses, aircraft, lawn mowers, construction equipment, aircraft ground support equipment and other portable equipment

  -- Installation commanders must ensure Air Force fleet vehicles and privately owned vehicles (POVs) operated by employees on the installation (regardless of where registered) comply with an existing local inspection and maintenance (I/M) program (if one exists)

    --- GOVs, unless issued a national security exemption (NSE), are subject to fleet testing requirements, which must be implemented by the installation where the GOV is assigned

    --- POV certification is required for employees assigned to the installation for more than 60 days

--- Certifications are accomplished in the *Employee-Certification and Reporting System* (also known as ECARS) or by AF Form 4434, *Vehicle Inspection and Maintenance Program Self-Certification,* for employees not identified in Air Force personnel systems

-- Manufacturers of certain military aircraft and combat vehicles may be entitled to an NSE upon request to EPA and after endorsement of the need for an NSE by the using military service

-- Installation equipment and vehicles not issued an NSE, are required to operate consistent with all applicable federal, state and local requirements

Stratospheric Ozone Protection

- Generally, the Clean Air Act phases out the production of ozone depleting substances. Other laws and regulations govern the continued use of these substances.

  -- Ozone-depleting substances are still used as fire suppressants, refrigerants, and inerting agents in combat aircraft fuel tanks

  -- Any use, storage, or handling of these substances is highly regulated

- In the absence of adequate substitutes, the EPA is authorized to grant exemptions to the consumption of specific ozone depleting substances

Enforcement

- Citizens have the right to sue the Air Force for violations of the CAA

- Regulators, under the CAA, have all the common environmental enforcement rights—inspections, fines, injunctions, and criminal sanctions

- Sovereign immunity for fines and penalties

  -- DoD does pay fines imposed by EPA under the CAA

  -- State-imposed fines and penalties are more complicated

    --- The current Department of Justice position is that Congress has not waived sovereign immunity regarding state-imposed CAA fines and penalties

--- DoD does not pay state CAA fines and penalties except under very limited circumstances (i.e., within 6th Circuit due to a Court of Appeals decision)

- It is imperative bases not pay CAA fines or penalties prior to consulting their SJA

References

Clean Air Act, 42 U.S.C. §§ 7401–7671q
AFI 32-7040, *Air Quality Compliance and Resource Management* (4 November 2014)
AF Form 4434, *Vehicle Inspection and Maintenance Program Self-Certification* (October 2013)

CLEAN WATER ACT AND SAFE DRINKING WATER ACT

In general, the Clean Water Act (CWA) (33 U.S.C. §§ 1251 to 1387) regulates discharge of pollutants into the waters of the United States and provides quality standards for surface waters. The Safe Drinking Water Act (SDWA) (42 U.S.C. §§ 300f to 300j-26) regulates the quality of drinking water. Rights to the use of surface water and groundwater are generally governed by state law and are not the focus of these acts.

Clean Water Act

- The CWA states it is unlawful to discharge pollutants from a point source to surface waters without a permit

- The statute defines "pollutant" very broadly to include almost any man-made addition to a body of water, including dredge and fill activities and pollutants from stormwater that drains from facilities

  -- Surface waters covered by the Act encompass all "waters of the United States, including the territorial seas," and certain wetlands

    --- In 2015, the Environmental Protection Agency (EPA) issued a final rule clarifying what are and what are not "waters of the United States" for purposes of the CWA. That rule is under legal challenge and is currently pending further action in federal court.

    --- Questions as to whether a particular body of water or wetland falls under the CWA should be directed to the staff judge advocate (SJA)

  -- The Act regulates discharges from a "point source," which is defined as "any discernible, confined and discrete conveyance" that discharges or may discharge pollutants

    --- Examples of point sources are pipes, ditches, tunnels, conduits, wells, containers, rolling stock, and vessels

    --- Storm water runoff, snow melt runoff, and other surface runoff and drainage may also be regulated as a point source discharge under the CWA if from certain municipalities (to include some military bases), and some industrial and construction activities

- CWA mandates each state develop a plan to reduce nonpoint source pollution that contributes to water quality control problems in the area. This type of pollution has a variety of sources and is caused by rainfall or snowmelt and resulting in land runoff or drainage.

- There are two primary permitting systems under the CWA:

  -- Section 404 regulates dredge and fill activities (i.e., activities which disturb waters of the United States, including certain wetlands)

  -- Section 402, the National Pollutant Discharge Elimination System (NPDES) program, regulates discharge of other pollutants from wastewater plants and other point sources and includes the stormwater permit program

NPDES Program (Section 402)

- EPA has delegated the authority to administer the NPDES program to most states

- Each delegated state may adopt more stringent limitations than those established by EPA

- EPA retains a veto authority over delegated states

- The EPA regional office issues permits in non-delegated states

- The NPDES program addresses discharge from both traditional point sources, such as sewage treatment plants, and storm water discharges

- The NPDES program regulates two very broad types of dischargers, direct and indirect

  -- Direct: Discharging wastewater directly from a facility to surface water requires a permit

  -- Indirect: Discharging to a wastewater treatment works, rather than directly into surface water, does not require a permit. Although pretreatment of wastewater may be required before introduction into a treatment works.

Dredge and Fill activities (Section 404)

- In conjunction with EPA, the U.S. Army Corps of Engineers administers a second permit program regulating dredge and fill activity

  -- Activities in waters of the United States, including wetlands (such as clearing and construction) require the Air Force to obtain a dredge and fill permit

  -- Failure to obtain a permit can delay projects, require the Air Force to restore land to its prior natural condition, and subject the Air Force and its personnel to applicable administrative, civil and criminal liability

  -- In some circumstances, a state may be delegated primary jurisdiction over dredge and fill permits within its boundaries

  -- There may also be nationwide permits applicable for some minor activities

State Enforcement

- Sovereign immunity has been waived with regard to the CWA, meaning federal agencies are subject to state and local regulation in delegated states

- The waiver applies to both substantive and procedural requirements, including permits and reasonable service charges

- The waiver does not authorize installations to pay civil or administrative fines and penalties, which is prohibited

Safe Drinking Water Act

- The Safe Drinking Water Act (SDWA) sets standards for public water systems (PWS) and prohibits underground injection that endangers drinking water sources. Underground injection rules govern a variety of wells to include oil and gas wells and even some septic system leach fields.

  -- SDWA standards apply to PWS with 15 connections or service to 25 people for at least 60 days per year

  -- The SDWA exempts from coverage any PWS receiving all of its water from another PWS (has only distribution and storage facilities, no collection or treatment facilities); that does not "sell" water to any person; and that is not a carrier conveying passengers in interstate commerce

--- Many PWS do not qualify for this exemption simply because they engage in minor treatment of their water (e.g., adding chlorine to maintain disinfection levels), or because they "sell" water by virtue of providing it to tenants. The EPA has allowed the regulatory authority to modify the monitoring requirements imposed on such "consecutive PWS." This matter must be evaluated based on the law and regulations of the permitting authority.

-- The Act specifies maximum contaminant levels for drinking water as well as treatment, testing and reporting requirements enforceable by states with EPA oversight

- 1996 amendments to the SDWA modified the waiver of sovereign immunity, resulting in federal facilities now being subject to punitive civil fines and penalties

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References

Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300f–300j-26
Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*
Executive Order 11990, *Protection of Wetlands* (24 May 1997)
AFI 32-1067, *Water and Fuel Systems* (4 February 2015)
AFI 32-7047, *Environmental Compliance, Release and Inspection Reporting* (22 January 2015
AFI 48-144, *Drinking Water Surveillance Program* (21 October 2014)

WATER RIGHTS

"Water rights" are a type of property right allowing for the diversion of water from its natural state, e.g., pumping it from the ground or transporting it from a stream. Many Air Force installations possess water rights, and those rights are crucial in minimizing the cost of water to operate the installation. (Because utility contracts do not confer water rights, they are outside the scope of this paper.)

Doctrines

- Like other types of property law, most water rights law is state rather than federal law. While there are distinctions between surface water and groundwater doctrines, most state water law is derived from either the Riparian Rights Doctrine or the Prior Appropriation Doctrine. Washington, Oregon, and California have hybrid schemes, drawing from both doctrines. Generally, riparian systems are found in the east and prior appropriation systems and federal reserve rights are found in western states.

  -- Riparian Rights Doctrine: Assigns the right to divert water from a water source to landowners with land riparian to (bordering or including) the water source. Land- owners have "overlying rights" to divert groundwater from sources beneath their land.

  -- Prior Appropriation Doctrine: Assigns the right to divert water (and priorities among water rights holders) on the basis of historical usage, with first-in-time given priority over later uses

  -- Federal Reserved Rights Doctrine: Created under federal law. Federal water rights are created upon public domain land which has been withdrawn or reserved for a specific federal purpose.

    --- Land withdrawn from the public domain (in those western states in which all title derives from the federal government), and reserved for a particular purpose, is entitled to the minimum amount of (previously unallocated) water necessary to fulfill the purpose of the reservation

    --- This doctrine is judicially created in Supreme Court cases

    --- When they exist, these rights are favored over state water rights and provide a number of advantages

    --- Local installation real estate offices can provide a history of whether a particular installation has parcels of "public domain" lands.

Sovereign Immunity

- The United States has waived its right against being sued (known as sovereign immunity) in "general stream adjudications." These lawsuits determine the rights of all potential claimants to a source of water.

  -- The Air Force has been involved in several major water adjudications in Arizona, Nevada, and Idaho

- All major western installations have water rights issues. Also, water rights are increasing in importance for all Air Force installations as questions regarding water withdrawal permits and payment of fees for Air Force water use has increased.

- The federal government has not waived sovereign immunity as to the regulation of federally owned water rights, nor has the federal government waived sovereign immunity with regard to state water codes. Generally, the Air Force may not pay fees associated with the privilege of withdrawing water such as water assessment or allocation fees.

- Appropriate small administrative fees may be paid if they serve to protect Air Force water rights and provide a benefit to the installation

  -- For example, paying an administrative fee to change a point of diversion for a well on an installation that does not have federal reserved rights may be prudent to protect the use of water to which the installation has right under state law.

- Before payment of any fees associated with an Air Force water right, consult with the base staff judge advocate (SJA) for advice regarding appropriateness. The base SJA will likely need to consult with AFLOA/JACE.

- In some instances, it may be appropriate, as a matter of policy, for the Air Force to agree (out of comity rather than obligation) to comply with state water codes, but only to the extent practicable and consistent with fiscal law and sovereign immunity principles

Key Issue for Bases: Preservation of Water Rights

- It is Air Force policy to retain water rights and to avoid jeopardizing Air Force interests in water rights/resources (see AFI 32-1067, *Water and Fuel Systems*)

- State water rights can be lost inadvertently (e.g., failing to follow procedures for transferring water rights when closing a well)

- Federal reserve rights cannot be lost or abandoned while the Air Force installation is active

- Bases must preserve records necessary to establish the right to take water. It is prudent to maintain all water use and water rights records. Civil engineering (CE) is the records custodian for these records.

- Installations should file objections to applications for water rights which may diminish water to which the installation has an existing right

- CE should monitor activities of local regulators relating to water sources within the area

- Installations should always consult their SJA prior to paying fees associate with water rights. State and local authorities have attempted to regulate water rights even though sovereign immunity has not been waived, and some bases have mistakenly paid associated fees.

Reference

AFI 32-1067, *Water and Fuel Systems* (4 February 2015)

SOLID AND HAZARDOUS WASTES

The Solid Waste Disposal Act (SWDA) (also known as the Resource Conservation and Recovery Act (RCRA)) imposes requirements for the management of hazardous wastes (HW) and nonhazardous solid wastes. The Act also provides for regulation of underground storage tanks (USTs).

Hazardous Waste Management: Subtitle C

- RCRA imposes comprehensive requirements on those who generate, transport, treat, store, or dispose of HW. Every Air Force installation generates HW, and many have a RCRA permit regulating the treatment, storage, and/or disposal of HW.

- RCRA is predominantly a program run by the individual states. Environmental Protection Agency (EPA) retains independent enforcement jurisdiction even in those states where overall program authority has been delegated.

  -- An individual state program must be at least as stringent as the federal program and may be more stringent

  -- Consult with the staff judge advocate (SJA) if questions arise as to the limits that exist, if any, when a state is enforcing RCRA requirements

- RCRA hazardous wastes are solid wastes that are specifically listed as hazardous waste in the C.F.R. or solid wastes that exhibit a hazardous characteristic (ignitability, corrosivity, reactivity, or toxicity). The Act excludes certain categories of waste from its coverage.

- Although used oil destined for disposal or recycling is not a listed HW, RCRA imposes management requirements for used oil from generation to reuse or disposal

  -- Used oil that exhibits a hazardous characteristic and is not recyclable must be managed as HW

  -- Be aware that if used oil is mixed with PCBs, the oil is managed under the Toxic Substances Control Act (TSCA), not RCRA. Avoid this type of mixing on your facility. You want to be under RCRA, not TSCA.

- RCRA creates a system that regulates and tracks HW from "cradle-to-grave"

  -- RCRA sets strict requirements for accumulating, storing, transporting and disposing of wastes. RCRA also regulates personnel training, facility equipment, inspections, and emergency response planning.

    --- Most of these requirements must be documented in a written paper or electronic record and the records kept available for inspection (for example, transport manifests must be kept for a minimum of 3 years)

  -- HW may only be accumulated in accordance with specific requirements. Containers must be properly marked, closed, and kept secure from unauthorized access or tampering.

  -- Out of date pharmaceuticals removed from formulary shelves require characterization under RCRA for a determination as to whether they are either "listed" hazardous waste or exhibit a hazardous characteristic (usually toxicity)

  -- Initial Accumulation Point ("satellite point"): Designated location at or near the point of generation of HW

    --- At this location, waste cannot exceed 55 gallons of HW or one quart of acutely hazardous waste

    --- Once the limit is exceeded, the container must be moved to an accumulation site or permitted Treatment, Storage and Disposal (TSD) facility within 3 days

  -- Accumulation Site: Used to temporarily store hazardous wastes until they are shipped to a TSD facility

    --- For those generating large quantities of hazardous waste, the waste may be retained at an accumulation site for up to 90 days for large quantity generators

    --- For small quantity generators (defined by the Act and regulations), waste may be stored longer

  -- HW is tracked by a manifest initiated by the generator. When waste is transferred to permitted entities that transport, treat, store or dispose of it, the manifest is annotated to show that it passed into their possession and was properly managed.

  - Transporters must properly label HW and deliver it to a designated TSD facility and must comply with Department of Transportation requirements for containers, labeling, placarding of vehicles, and spill response

- Installations must develop a hazardous waste management plan (HWMP). The HWMP incorporates a waste analysis plan, which is the primary document used to identify all waste streams generated at the installation.

Solid Waste: Subtitle D

- Establishes minimum requirements for controlling and monitoring solid waste disposal. States are given responsibility for the regulation of nonhazardous (municipal) solid waste.

- Municipal solid waste includes containers and packaging, food scraps, and yard trimmings. It does not include medical and hazardous wastes, construction and demolition debris, municipal sludge, or ash from power plants and incinerators.

- AFI 32-7042, *Waste Management*, requires an installation commander to implement either a recycling or a qualified recycling program on the installation. Such programs require careful monitoring to ensure ineligible solid or hazardous waste is not disposed through the implemented program.

Underground Storage Tanks: Subtitle I

- The Act covers tanks, including connecting underground pipes, when 10 percent or more of the volume of the tank and its underground pipes are beneath the surface of the ground

- Tanks that meet this definition are covered if they contain a regulated substance. This includes any hazardous substance (defined under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)) or petroleum or substances that are derived from crude oil.

  - Tanks containing HW are regulated under Subtitle C

- Existing tanks must be brought up to specified performance standards or closed. If a tank has a release, owners and/or operators must take corrective action, including cleaning up the area around the tank.

- New tanks must meet specified standards, and the appropriate regulatory agency must be notified before a new tank is installed

- Congress amended RCRA to include a waiver of sovereign immunity regarding UST regulation. This means state and local UST provisions apply to bases.

- EPA has expanded 40 C.F.R. Part 280 requirements as implemented in AFI 32-7044, *Storage Tank Environmental Compliance*, to mandate inspection requirements for emergency tanks and airport hydrant fueling systems and to increase training requirements for all people responsible for tank maintenance. These requirements become effective on a rolling schedule between October 15, 2015 and October 15, 2018.

Pollution Prevention Program

- It is DoD policy to reduce the use of hazardous material, the generation or release of pollutants, and the adverse effects on human health and the environment caused by DoD activities

  -- The Air Force manages to reduce use of hazardous materials and the release of pollutants into the environment in the following hierarchy of actions:

    --- Reduce/eliminate dependence on hazardous materials and reduce waste streams

    --- Reclaim generated waste for reuse whenever possible

    --- Recycle waste which cannot be reclaimed whenever possible

    --- Employ treatment if properly permitted to do so

    --- Dispose or release pollutants into the environment only as a last resort and, then, only if such disposal or release is authorized by applicable statute or regulation

  -- Major commands or the Air Force Civil Engineer Center establish procedures to ensure installations develop and execute pollution prevention management plans. Plans must contain management strategies for ozone depleting chemicals, EPA 17 industrial toxics, hazardous waste, municipal solid waste, affirmative procurement of environmentally friendly products, energy conservation, and air and water pollutant reduction.

  -- Installations must conduct opportunity assessments on a recurring basis for all pollutant sources. The assessment examines the total waste generation by type and volume of content and determines the most economical and practical option for reduction.

Federal Procurement: Subtitle F

- RCRA sec. 6002 and Executive Order 13101 require federal agencies to establish an affirmative procurement program (also known as the green procurement program)

  -- The EPA designates which items are or can be produced with recovered materials, such as paper, retread tires, building insulation, cement/concrete containing fly ash, and re-refined oils

  -- Federal agencies must procure these designated items composed of the highest percentage of recovered material practicable, unless they are not reasonably available, fail to meet performance standards, or are available only at an unreasonable price

    --- Procurement is not limited to contracting activities, but also includes Government Purchase Card purchases

    --- Installations must train all Air Force personnel on the federal procurement requirements

  -- The EPA is required to evaluate the federal agency's compliance with RCRA sec. 6002 and EPA guidance when conducting RCRA inspections. Although the EPA has no enforcement authority, it can issue a notice of violation for non-compliance with RCRA sec. 6002 or the EPA guidance.

References

Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act (RCRA)), 42 U.S.C. §§ 6901-92

40 C.F.R. Parts 260-280

OSD Memorandum, *Establishment of the DoD Green Procurement Program* (27 August 2004)

AFI 32-7001, *Environmental Management* (16 April 2015), incorporating Change 1, 8 April 2016

AFI 32-7042, *Waste Management* (7 November 2014)

AFI 32-7044, *Storage Tank Environmental Compliance* (18 August 2015), incorporating Change 1, 22 April 2016

AFI 32-7086, *Hazardous Materials Management* (4 February 2015)

CONTROL OF TOXIC SUBSTANCES

The Toxic Substances Control Act (TSCA) (15 U.S.C. §§ 2601-92) regulates the manufacture, processing, and distribution of chemicals that pose unreasonable risk of injury to human health or the environment. TSCA authorizes the Environmental Protection Agency (EPA) to screen existing and new chemicals to identify potentially dangerous products or uses and to take action ranging from banning production, import, and use to requiring warning labels.

Polychlorinated Biphenyls (PCBs)

- TSCA prohibits manufacture and distribution of polychlorinated biphenyls (PCBs)

  -- PCBs were common components in hydraulic fluids, lubricants, insecticides, and heat transfer fluids and were used in electrical equipment (e.g., transformers, capacitors)

  -- Old transformers and capacitors containing PCBs may be found on installations, as might PCB-contaminated soil

  -- Past insecticide spraying, ceiling tile coatings, and certain painted surfaces may also be sources of PCBs

  -- Consistent with Air Force Policy and TSCA, installations focus on PCB elimination

  -- Installation personnel should be trained to avoid mixing normal used oil and oil containing PCBs. Managing PCB imbued oil under TSCA is far more expensive than managing used oil under RCRA.

Asbestos

- TSCA also regulates asbestos

  -- Asbestos was widely used in thousands of products because it is strong, flexible, will not burn, insulates effectively, and resists corrosion (e.g., floor tiles, insulation, or sealants)

  -- Inhalation or ingestion of asbestos fibers can cause disabling or fatal diseases

  -- Regulatory requirements cover, among many things, remediation of asbestos hazards, implementation of proper work practices, and training in proper handling

-- Installations are most likely to encounter asbestos when maintaining, repairing, renovating, or demolishing buildings or utilities

--- TSCA mandates specific requirements regarding training and certification of workers and site preparation for renovation of buildings containing asbestos containing material

-- Asbestos is also regulated by other statutes, including the Clean Air Act and the Occupational Safety and Health Act

-- The Air Force manages asbestos to reduce human exposure to airborne asbestos fibers

Radon

- TSCA requires studies of federal buildings to determine the extent of indoor radon contamination, but does not require monitoring or abatement of radon

- Radon is a naturally-occurring radioactive gas that may be found in drinking water and indoor air, and which presents serious health risks, including cancer

- Radon in soil under homes is the biggest source of radon in indoor air

- In 1999, the EPA proposed a rule to reduce radon in drinking water. Although public comment was complete in 2000, the rule has not yet been adopted

  -- See http://www.epa.gov/reg-flex/sbar-panel-national-primary-drinking-water-regulations-radon)

Lead-Based Paint

- TSCA addresses lead hazards, including requirements for the identification, reduction, disclosure, and management of lead-based paint

  -- Lead exposure can cause serious health effects, particularly in children

  -- Lead, especially lead-based paint (LBP), is a major concern on installations where it was commonly used on military family housing and other buildings prior to 1950. Lead-contaminated soil and dust are also a problem.

- Bases must address lead hazards during maintenance, repair, renovation, and demolition of buildings

- Lead hazards are also an important issue when property is transferred or sold

- TSCA seeks to reduce the lead hazard to young children by focusing on child-occupied facilities and "target housing" (housing built before 1978)

- Although TSCA does not contain a general waiver of sovereign immunity, the waiver for LBP is extensive, requiring DoD to comply with federal, state, and local requirements

- EPA and DoD have agreed lead-contaminated soil outside a housing unit will be governed by TSCA and its implementing regulations, rather than CERCLA

- DoD policy requires military installations to comply with disclosure regulations related to LBP in military family housing

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References

Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-92

Memorandum, Office of the Under Secretary of Defense, *Lead-Based Paint Policy for Disposal of Residential Real Property* (7 January 2002) (with attachment *Field Guide, Lead-Based Paint Guidelines for Disposal of Department of Defense Residential Real Property*, December 1999)

Memorandum, Office of the Under Secretary of Defense, *Disclosure of Known Lead-Based Paint (LBP) and/or LBP Hazards in DoD Family Housing* (18 February 1997)

Memorandum, Office of the Under Secretary of Defense, *Asbestos, Lead Paint and Radon Policies at BRAC Properties* (31 October 1994)

Memorandum, HQ USAF/CC, *Air Force Policy and Guidance on Lead-Based Paint in Facilities* (24 May 1993)

Memorandum, HQ USAF/CEV, *Policy and Guidance on Lead-Based Paint (LBP) Final Disclosure Rule* (19 August 1996)

Memorandum, HQ USAF/CEV, *Air Force PCB-free Status and Clarification of "Target" PCB Equipment* (15 May 1996)

Memorandum, USAF/CEV, *Polychlorinated Biphenyl (PCB) Pollution Prevention Program* (27 February 1996)

AFMAN 48-155, *Occupational and Environmental Health Exposure Controls* (1 October 2008)

AFI 32-1052, *Facility Asbestos Management* (24 December 2014)

ENVIRONMENTAL LAW OVERSEAS

Environmental requirements for U.S. forces outside the states, territories, and possessions that comprise the United States are determined primarily by treaties and international agreements, DoD and geographic combatant command policies, and service and subordinate command directives. Few U.S. environmental laws apply outside the United States and those that do apply extraterritorially are incorporated into DoD policy for overseas installations and operations.

Treaties and International Agreements

- Treaties and other international agreements (IAs) may dictate or influence environmental requirements for U.S. forces overseas. For example:

  -- The London Dumping Convention regulates disposal at sea of wastes from ships, aircraft, and platforms, or other man-made structures. Because the United States signed and ratified this agreement, it has the force of law, and directly affects U.S. actions during contingency operations.

  -- The Basel Convention treaty governs trans-boundary movement of hazardous waste. This treaty is not binding on the United States (it signed, but never ratified); however, the treaty can impact U.S. operations by limiting waste-handling options in countries with inadequate disposal facilities.

- Status of Forces Agreements (SOFAs), defense cooperation agreements, mutual defense agreements, basing or access agreements, and other IAs may specifically address environmental matters. For example:

  -- The U.S.-Republic of Korea SOFA includes provisions addressing environmental protection

  -- The 1993 Supplementary Agreement to the NATO SOFA contains environmental provisions that apply to NATO-member countries who station forces in Germany

- IA requirements have been incorporated within DoD and Unified Combatant Commands (UCCs) policies

DoD Overseas Environmental Policy

- DoDI 4715.05, *Environmental Compliance at Overseas Installations Outside the United States*, is the foundation of environmental compliance requirements

  -- Applies to overseas enduring locations, but not overseas contingency locations

    --- Enduring Locations: Installations and other DoD activities under the operational control of DoD or a DoD Service Component which DoD intends to maintain access to and use for the foreseeable future

    --- Contingency Locations: Non-enduring locations that support and sustain operations during named and unnamed contingencies

  -- Requires DoD establish and maintain the Overseas Environmental Baseline Guidance Document (OEBGD), which is a set of objective standards and management practices establishing minimum human health and environment protection levels

    --- The OEBGD reflects generally accepted environmental protection standards that apply to DoD installations and actions in the United States

    --- The OEBGD incorporates requirements of U.S. laws that apply outside the United States (e.g., portions of the National Historic Preservation Act are incorporated into the OEBGD and country-specific Final Governing Standards (FGS) required by DoDI 4715.05)

  -- Requires DoD Lead Environmental Components (LECs) to develop and maintain country-specific FGS

    --- County specific FGS are country-specific environmental standards above and beyond what is required by the OEBGD. They are binding on all enduring locations within a particular country.

    --- A LEC is the designated Secretary of a Military Department, a Combatant Commander, or a Subunified Commander who is responsible for environmental matters on all DoD installation in a specific foreign country or geographic location outside the United States

    --- LECs create FGS based on comparison of certain host nation and IA requirements to OEBGD standards

---- Standards providing more protection to human health and the environment generally are incorporated into the FGS

---- LECs coordinate FGS and FGS changes with the appropriate GCC and with DoD components who operate enduring locations in a country

---- FGS establish compliance requirements for all enduring locations in a country

- DoDI 4715.08, *Remediation of Environmental Contamination Outside the United States*, specifies DoD remediation policy for overseas installations for all enduring locations (not contingency locations)

  -- Applies to remediation of environmental contamination on DoD installations overseas (not off-installation or at contingency locations)

  -- Requires remediation to address a substantial impact to human health and safety caused by DoD activity contamination and to comply with applicable IA provisions

    --- An IA may require remediation not otherwise required by this DoDI (e.g., off-installation, when contamination does not pose a substantial impact to human health and safety)

  -- Authorizes remediation to address environmental contamination from non-DoD activities if the contamination poses a substantial impact to health and safety (SIHS) or, after DoD approval, when extraordinary circumstances exist not covered by DoDI 4715.08

  -- Prohibits the United States from conducting remediation to:

    --- Address any off-installation contamination unless required by IA

    --- Address contamination at installations DoD has approved for realignment (return to host nation), except for remedial measures needed to prevent immediate exposure to contamination that poses a SIHS

    --- Address contamination at installations after they have been returned to the host nation unless an IA requires remediation

    --- Serve a symbolic purposes (e.g., to foster good relations)

- 32 C.F.R. 187, *Environmental Effects Abroad of Major Department of Defense Actions*, requires environmental impact analysis for proposed major federal actions in the "foreign commons" and within foreign nations when those actions will do significant harm to the environment or protected global resources

  -- Actions taken in the course of "armed conflict" are exempt from the requirements of 32 C.F.R. 187 as long as the armed conflict continues

  -- The need for analysis of some proposed actions is eliminated due to the narrow definition of "major federal action," exclusions and exemptions, and the "significant harm" trigger

  -- Different analysis/documentation is required depending on what the proposed actions will affect

  -- <u>Overseas Environmental Impact Statement (OEIS)</u>: Required when the proposed action will significantly harm the environment of the global commons

    --- "Global commons" are geographic areas outside the jurisdiction of any nation (e.g., Antarctica, oceans outside territorial limits)

    --- The OEIS is prepared in draft and final versions and must:

      ---- Address the purpose and need for the proposed action

      ---- Identify the effects of the proposed action and alternatives to the proposed action

      ---- Describe the affected environment

      ---- Provide a comparative analysis of environmental effects

    --- No public comments or hearing is required, but the final OEIS must be made available to public

    --- No decision on the proposed action is allowed until after the final OEIS is published

-- An Environmental Review (ER) or an Environmental Study (ES) is required when the proposed action will significantly harm the environment of a foreign nation or protected global resource

--- "Protected global resource" is a natural or ecological resource of global importance designated for protection by the President of the United States or, in some cases, the Secretary of State

--- The ER is a concise review of important environmental issues raised by a proposed action

---- It is a unilateral effort prepared by the DoD Component alone

---- It should include a description of actions by the proponent to improve the environment or minimize impact of the proposed action

--- An ES is an analysis of the likely environmental effects of a proposed action

---- It is a joint effort prepared by the DoD Component in cooperation with at least one foreign nation or international organization to which the United States belongs (e.g., NATO)

---- It should identify significant actions taken by the proponent to either avoid harm to the environment or improve the environment

--- No public comments or hearings are required for an ER or ES

--- The ER and ES must be made available to interested federal agencies and, upon request, members of the public

--- ER and ES analysis, report, and release/distribution requirements must remain flexible to:

---- Enable prompt action

---- Avoid adverse impacts on U.S. relations with foreign nations

---- Avoid sovereignty issues

---- Ensure consideration of national security interests

--- ER and ES requirements must be complete before the proponent executes the proposed action

- DoDI 4715.19, *Use of Open-Air Burn Pits in Contingency Operations*, applies to contingency locations in place more than 90 days and with more than 100 attached or assigned personnel

  -- This policy generally discourages use of open-air burn pits except as a short-term solution where no other alternative is feasible

  -- Burn pits, when used, must be operated in a manner to prevent or minimize risks to human health and safety of DoD personnel and, where possible, harm to the environment

  -- Burn pits are not authorized except in accordance with the solid waste management plan (SWMP) which the operational commander has developed and approved

  -- The SWMP must prohibit burning of "covered waste" in open air burn pits

    --- "Covered waste" includes hazardous waste, medical waste, and a lengthy list of specific waste items listed in DoDI 4715.19, pages 11 and 12, which would pose a threat to humans or the environment if open-burned

    --- SWMP must prohibit burning of covered waste unless:

      ---- The Commander of the Unified Command determines "no alternative disposal" method is feasible and informs DoD of his decision; and

      ---- DoD notifies Congress of the "no alternative disposal" determination

  -- Covered waste may not be disposed in an open-air burn pit longer than 180 days unless:

    --- The Commander of the Unified Command makes a determination "no alternative disposal" method is feasible;

    --- The Commander of the Unified Command provides DoD justification for continued disposal of covered waste in a burn pit (justification required every180 days thereafter to continue); and

--- DoD notifies Congress of the justification for continued disposal by open burning (justification required every180 days thereafter to continue)

-- The Commander of the Combatant Command must include a health assessment with the initial notification and all subsequent justification packages sent to DoD

Unified Combatant Command (UCC), DoD Component, and Subordinate Policies

- These policies implement, interpret, and add to DoD requirements. Examples are:

  -- United States European Command Instruction (ECI) 4804.1, *Environmental Security*

  -- CENTCOM Regulation (CCR) 200-1, *Protection and Enhancement of Environmental Quality*

  -- AFI 32-7091, *Environmental Management Outside the United States* (publication pending)

  -- AFCENT Instruction (USAFCENTI) 32-108, *Fuel Spill Reporting*

  -- Environmental Annex to specific Operation Plan (OPLAN), Operation Order (OPORD), or other operation directive

- These policies are prohibited from conflicting with or replacing DoD standards. For example:

  -- USFK Regulation (USFK Reg) 200-1, *United States Forces Korea Remediation Regulation* cannot conflict with DoDI 4715.08

  -- 32 C.F.R. 989 (environmental impact analysis for Air Force actions overseas) does not trump 32 C.F.R. 187

- Because there is a current lack of DoD requirements (other than DoDI 4715.19) for contingency locations, environmental annexes to applicable OPLANs, OPORDs, or other operation directives are the primary sources of environmental requirements in these locations

  -- UCC and DoD Component policies influence environmental annex contents. Examples are:

    --- CCR 200-2, *CENTCOM Contingency Environmental Standards*

--- AFH 10-222, vol 4, *Environmental Considerations for Overseas Contingency Operations*

--- AFCENT Instruction (USAFCENTI) 32-108, *Fuel Spill Reporting*

--- USAFE Instruction (USAFEI) 32-7068, *Environmental Baseline Surveys for Deployed Operations*

References

32 C.F.R. Part 187

32 C.F.R. Part 989

DoDI 4165.69, *Realignment of DoD Sites Overseas* (6 April 2005)

DoDI 4715.05, *Environmental Compliance at Installations Outside the United States* (1 November 2013)

DoDI 4715.08, *Remediation of Environmental Contamination Outside the United States* (1 November 2013)

DoDI 4715.19, *Use of Open-Air Burn Pits in Contingency Operations* (15 February 2011), incorporating through Change 3, 3 July 2014

AFI 32-7001, *Environmental Management* (16 April 2015), incorporating Change 1, 8 April 2016

AFI 32-7091, *Environmental Management Outside the United States* (18 March 2016)
http://static.e-publishing.af.mil/production/1/af_a4/publication/afi32-7091/afi32-7091.pdf

AFH 10-222, vol 4, *Environmental Considerations for Overseas Contingency Operations* (1 September 2012)

UTILITY LAW

Utility costs are often a large part of the operating cost of federal facilities. The Air Force has established the Utility Law Field Support Center (AFLOA/JACE-ULFSC), embedded within the AFCEC Energy Directorate (AFCEC/CN), at Tyndall Air Force Base, Florida, to assist continental United States (CONUS) commanders in minimizing utility costs. The ULFSC assists installations by supporting contracting actions with utility providers, by representing Air Force interests in utility rate litigation, and by advising on conservation and renewable energy projects.

Methods of Purchasing Utilities

- General Services Administration (GSA) administers areawide contracts for energy acquisition
    - -- Areawide contracts are convenient and are modifiable to address specific base issues
    - -- GSA areawide contracts are found at http://www.gsa.gov/portal/content/184627
- Federal Acquisition Regulation (FAR) Part 41 individual installation contracts are the most common utility purchase method
- Interagency Agreements under the Economy Act (31 U.S.C. § 1535) and utility service provider tariff rate purchases are other, less common, methods of utility acquisition

Utility Litigation Challenging Rate Increases

- The ULFSC represents Air Force interests in utility rate cases (usually triggered by proposed rate increases)
- Bases should notify AFCEC any time they become aware of potential or actual rate increases. Even periodic small increases can have significant long-term impact.

Conservation and Renewable Energy Projects

- Installation energy conservation goals can be met through various vehicles
    - -- An Energy Savings Performance Contract (ESPC) is a collaboration between a federal agency and a contractor
        - --- Task orders are issued under a Department of the Army or Department of Energy contract

---- The energy provider will identify potential energy savings, design/propose a project, and execute the project using third-party financing

---- ESPCs must contain a guarantee the project will result in measurable and verifiable energy cost savings throughout the term of the contract

---- Cost savings are used to pay the contractor

-- Utility Energy Service Contracts (UESC) are performed by local utility service providers

---- Service providers make Air Force customers aware of available energy-saving initiatives (e.g., energy-saving lighting initiatives) through on-site visits, pamphlets, or proposals

---- UESCs must be competitively bid when there are two or more providers

---- UESCs should include a guarantee of energy savings to the installation

- Renewable energy projects, such as solar arrays and wind turbines, may lower energy costs

-- Under a power purchase agreement (PPA), an installation leases land to a renewable energy generation developer and contracts to purchase energy produced by the project

---- For cost effectiveness, project energy rates must be less than preexisting rates

---- PPAs may assist installations in meeting federal renewable energy goals

-- Enhanced use leases (EUL) involve a land lease to a developer who builds a renewable energy project on the leased land

---- The installation receives money or in-kind consideration for the lease

---- The installation does not buy power directly from the project

---- EULs may help meet certain federal renewable energy goals, however, installations do not retain renewable energy credits from the project

Assistance

- Utility acquisition matters can be very complex. Installations should notify AFCEC of energy rate increases and seek assistance on utility matters.

  -- The 24-hour AFCEC reach-back support center is available at (850) 283-6995/DSN 523-6995 or http://www.afcec.af.mil

  -- The ULFSC is available at (850) 283-6347/DSN 523-6347 or ulfsc.tyndall@us.af.mil

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References

Economy Act, 31 U.S.C. 1535
48 C.F.R. Part 41
AFI 32-1061, *Providing Utilities to U.S. Air Force Installations* (27 January 2016), corrective actions applied on 31 March 2016

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CHAPTER SEVENTEEN: INTERNATIONAL AND OPERATIONS LAW

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INTRODUCTION TO OPERATIONS LAW

Since 1947, the mission of the Air Force has included the ability to "fly and fight." When called upon to provide the nation's air power, Airmen conduct those operations in accordance with U.S. and international law, to include the law of war (LoW) (also known as the law of armed conflict (LOAC)). This respect for the rule of law is a fundamental part of who we are as the world's greatest Air Force and as a nation. Compliance with the rule of law is not only an end in and of itself. It is a strategic and operational imperative. Failure to comply with the law undermines the legitimacy of U.S. military operations (e.g., Abu Ghraib abuses) and can result in mission failure. Commanders must increasingly understand the relationship between adherence to the law, and the achievement of operational objectives. The following provides an overview of operations law and the role of judge advocates as operations law advisors. This discussion establishes the foundation for the remaining sections in this chapter.

Operations Law Defined

- Operations law is defined in AFI 51-108, *The Judge Advocate General's Corps Structure, Deployment, and Operational Support*, as "[t]he domestic, foreign and international law associated with the planning and execution of military operations in peacetime or hostilities…[it] is the application of law to a specific mission of the supported Air Force unit." AFI 51-108, *The Judge Advocate General's Corps Structure, Deployment, and Operational Support* (9 October 2014).

- Topics normally associated with operations law include legal bases for the use of force, LoW, rules of engagement (ROE), and international agreements. However, as the definition within AFI 51-108 makes clear, operations law encompasses any area of the law impacting a commander's ability to plan and successfully execute his or her unit's mission, such as contract and fiscal law, and military justice.

Role of Judge Advocates

- Regardless of formal duty title, all judge advocates practice operations law on a daily basis. The Air Force, like other Services, continues to operate in an increasingly complex environment around the world, demanding nothing less than the very best in legal capability. Operations law attorneys are mission-focused and provide commanders with options and recommendations to enable mission accomplishment. Operations law is a mindset as much as an area of practice.

- Legal support to Air Force commanders is critical to mission success. Proper legal counsel enhances commanders' successful decision-making ability, aiding in mission success. A common misconception is that judge advocates practice operations law only when deployed overseas. This is untrue. Judge advocates have provided crucial legal support to command during the full range of domestic operations, including the 9/11 attacks, Hurricane Katrina, the flooding of the northern Red River Valley, and combating wildfires in California. These and other similar events have only increased the need for judge advocates to provide such support. This is in no small part due to the fact that military operations in the homeland can be politically and legally complex. Successful commanders are those who demand close coordination with their servicing staff judge advocate (SJA).

- Technological, doctrinal, and organizational innovations have also given rise to geographically distributed operations controlled from the United States (e.g., remotely piloted aircraft operations and cyber operations). Installation commanders and their SJAs must ensure sufficient legal support is available for these operations.

- One key to success for commanders is to ensure judge advocates are thoroughly integrated into unit planning and execution of military operations

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References

AFI 51-108, *The Judge Advocate General's Corps Structure Deployment, and Operational Support* (9 October 2014)

Air Force Doctrine Annex 1-04 (4 March 2012)

Air Force Operations & The Law (2014), http://www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf

THE LAW OF WAR / THE LAW OF ARMED CONFLICT

Understanding the object and nature of war is important in understanding and applying the law of war (LoW) (also known as the law of armed conflict (LOAC) or international humanitarian law (IHL). LoW treaties, such as The Hague and Geneva Conventions, have been negotiated with the understanding that suffering and destruction are unavoidably part of war. But these treaties and the principle of humanity seek to reduce unnecessary suffering and destruction. As recent events have taught us, we cannot assume that every Airman is fully aware of all his or her rights and responsibilities under the LoW, also known as the law of armed conflict (LOAC), or international humanitarian law (IHL). Now more than ever, in the myriad of operational situations in which Air Force units are involved, **COMMANDERS MUST ENSURE their personnel are trained and comply with the LoW.** Judge advocates are available to assist commanders with this responsibility.

What Is LoW?

- LoW is the part of international law that regulates the resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States

- LoW has two main sources: (1) Customary international law arising out of the conduct of nations during hostilities, which is binding upon all nations; and (2) treaty law arising from international agreements, which is only binding upon those nations that are parties to the pertinent agreements

- LoW treaty law is generally divided into two overlapping areas: (1) Geneva Law, named for treaty negotiations held over the years at Geneva, Switzerland, and (2) Hague Law, named for treaty negotiations held over the years at The Hague, Netherlands

  -- <u>Geneva Law</u>: Generally consists of four treaties known as the 1949 Geneva Conventions and are concerned with protecting persons involved in conflicts (wounded and sick; wounded, sick and shipwrecked at sea; POWs; and civilians)

    --- The Geneva Conventions are supplemented by two protocols negotiated in 1977, Additional Protocol I (AP I) addresses international armed conflicts, and Additional Protocol II (AP II) addresses non-international armed conflicts. The United States signed AP I and stated two understandings. AP I is a significant law of war treaty that the United States has decided not to ratify. The United States signed AP II and stated one understanding. Although the United States is not a Party to AP I or AP II, reviews have concluded that many provisions of these Protocols are consistent with long standing U.S. practice but that

no determination has been made about whether any of these provisions reflect customary international law. The United States is a party to the third additional protocol (AP III) which recognizes a red crystal as an additional distinctive protective emblem adopted in 2005.

-- Hague Law: Is concerned mainly with the means and methods of warfare (e.g., lawful and unlawful weapons, targeting)

--- The Hague Peace Conferences of 1899 and 1907 resulted in the Hague Conventions of 1907; those conventions addressed warfare on land and sea, established bans on certain types of war technology and established a court to settle international disputes

--- Efforts in 1922-1923 to create the Hague Rules of Air Warfare resulted in draft rules that never took effect, but are today viewed as reflecting guidelines for proper conduct

Basic Legal Principles of LoW

- Military Necessity:

  -- Definition: Justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war

  -- The principle of military necessity permits attacks on military objectives, i.e., any objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Examples include troops, bases, supplies, lines of communications, and headquarters.

- Distinction:

  -- Definition: Obliges parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects

  -- Military force may be directed only against military objectives, and not against civilian objects

  --- Civilian objects are such objects as places of worship, schools, hospitals, and dwellings

--- Civilians can lose their protected status if they directly participate in hostilities. Civilian objects can lose their protected status if they are used for a military purpose, such as to shield military personnel and objectives.

--- Attacks may not be directed against civilians or civilian objects based on merely hypothetical or speculative considerations regarding their possible current status as a military objective. In case of doubt whether a civilian is directly participating in hostilities or whether a civilian object is being used for a military purpose, commanders must reach a conclusion in good faith and based on their assessment of the information available to them at the time.

-- Application of the principle of distinction to military operations is understood to prohibit the following types of actions:

--- Intentional attack of persons *hors de combat* (outside of combat)

--- Directing force against civilian objects rather than military objectives

--- Deliberately attacking civilians not taking a direct part in hostilities

-- However, a defender has an obligation to separate civilians and civilian objects (either in the defender's country or in an occupied area) from military objectives. Failure to separate them may lead to a loss of their protected status.

- <u>Proportionality</u>:

-- Definition: The loss of civilian life and damage to civilian property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Thus, those who plan military operations must take into consideration the extent of civilian destruction and probable casualties that will result and, to the extent consistent with the necessities of the military situation, seek to avoid or minimize such casualties and destruction.

-- The concept does not apply to military facilities and forces, which are legitimate targets anywhere and anytime. However, individual military personnel may be in a protected status (e.g., chaplains, medics, wounded, sick, shipwrecked at sea, surrendering, or aircrews parachuting from disabled aircraft).

- -- Attackers must take feasible precautions to reduce the risk of harm to the civilian population and other protected persons and objects. Feasible precautions are those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. For example, if a commander determines that taking a precaution would result in a risk of failing to accomplish the mission or an increased risk of harm to their own forces, then the precaution would not be feasible and would not be required.

- Humanity:

  - -- Definition: This principle **FORBIDS** the infliction of suffering, injury, or destruction unnecessary for the accomplishment of legitimate military purposes

- Honor:

  - -- This principle (also called chivalry) addresses the waging of war in accord with well- recognized formalities and courtesies, requiring a certain amount of fairness in offense and defense and a certain mutual respect between opposing forces

  - -- It permits lawful ruses, such as camouflage false radio signals, and mock troop movements

  - -- It **FORBIDS** treacherous acts (perfidy). These involve misuse of internationally recognized symbols or status to take unfair advantage of the enemy, such as false surrenders, placing anti-aircraft artillery in hospitals, and misuse of the red cross, red crystal, or the red crescent.

Conclusion

- Compliance with the LoW is critical to mission success. Proper legal counsel enhances commanders' successful decision-making ability, aiding in mission success. One key to success for commanders is to ensure judge advocates are thoroughly integrated into unit planning and execution of military operations so that commanders are aware of their options and recommendations to enable mission accomplishment and compliance with the LoW.

References

Geneva Convention for the Protection of War Victims, Aug. 12, 1949, 6 U.S.T. 3217

DoDD 2311.01E, *DoD Law of War Program* (9 May 2006), with Change 1, 15 November 2010, certified current 22 February 2011

Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01D, *Implementation of the DoD Law of War Program* (30 April 2010)

Department of Defense Law of War Manual (June 2015)

AFPD 51-4, *Compliance with the Law of Armed Conflict* (4 August 2011)

AFI 36-2201, *Air Force Training Program* (13 September 2010), incorporating through Change 3, 7 August 2013, including), including AFGM2015-10-01, *Expeditionary Readiness*, 16 October 2015

AFI 51-401, *Training and Reporting to Ensure Compliance with the Law of Armed Conflict* (5 September 2014)

Air Force Operations & The Law (2014), Ch. 2 & 16, http://www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf

RULES OF ENGAGEMENT AND RULES FOR THE USE OF FORCE

This chapter will describe both Rules of Engagement (ROE) and Rules for the Use of Force (RUF), the differences between the two sets of rules, their purpose and when they apply. In this regard there are standing rules by the Secretary of Defense (SecDef), contained in Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, *Standing Rules of Engagement/ Standing Rules for the Use of Force for U.S. Forces*. These are the Standing Rules of Engagement (SROE) and Standing Rules for the Use of Force (SRUF). **It is strongly recommended that all commanders familiarize themselves with CJCSI 3121.01B as this chapter is not a substitute for that CJCSI.** While portions of the SROE are classified SECRET and may not be reproduced in this publication, significant portions are unclassified, particularly the self-defense policy and procedures.

What Are ROE?

- JP 1-04, *Legal Support to Military Operations*, defines ROE as "directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered."

  -- ROE deal with the use of force in military operations

  -- ROE are based upon law, government policy, and a host of other political considerations and constraints

  -- ROE are owned by the commander and implemented by the Airmen who execute the mission

What Are RUF?

- CJCSI 3121.01B defines RUF as "fundamental policies and procedures governing actions to be taken by U.S. forces during all [Department of Defense] (DoD) civil support (e.g., military assistance to civil authorities) and routine Military Department functions (including Anti-Terrorism/Force Protection (AT/FP) duties) occurring within U.S. territory or U.S. territorial seas"

- It can be seen from this reference that in contrast to ROE, RUF concern the use of force by U.S. forces within U.S. territory and outside of military operations. Furthermore, unlike ROE, RUF are not generally permissive.

Purposes of ROE

- ROE is a framework reflecting national policy goals, mission requirements, and the Law of War and serves three functions:

  -- Provide guidance from commanders (the President, SecDef and subordinate commanders) to deployed units on the use of force

  -- Provide a control mechanism for the transition from peacetime to armed conflict

  -- Provide a mechanism to facilitate planning

- The three functions all emphasize control, which is needed for three purposes (political, military and legal):

  -- Political: to ensure that action in the field reflects the national policy objectives (for example by restricting the scale of action, target or weapon types to influence international and domestic opinion). Such political concerns include how the conflict (and possible escalation thereof) is viewed internationally or with a host nation.

  -- Military: for commanders to provide permissions to use force and restraints to ensure that the application of force furthers the accomplishment of the mission (for example by authorizing offensive force and designating target sets, or by imposing limits/restricting authorizations to prevent undesired escalation and ensure the commander has control over certain uses of force)

  -- Legal: to ensure compliance with the law. As ROE is an expression of national policy, it often contains greater constraints on action than the law requires. **ROE can never be more permissive than the law allows.** Commanders should be familiar with the legal basis for their mission as it will determine what is permissible. Commanders may also formulate ROE to emphasize compliance with certain legal principles, such as prohibitions on the destruction of religious or cultural property or the minimization of injury to civilians and civilian property.

SROE

- The current SROE came into force on 13 June 2005. Their purpose is to provide implementation and guidance on two important issues:

  -- Inherent right of self defense

  -- Application of force for mission accomplishment

SROE Applicability

- SROE applies to:

  -- All military operations and contingencies outside U.S. territory and outside U.S. territorial seas

  -- The air and maritime homeland defense mission conducted within U.S. territory and territorial seas

Self-Defense in SROE

- Inherent Right of Self-Defense: In accordance with CJCSI 3121.01B, Enclosure A & L, unit commanders have an inherent right and obligation to exercise unit self-defense. Unless otherwise directed by their commander, individual military members may exercise individual self-defense)

- Unit and individual self-defense arises in two circumstances:

  -- In response to a use of force which is often referred to as a "hostile act" or

  -- In response to an imminent use of force which is often referred to as a "hostile intent". Determining the imminence of a threat will be based on an assessment of all the facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.

- National Self-Defense: The right of a State to defend itself against armed attack is recognized in internal law both individually and collectively (i.e., as part of an alliance such as NATO), and enshrined in Article 51 of the UN Charter

  -- National self-defense is defined in the SROE as "Defense of the United States, and in certain circumstances, U.S. persons and their property, and/or U.S. commercial assets from a hostile act or demonstration of hostile intent. Unit commanders may exercise National Self-Defense, as authorized in Appendix A to Enclosure A, para. 3."

- Collective Self-Defense: In accordance with CJCSI 3121.01B, Enclosure A, collective self-defense is defined as "Defense of designated non-U.S. military forces and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent. Only the President or SecDef may authorize collective self-defense."

- Procedures in Self-Defense: All necessary means available and all appropriate actions may be used in self-defense. Four guidelines apply:

  -- De-escalation: When time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening actions

  -- Necessity: Such necessity exists when a hostile act occurs or when a force demonstrates hostile intent. When such conditions exist, use of force in self-defense is authorized while the force continues to commit hostile acts or exhibit hostile intent.

  -- Proportionality: The force used may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required. This principle of proportionality should not be confused with attempts to minimize collateral damage during offensive operations.

  -- Pursuit in Self-Defense: Self-defense includes the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent)

ROE for Mission Accomplishment

- SROE provides guidance on the use of force for mission accomplishment. Supplemental measures can be produced to provide for mission specific ROE.

- The SROE are designed to be permissive in nature. Therefore, unless a specific weapon or tactic requires SecDef or combatant commander approval, or unless a specific weapon or tactic is restricted by an approved supplemental measure, commanders may use any lawful weapon or tactic available for mission accomplishment.

- Declared Hostile Force: SROE permits appropriate U.S. authority to declare any civilian, paramilitary or military force or terrorist(s) as a declared hostile force. U.S. forces may engage declared hostile forces regardless of whether such forces have committed a hostile act or demonstrated hostile intent.

Critical Factors that Influence the Promulgation of ROE

- Domestic law and regulations (e.g., Executive Order 11850, *Enunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents*, limiting use of riot control agents)

- National security policy (protect interests of the United States and allies)

- Operational concerns (protect our forces and those of our allies)

- International law (Law of War (LoW), Status of Forces agreements (SOFAs), UN Security Council Resolutions)

  -- LoW is the part of international law that regulates the conduct of armed hostilities (violations are punishable under the UCMJ)

  -- ROE have to comply and can **NEVER** authorize an act that is forbidden under the LoW. Essentially, ROE are always either equal in restrictiveness or more restrictive than the LoW. DoD policy is to comply with the LoW for all military operations regardless of the nature of the conflict.

Specific Guidance for U.S. Forces Operating With Multinational Forces

- U.S. forces assigned under operational control (OPCON) or tactical control (TACON) of a multinational force (MNF) will follow the ROE of the MNF for mission accomplishment, if authorized by order of the SecDef U.S. forces retain the right of self-defense. Apparent inconsistencies between the right of self-defense contained in U.S. ROE and the ROE of the MNF will be submitted through the U.S. chain of command for resolution. While a final resolution is pending, U.S. forces will continue to operate under U.S. ROE.

- When U.S. forces are under U.S. OPCON or TACON, operating in conjunction with a MNF, reasonable efforts will be made to develop common ROE. If common ROE cannot be developed, U.S. forces will operate under all applicable U.S. ROE and the MNF forces will be informed of this fact.

Considerations When Preparing ROE

- Different ROE must be drafted for different missions (e.g., information operations, counterdrug support operations, noncombatant evacuation operations, domestic support operations, and cyber, maritime, land, air, and space operations). In creating such mission-specific ROE, it is important to ask several questions:

  -- First, what is the goal of the President and the SecDef? (e.g., hostage rescue, freedom of navigation, destruction of a terrorist training base, humanitarian assistance)

- -- Second, in order to carry out that goal, what is the mission? (e.g., conduct a show of force, limited or minor attack, establish a no-fly zone, or occupy hostile territory)

- -- Third, who are our hostile forces, if any?

- -- Fourth, who are our allies? (e.g., NATO, coalition partners, UN)

- -- Fifth, are there any unique concerns? (e.g., preserving a coalition, avoiding escalation of the conflict)

- -- Sixth, what specific topics need not be addressed? (e.g., strategy, doctrine, restatements of the law of armed conflict, tactics, and safety-related restrictions)

- -- Seventh, who should draft the ROE? (e.g., those familiar with the weapons and the systems, keeping in mind that commanders are responsible for the ROE)

- -- Eighth, how are ROE disseminated? (e.g., SROE, Special Instructions (SPINS), SRUF, joint task force guidance)

Supplemental Measures and Command Guidance

- Although the SROE are fundamentally permissive commanders at all echelons may issue supplemental ROE or request approval of supplemental ROE (SROE, Enclosure J). The SROE specifies the required approval level for certain types of supplemental measures. Supplemental measures are primarily used to define limits or grant authority for the use of force for mission accomplishment. Clarity is the goal.

- Subordinate commanders may issue tactical directives or other forms of command guidance to clarify the application of the governing ROE/RUF for members of their command

  - -- If a commander's guidance further restricts approved ROE, that commander is obligated to notify SecDef, as soon as practical of any imposed restriction

- In order to ensure compliance with the Law of War in the application of force under ROE instructions have been promulgated by the Chairman of the Joint Chiefs of Staff applicable to the Services and Combatant Commands. These include the manner in which targets are developed and selected for engagement, how it is determined what facilities, entities or persons may not be struck, the methodology and mitigation to be used when considering collateral damage when planning an attack, who may carry out such assessments and who may authorize engagements.

SRUF

- In contrast to SROE, the SRUF are not designed to be permissive. Specific weapons and tactics not approved within the SRUF require SecDef approval.

- SRUF apply to:

  -- Actions taken by U.S. commanders and their forces during all DoD civil support and routine Military Department functions (including AT/FP duties) occurring inside U.S. territory or territorial seas

  -- Land-based homeland defense missions occurring within U.S. territory

  -- DoD forces, civilians and contractors performing law enforcement and security duties at all DoD installations (including those outside U.S. territory)

SRUF Self-Defense

- Outside of military operations, U.S. forces may use force only in self-defense

- Inherent Right of Self-Defense: Unit commanders have an inherent right and obligation to exercise unit self-defense. Unless otherwise directed by their commander, individual military members may exercise individual self-defense.

- Unit and individual self-defense arises in two circumstances:

  -- In response to a use of force which is often referred to as a "hostile act" or

  -- In response to an imminent use of force which is often referred to as a "hostile intent". Determining the imminence of a threat will be based on an assessment of all the facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.

Mission Specific RUF

- Commanders may submit requests to the SecDef for mission specific RUF if required. Such mission specific RUF may be requested for tasks that due to their distinctive nature require the use of different weapons or tactics not permitted by SRUF.

- Such mission specific RUF may also be tailored to meet the challenges presented by developing threats (e.g., active shooters on installations) or developing technology (e.g., remote piloted aircraft) by altering the weapons or tactics available for employment

References

Charter of the United Nations, Art. 51 (26 June 1945)

DoDD 2311.01E, *DoD Law of War Program* (9 May 2006), incorporating Change 1, 15 November 2010

Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, *Standing Rules of Engagement for U.S. Forces* (13 June 2005), certified current, 18 June 2008

CJCSI 3160.01B, *No Strike and the Collateral Damage Estimation Methodology* (11 December 2015)

CJCSI 3370.01A, *Target Development Standards* (17 Oct 2014)

CJCSI 5810.01D, *Implementation of the DoD Law of War Program* (30 April 2010)

Joint Publication (JP) 1-04 Legal Support to Military Operations (4 March 2012)

JP 1-02, *Department of Defense Dictionary of Military and Associated Terms* (8 November 2010), as amended through 15 February 2016

INTERNATIONAL HUMAN RIGHTS LAW

International Human Rights Law (IHRL) is the body of law focusing on the protection of life and dignity of human beings. In contrast to most areas of international law, IHRL is concerned with the rights of individuals rather the rights of sovereign states. It imposes obligations upon states to protect the life and dignity of individuals. It is the policy and practice of the United States Government to respect and implement its obligations under the international human rights treaties to which it is a party. It is also U.S. policy that the prevention of mass atrocities and genocide is a core national security interest and core moral responsibility.

Law of War (or Law of Armed Conflict) and IHRL

- The U.S. position is that the law of war (LoW) and IHRL are separate bodies of law. However, to the degree that both can be applied without conflict, the protections of both the LoW and IHRL should be applied during military operations (in peacetime and in conflict).

- In military operations where provisions of the LoW and IHRL seem to conflict, the provisions of the LoW will prevail over IHRL. This includes the conduct of hostilities and the protection of persons involved in armed conflict. Advice should be sought from Judge Advocates if there is any doubt about the applicable law.

- Commanders should be aware that some coalition partners may be subject to different IHRL obligations. Coalition partners may be subject to different treaty obligations and may have different interpretations of the law and the scope of its application in military operations. For example, the European Court of Human Rights has ruled that aspects of the European Convention on Human Rights apply to a party's military forces serving abroad and during armed conflict.

IHRL Obligations

- The LoW directly incorporates many core human rights protections. Per DoDD 2311.01E, *DoD Law of War Program,* the DoD shall apply the LoW in all military operations.

  -- The United States accepts Article 75 of Additional Protocol I to the 1949 Geneva Conventions as reflective of U.S. policy and practice. This article applies to persons who fall under the power of the United States during international armed conflict, and at a minimum (unless other LoW provisions offer greater protection):

--- Prohibits adverse distinction of those in the United States' power based on race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or other similar criteria

--- Prohibits violence to their life, health, or physical or mental well-being (in particular murder, torture, corporal punishment, and mutilation)

--- Prohibits outrages upon personal dignity, to include forced prostitution, any form of indecent assault, the taking of hostages, collective punishments, and threats to commit any of the above acts

--- Guarantees that those arrested, detained, or interned for actions related to the conflict will be informed of the reason for the actions taken

--- Guarantees provisions for fundamental fairness at any court, hearing, or tribunal

--- Provides that detained women will be held separate from detained men, and will be immediately supervised by women

-- Common Article 3 of the 1949 Geneva Conventions applies to non-international armed conflicts. It provides similar protections for civilians and those persons no longer taking part in the conflict.

- IHRL obligations may arise out of U.S. treaty law or customary international law, while there is no definitive list of these provisions, the following acts are prohibited:

-- Genocide

-- Slavery

-- Murder or forced disappearance

-- Torture or other cruel, inhuman, or degrading treatment or punishment

-- Prolonged arbitrary detention

-- Systemic racial discrimination

-- Hostage taking

-- Punishment without fair trial

Obligations to Prevent or Punish Human Rights Violations

- Commanders have an obligation to ensure that forces under their command do not commit human rights breaches. Such violations may be punishable under the UCMJ, the War Crimes Act, or under other federal law.

- U.S. forces should recognize that enemy forces, partner states, or other parties in an area of military operations may commit human rights violations

- If U.S. forces become aware of human rights violations committed by U.S. forces, enemy forces, or other parties, this should be reported up the chain of command as soon as possible

- Prior to any forceful intervention to stop IHRL violations, U.S. forces must ensure that their actions are consistent with the rules of engagement (ROE) or rules for the use of force (RUF) for the operation

  -- Under the Standing Rules of Engagement (SROE), collective self-defense of non-Department of Defense (DoD) persons or the affirmative defense of others would not be authorized unless for the protection of previously designated persons or groups. Commanders should seek prior authorization before acting.

  -- Under the Standing Rules for the Use of Force (SRUF), the use of deadly force would be authorized when reasonably necessary to prevent an imminent threat of life or serious bodily harm to civilians. However, the scope of application of the SRUF is narrow.

References

War Crimes Act of 1996, 18 U.S.C. § 2441

PSD-10, Presidential Study Directive on Mass Atrocities (4 August 2011)

Executive Order 13107, Implementation of Human Rights Treaties, 63 Fed. Reg, 68,991 (15 December 1998)

CJCSI 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces* (3 June 2005)

DoDD 2311.01E, *DoD Law of War Program* (9 May 2006), incorporating Change 1, 15 November 2010

DoD Law of War Manual (12 June 2015)

INTERNATIONAL LAW AND INTERNATIONAL AGREEMENTS

International Law

- International law consists of rules and principles dealing with the conduct of nations (often referred to as "states") and international organizations in their relations with individuals, other international organizations, or other states

- International law is routinely applied by international tribunals as well as domestic courts. But, international law is not relevant solely in judicial proceedings.

  -- States rely on it in their diplomatic relations, in their negotiations, and in their policy making

  -- States defend their actions and policies and challenge the conduct of other states by referencing the authority of international law

- To the extent that international law is perceived as "law" by the international community, it imposes restraints on the behavior of states and affects their decision-making process

- Air Force commanders should be familiar with international law concepts since those concepts impact mission success stretching from the stationing of U.S. forces abroad to regulating air travel, and ultimately governing the use of force in relations between States and in the conduct of hostilities

Two Main Sources of International Law: International Agreements and Customary Law

- International Agreements: A broad category of mostly written, but sometimes oral, agreements entered into by authorized representatives of the parties to the agreement, with each party being either a state or a recognized international organization. In very limited and specific circumstances, Air Force commanders may have authority to negotiate and conclude international agreements in accordance with AFI 51-701, *Negotiating, Concluding, Reporting, and Maintaining International Agreements*.

  -- The parties enter into commitments involving the subject matter of the agreement, and agree that international law shall govern the terms of the agreement

  -- International law does not distinguish between treaties and international agreements, both of which are viewed as binding

-- International agreements are called by many names, to include treaty, convention, covenant, pact, protocol, status of forces agreement (SOFA), executive agreement, memorandum of understanding (MOU), memorandum of agreement (MOA), etc. Whatever their designation, all such agreements have the same status under international law.

-- International agreements to which the United States is a party are part of U.S. law, equivalent in authority to a federal statute, if its provisions are deemed self-executing or have been implemented by other federal legislation

- Customary Law: International law resulting from the general and consistent practice of nations which they follow due to a sense of legal obligation. This would not include practices that states generally follow but feel legally free to disregard. In determining whether a state considers a practice or custom to be customary law, positive evidence must exist that the state (1) considers itself legally obligated to follow the practice or custom, and (2) actually follows the practice or custom.

  -- Customary law is also called international custom and customary international law. The Supreme Court has ruled that customary international law is part of U.S. law, as long as it does not conflict with a pre-existing federal executive or legislative act.

  -- Customary law may take centuries to evolve, or it may be formed very quickly. Examples include:

    --- Outer Space Overflight: Prior to the 1957 Sputnik flight, nations had to seek consent before overflying the territory of other nations. No nation objected to Sputnik's historic overflight which evolved into the customary law which states that a nation's space vehicles may pass over the territory of other nations while in outer space without seeking prior consent. This principle was ultimately incorporated into the 1967 Outer Space Treaty.

    --- Law of Aerial Warfare: Practices between warring states on land over years evolved into customary principles of the law of war (e.g., necessity, distinction, and proportionality), which further evolved by state practice to the distinctive aspects of aerial warfare and more specifically, customary rules relating to interception, diversion, search, and capture of enemy and neutral aircraft during armed conflict

    --- Law of the Sea: Although the United States is not a party to the UN Convention on the Law of the Sea, it considers the Convention's provisions on freedom of navigation and overflight as reflecting customary international law binding upon all nations

International Agreements in the United States Air Force

- AFI 51-701 generally regulates this area for all Air Force personnel

  -- Air Force individuals seeking to negotiate and conclude international agreements must first secure approval from the Secretary of the Air Force or designee, and may only negotiate and conclude international agreements on matters within their authority and responsibility

  -- With this firmly in mind, be careful that your own words or conduct do not lead your foreign counterpart to believe that **YOU** are entering into an international agreement

  -- This can occasionally be challenging, as the definition of an international agreement is fairly broad. Under AFI 51-701, an international agreement is any agreement concluded with one or more foreign governments (including their agencies, instrumentalities, or political subdivisions) or with international organizations, that:

    --- Is signed or agreed to (oral agreements can be binding), by personnel of any DoD Component, or by representatives of the Department of State, or from other departments or agencies of the U.S. Government

    --- Signifies the intention of the parties to be bound in international law, and

    --- Is denominated as an international agreement or as a memorandum of understanding, memorandum of agreement, memorandum of arrangements, exchange of notes, exchange of letters, technical arrangement, protocol, *note verbale*, *aide-mémoire*, agreed minute, plan, contract, arrangement, statement of intent, letter of intent, statement of understanding, standard operating procedure, CONPLAN, or any other name connoting a similar legal consequence

  -- The definition of "negotiation" is similarly broad under AFI 51-701, attachment 1

    --- Communication by any means of a position or offer

    --- On behalf of the United States, DoD, or of any officer or organizational element thereof

--- To an agent or representative of a foreign government

--- In such detail that acceptance would result in an international agreement (includes provision of a draft agreement or discussion concerning a draft document, whether or not titled "agreement")

Bottom Line

-- Don't do anything that might be construed as a negotiation unless you have received advance authority

--- Commanders do not have any independent power to negotiate international agreements. Any power to do so arises from a delegation of the President's executive power. There must be a specific grant of authority delegated to the commander to permit the making of such an agreement.

--- DoDD 5530.03 & AFI 51-701, *International Agreements*, and AFI 51-701: Air Force personnel will not make any unilateral commitment to any foreign government or international organization (either orally or in writing), tender to a prospective party thereto any draft of a proposed international agreement, nor initial or sign an international agreement, before obtaining legal concurrence and the required approval to proceed

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References

Restatement of the Law, Third, Foreign Relations Law of the United States (1987)
DoDD 5530.3, *International Agreements*, 11 June 1987, certified current 21 Nov 2003
AFI 51-701, *Negotiating, Concluding, Reporting, and Maintaining International Agreements* (16 August 2011)
Air Force Operations & The Law (2014), http://www.afjag.af.mil/shared/media/document/AFD-100510-059.pdf

DEPLOYED FISCAL LAW

In an era marked by a rapidly-expanding operational tempo, commanders must be aware of the rules regarding the spending of appropriated funds in their Area of Responsibility (AOR). Fiscal law is often a complex area of law to navigate and can be challenging in a contingency environment. One of the basic tenets of fiscal law is that you must have specific authority to spend funds **BEFORE any funds can be obligated**. In a deployed environment, the basic rules of fiscal law still apply. There is **no deployed exception** to fiscal law! Since statutory authority, threshold amounts, and funding levels can fluctuate from year to year, commanders should consult with financial management (FM) and judge advocate (JA) personnel on fiscal law issues.

Overseas Contingency Operations (OCO Funds)

- Congress appropriates funds for the Department of Defense (DoD) specifically for designated ongoing contingency operations. From 2001 until 2010, these appropriations were commonly called Global War on Terrorism (GWOT) funds.

- OCO is a special type of funding (could be Operation and Maintenance (O&M) or another type of appropriation) requested by DoD and provided by Congress specifically for overseas contingency operations. OCO funds are to be used only for incremental expenses incurred in direct support of a specific contingency operation and not for day-to-day "normal" operations.

Military Construction Funding Sources

- In addition to the two primary construction authorities (specified and unspecified Military Construction (MILCON), there are other important authorities of which to be aware in advising on construction projects in the deployed environment

  -- Emergency Construction (10 U.S.C. § 2803): Unobligated MILCON funds for projects not otherwise authorized. These are for projects that are vital to national security or to the protection of health, safety, or the environment, and are so urgent that they can't wait until the next MILCON authorization act.

  -- Contingency Construction (10 U.S.C. § 2804): The Secretary of Defense (SecDef) may authorize MILCON when waiting for the next MILCON authorization act would be "inconsistent with national security or national interest." The expenditure must be within the amount appropriated for such purpose, and is normally used on extraordinary projects that develop unexpectedly. It may not be used for projects denied authorization in previous Military Construction Appropriations Acts.

General Purpose Funds

- Emergency and Extraordinary Expenses (10 U.S.C. § 127): Funding provided to the Secretaries of the military departments for unanticipated emergencies or extraordinary expenses, including unanticipated, short-notice construction. Controlled by SAF/IA.

  -- Official Representation Funds (ORF) (AFI 65-603, *Official Representation Funds*): A subset of 10 U.S.C. § 127 funds, ORF may be used to extend official courtesies, on a modest basis, to authorized guests. These courtesies including hosting meals, providing entertainment to maintain civic and community relationships, and to purchase gifts and mementos for presentation to authorized guests.

- Combatant Commander Initiative Funds (CCIF) (10 U.S.C. § 166a): Enables the Chairman of the Joint Chiefs of Staff to act quickly to support his combatant commanders with: (1) force training, (2) contingencies, (3) selected operations, (4) command and control, (5) joint exercises, (6), humanitarian and civic assistance, (7) military education and training to military and related civilian personnel of foreign countries, (8) personnel expenses of defense personnel for bilateral or regional cooperation programs, (9) force protection, and (10) joint warfighting capabilities. Controlled by combatant commander.

Training and Equipping of Foreign Forces

- Funding foreign forces is not a proper purpose for using O&M funds. Generally, the duty to train and provide assistance to foreign countries rests with the Department of State (DOS) under title 22 of the U.S. Code.

- There are two exceptions to the general rule:

  -- Training or instruction for foreign forces for the primary purpose of promoting interoperability, safety, and familiarization training with U.S. forces, with the overall benefit being to U.S. military forces. This is sometimes called "little 't' training."

  -- Specific authorization from Congress for DoD to obligate defense funding to conduct foreign assistance

- Afghanistan Security Forces Fund (2016 NDAA Sec. 1531): Authorizes the SecDef to provide certain support to the Afghan security forces, including the provision of equipment, supplies, services, training, facility, and infrastructure repair, renovation, construction, and funding. The Commander, Combined Security Transition Command-Afghanistan (CSTC-A), controls and administers this fund in Afghanistan.

- 1206 "Train and Equip" Authority (10 U.S.C. § 2282): Provides funds for equipment, supplies, training, defense services, and small-scale military construction activities to build the capacity of foreign military forces and national level security forces. The approval authority is SecDef with the Secretary of State (SecState) concurrence.

- Iraq Train and Equip Fund (FY 15 NDAA Sec. 1236, as amended by 2016 NDAA Sec. 1223): Provides funds for training, equipment, logistics, infrastructure repair, renovation, and sustainment to military and other security Forces of or associated with the Government of Iraq (GOI). The approval authority is SecDef in coordination with SecState.

- Syrian Train and Equip Fund (FY 15 NDAA Sec. 1209, as amended by FY 16 NDAA Sec. 1225): Provides funds for training, equipment, supplies, stipends, construction of training and associated facilities, and sustainment to vetted Syrian groups and individuals. The approval authority is SecDef in coordination with SecState.

- Acquisition and Cross-Servicing Agreements (ACSA) (10 U.S.C. 2342): Bilateral agreements for the reimbursable mutual exchange of Logistic Support, Supplies, and Services (LSSS) from and transfer LSSS to foreign military forces. There are three methods of reimbursement: (1) payment in kind; (2) replacement in kind; and (3) equal value exchange. Commanders must still use proper appropriated funds for acquiring LSSS from foreign forces.

Humanitarian Assistance Funding

- Traditionally, humanitarian assistance (HA) is considered security assistance within the realm of the DoS. However, recognizing that the need exists, in 1986 Congress enacted DoD's first statutory authority for HA in 10 U.S.C. § 401.

- Overseas Humanitarian, Disaster, and Civic Aid (OHDACA): A series of interrelated statutes. These statutes include 10 U.S.C. 401 (Humanitarian & Civic Assistance (HCA)), 402 (Relief Supplies Transportation), 404 (Foreign Disaster Assistance), 407 (Humanitarian Demining), 2557 (Excess Non-Lethal Supplies), and 2561 (Humanitarian Assistance).

- Commander's Emergency Response Program (CERP) (FY16 NDAA Sec. 1211; 2016 CAA Sec. 9005): CERP is designed to enable local commanders in Afghanistan to respond to urgent humanitarian relief and reconstruction by carrying out programs that will immediately assist the indigenous population. CERP is intended to be used for small-scale projects that, optimally, can be sustained by the local population or government.

AOR Specific Guidance

- Many contingency environments have local guidance governing the expenditures of funds in that AOR. For example, the Army has the "Money As A Weapons System-Afghanistan (MAAWS-A)" which provides guidance, processes, and approval thresholds for the expenditure of various types of funds in the AOR.

References

10 U.S.C. § 127
10 U.S.C. § 166a
10 U.S.C. § 401
10 U.S.C. § 2282
10 U.S.C. § 2803
10 U.S.C. § 2804
National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015, Pub.L. 113-291
NDAA FY 2016, Pub.L. 114-192
The Honorable Bill Alexander, B-213137, 63 Comp. Gen 422 (1984)
AFI 65-603, *Official Representation Funds* (24 August 2011)

INTELLIGENCE OVERSIGHT

During periods of our nation's history, intelligence capabilities were sometimes used in a manner that infringed upon the constitutional and privacy rights of United States Persons (USP). As a result, an oversight regime consisting of statutes, executive orders (EOs), and agency regulations was established to ensure the proper use of intelligence capabilities and the proper conduct of intelligence activities. The Air Force possesses an array of intelligence and counterintelligence capabilities designed to provide commanders and national leaders with information on foreign nationals, hostile or potentially hostile forces or elements, and areas of actual or potential operations. Intelligence collection is a specialized mission with tactics, techniques, and procedures that require strict control and oversight. The purpose of this chapter is to enable installation-level commanders and their staffs to recognize potential legal issues related to intelligence activities.

Intelligence Oversight (IO) Regime

- IO ensures all DoD intelligence, counterintelligence, and intelligence-related activities are conducted in a manner that protects the statutory and constitutional rights of USP by ensuring the activities are conducted in accordance with applicable U.S. law, EOs, and DoD directives and regulations.

  -- The term USP includes U.S. citizens, but is broader. It also includes permanent resident aliens, unincorporated associations substantially composed of U.S. citizens or permanent resident aliens, and corporations incorporated in the U.S. and not directed and controlled by a foreign government. A person or organization in the United States is presumed to be a USP, unless specific information to the contrary is obtained.

- Defense Intelligence Components (DICs) are all DoD organizations that perform national intelligence, defense intelligence, and intelligence-related functions. DICs provide necessary information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons, and their agents.

  -- The duties and obligations placed on DICs arise from the U.S. Constitution; EO 12333 (as amended), *United States Intelligence Activities*; DoDD 5240.01, *DoD Intelligence Activities*; forthcoming DoDI 5148.11, *Intelligence Oversight;* DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities*; and parts of DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons*. In addition, the Air Force has its own governing instruction, AFI 14-104, *Oversight of Intelligence Activities.*

- Roles and Responsibilities:

  -- IO is a shared responsibility between the commander, the staff judge advocate (SJA), and the investigator general's office (IG). Commanders should support an active IO program, designate appropriate oversight officials, provide appropriate training, provide reprisal protection for persons reporting questionable activities, and implement corrective action to address substantiated allegations.

  -- Servicing SJAs provide DICs with advice and counsel on proposed and on-going intelligence activities, interpretations of DoDM 5240.1, and assistance to Intelligence Monitors and IGs as each performs their missions

- DoD IO regulations and policy are grounded in EO 12333. The term "intelligence activities" refers to all activities that DoD intelligence components are authorized to undertake pursuant to EO 12333.

  -- There are only two lawfully assigned intelligence mission sets for the DoD:

    --- Foreign intelligence; and

      ---- Title 50, United States Code (U.S.C.), § 3003(2), defines "foreign intelligence" as "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities"

    --- Counterintelligence

      ---- Title 50, U.S.C. § 3003(3), defines "counterintelligence" as "information gathered, and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities"

- DoDD 5240.01 implements EO 12333 and establishes broad responsibilities of officials and offices across the DoD and establishes as DoD policy that all DoD intelligence and counterintelligence activities will be carried out pursuant to the authorities and restrictions of the U.S. Constitution, applicable law, EO 12333, and other relevant DoD policies

- DoDM 5240.1 and the remaining parts of DoD 5240.1-R provide the sole authority by which DoD intelligence components may collect, retain and disseminate United States person information (USPI) and also contains the structure for reporting possible violations

-- DoDM 5240.01 was released in August 2016 and is the first major update to DoD's IO issuances since 1982. DoDM 5240.01 has replaced the DoD 5240.1-R for Procedures 1-10. DoD 5240.1-R remains authoritative for Procedures 11-15, until and unless superseded. At the time of this publication, AFI 14-104 has not been updated. Commanders of DICs are highly encouraged to consult their servicing legal offices for the most current regulations and guidance.

-- DoDM 5240.01 outlines the IO and serves as the basis for the DoD regulations and instructions that implement Service, Combatant Command, and DoD intelligence agency IO programs.

Procedures for Collection, Retention, and Dissemination of Information on U.S. Persons

- Procedure 1 of DoDM 5240.01 establishes the manual's scope and administrative provisions. Procedures 2 through 4 articulate the procedures through which the DICs may collect, retain, and disseminate USPI.

- Procedure 2 allows a DIC to collect USPI **ONLY** if the Component reasonably believes the USPI is necessary for the performance of the Component's authorized intelligence mission and the USPI falls into one or more authorized categories:

  -- Authorized categories include:

    --- Publicly available information

    --- Information obtained with consent

    --- Foreign intelligence

    --- Counterintelligence

    --- Threats to safety

    --- Protection of intelligence sources, methods, and activities

    --- Current, former, or potential sources of assistance

    --- Persons in contact with sources or potential sources

    --- Personnel security

    --- Physical security

--- Communications security investigation

--- Overhead and airborne reconnaissance

--- Administrative purposes

-- DICs may not collect USPI for the sole purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or law of the United States. In addition, all collections will be lawful, using the least intrusive collection means feasible.

-- "Collection" of intelligence occurs when the information is in an intelligible form (unintelligible is defined as information that a DIC cannot decrypt or understand in its original format). Generally, this means collection occurs when the information is acquired by the DIC. This is a change from DoD 5240.1-R wherein "collection" occurred when the Component employee received the intelligence for use in the course of his or her official duties.

- Procedure 3 allows a DIC to retain USPI when the DIC evaluates the USPI for retention within certain defined timelines discussed below. If a Component does not evaluate the USPI within those timelines or, after evaluating the USPI, determines retaining the USPI is not reasonably believe necessary for the performance of the Component's authorized intelligence mission or function, the Component must delete the USPI.

  -- DoDM 5240.01 does **NOT** have a provision similar to the 90-day temporary retention period found in DoD 5240.1-R prior to Change 1. Commanders of DICs are encouraged to review their retention processes to ensure compliance with DoDM 5240.01, Procedure 3.

- Procedure 4 allows a DIC to disseminate collected or retained USPI. The Component disseminating USPI must have received training on Procedure 4 and the USPI being disseminated must fall into one of the falling categories:

  --- The USP consented;

  --- The USPI is publicly available; or

  --- The recipient is reasonably believed to need the information to perform a lawful mission or function and is a/an: (1) element of the intelligence community; (2) DoD Element or contractor; (3) other federal government entity; (4) state, local, tribal, or territorial government; (5) foreign government or international organization that meets prescribed criteria; (6) entity assisting

the component; (7) entity protecting another's safety or security; or (8) entity entitled to receive the USPI by law or court order

- Procedures 5 through 10 govern the use of more specialized collection techniques. Commanders of DICs using these techniques are encouraged to read the applicable procedure, any supplements to that procedure, and consult his or her servicing legal office.

  -- Procedure 5: electronic surveillance

  -- Procedure 6: concealed monitoring

  -- Procedure 7: physical searches

  -- Procedure 8: searches and examinations of mail

  -- Procedure 9: physical surveillance

  -- Procedure 10: undisclosed participation in organizations

- Procedures 11 through 15 remain in DoD 5240.1-R, but may be moved to other publications in the near future

  -- Procedure 11 deals with contracting practices to ensure compliance with IO programs

  -- Procedure 12 establishes requirements for the DoD intelligence community to provide assistance to law enforcement agencies

  -- Procedure 13 prohibits DoD intelligence community experimentation on human subjects for intelligence purposes except by informed consent

  -- Procedure 14 addresses DoD intelligence community employee conduct and requires employees receive training on the limits of the authorities under which intelligence activities are conducted

  -- Procedure 15 establishes procedures for identifying, investigating, and reporting questionable activities. Air Force agencies, units, and personnel must report any questionable activity or highly sensitive matter to SAF/GC and their servicing or higher headquarters legal office.

Identifying, Investigating, and Reporting Questionable Intelligence Activities

- Procedure 15 is a responsibility shared by commanders, leaders, employees, IGs, and SJAs

- A questionable intelligence activity (QIA) is one that:

  -- ***May violate*** law, executive order, presidential directive, intelligence community directive, DoD policy, or service – agency–or command policy/regulation, ***and***

  -- Is incident to an intelligence or intelligence-related activity or misuse of an intelligence authority. DICs submit a quarterly report of all QIAs that is presented to the President's Intelligence Oversight Board

- A Significant or Highly Sensitive Matter (S/HSM) must be reported immediately and is characterized as an intelligence activity that could impugn the reputation or integrity of the DoD intelligence community or otherwise call into question the proprietary of an intelligence activity. Examples include activities:

  -- Involving congressional inquiries or investigations

  -- That may result in adverse media coverage

  -- That may impact on foreign relations or foreign partners

  -- Related to unauthorized disclosure of classified or protected information

- Personnel shall report suspected QIAs or S/HSMs to their unit's servicing legal office, IG, SAF/GCI, SAF/IG, DoD Office of General Counsel, or DoD Senior Intelligence Oversight Official. Personnel are highly encouraged to additionally report suspected QIAs to their chain of command and Intelligence Oversight Monitors. Generally, IGs investigate QIAs and legal offices advise those conducting the investigation. Specific procedures are found in the forthcoming DoDI 5148.11.

Non-Intelligence Activities

- Activities not governed by EO 12333 will be carried out in accordance with other applicable policies and procedures, including Presidential directives that govern those particular missions or functions. For example, if the DoD Intelligence Component is authorized to conduct law enforcement activities (e.g. Air Force Office of Special Investigations (AFOSI)), it shall investigate under appropriate law enforcement authorities and procedures.

- When specifically authorized by the Secretary of Defense or delegatee to perform missions or functions ***other than*** foreign intelligence or counterintelligence, DICs will comply with DoD policy applicable to DoD non-intelligence organizations and any specific operational parameters specified by the Secretary of Defense for that mission or function

  -- Examples Include:

    --- Law enforcement of civil disturbance activities

    --- Defense support to civil authorities

    --- Humanitarian assistance

    --- Disaster readiness, response, and recovery

    --- Environmental and security vulnerability studies

    --- Mapping, charting, and geodesic missions

    --- National manager for national security systems activities

Key Changes to IO in DoD Manual 5240.01

- Collection: As noted above, "Collection" is now defined in the revised procedures as occurring "upon receipt," which differs from the previous version of the manual, which defined "collection" as occurring when the information was "officially accept[ed]… for use." Because information is deemed collected upon receipt, while information must be promptly evaluated, the retention periods that could apply to unevaluated information are longer than the 90-day period that applied under the previous guidelines, where information could be held for a longer period until it was affirmatively evaluated for use by DoD.

- Protection and Evaluation of Information for Permanent Retention: The procedures now establish maximum evaluation periods that are based on how information is collected. The procedures require that, at the end of the maximum evaluation period, USPI and information that may incidentally include USPI is deleted from intelligence databases unless affirmatively determined to meet the criteria for permanent retention. The procedures include other enhanced safeguards and protections that apply during the evaluation period. These include access rules and query rules beyond those included in the old procedures.

-- For intentionally collected USPI, those records may, if necessary, only be retained for evaluation for up to 5 years. Incidentally collected USPI may be retained for evaluation for up to 5 years if the collection targeted a person or place in the United States or involves "special circumstances," and up to 25 years if the collection targeted a person who is reasonably believed to be outside the United States.

-- All USPI, including any information that may contain USPI, must be deleted upon expiration of these evaluation periods unless it has been determined to meet the standard for permanent retention. These periods can only be extended based on high-level approval, which requires a written finding of necessity and a finding that the information is likely to contain valuable information.

- Special Collection: To address those collections where privacy and civil liberties interests may be heightened, the manual now includes a new collection category of "special circumstances" collections. Special circumstances collections require consideration of additional handling safeguards based on the volume, proportion, and sensitivity of the USPI, and the intrusiveness of the collection method. These new "special circumstances" rules require an accountable senior intelligence official to make specific decisions about the intelligence value of the collection. The new rules also enhance the protection of USPI as the manual requires new considerations and protections if special circumstances exist.

- Shared Repositories: The manual creates new rules for shared data repositories when a DoD intelligence component is the host of or a participant in a shared repository, and it provides guidance for dissemination of USPI within and outside the DoD to meet intelligence community information sharing requirements. These provisions reflect post-9/11 policy recommendations and Executive Branch policy decisions to enhance the sharing of information across the intelligence community.

- Publicly Available Information: Obtaining publicly available information is one of the least intrusive collection methods available to DoD intelligence components. The manual clarifies the definition of "publicly available" and adds context to several of its provisions by providing a more detailed characterization of what "publicly available" means, recognizing the policy issues raised by the Internet and new technology.

- New Physical Search Rules: The manual also incorporates new rules regarding physical searches to reflect changes to the Foreign Intelligence Surveillance Act (FISA) since 1982, including the requirement to obtain a FISA warrant for nonconsensual physical searches within the United States and for targeted collection of U.S. person information outside the United States.

IO Analytical Framework

Applicability: IO procedures govern the conduct of DICs and non-intelligence components or elements, or anyone acting on behalf of those components or elements, when conducting intelligence activities under DoD's authorities.

- The Air Force Intelligence Component: Members of the Air Force intelligence component include all Air Force intelligence units and personnel *and* non-intelligence personnel assigned to intelligence functions or activities. This includes active duty, reserve, Air National Guard (ANG) personnel in Title 10 or Title 32 status, civilian personnel, and contractors. All members of the intelligence component must comply with the previously identified laws and regulations established for intelligence activities and are subject to IO.

  -- Air Force intelligence units and personnel support strategic, operational, and tactical operations by providing information and services to a divergent set of customers, ranging from national to unit-level decision makers. Every unit with assigned intelligence personnel will have a Senior Intelligence Officer (SIO) who is responsible authority for intelligence functions and operations within an organization.

- Other Air Force Units and Personnel Who Acquire Intelligence: In addition to members of the Air Force intelligence component, EO 12333, DoDM 5240.01, and AFI 14-104 apply to non-intelligence units and staffs when assigned an intelligence mission or when doing intelligence work as an additional duty. The SIO will make determinations as to applicability.

- Everyone Else: Information collected by non-intelligence personnel/equipment for non-intelligence purposes and is not considered an intelligence-related activity is not intelligence subject to IO. For example, information Security Forces and AFOSI collect pursuant to their law enforcement missions is not intelligence subject to IO requirements.

  -- Such information must still comply with other applicable laws and regulations

Threshold Questions:

- Does the Unit Have an authorized Mission Requiring the Collection of the Information?

  -- It is not enough to be a member of the intelligence component conducting an intelligence activity, an intelligence unit must have an assigned mission necessitating the collection of information

-- Intelligence activities, whether against a USP or foreign target, are required to be directly related to a unit's assigned mission. For Air Force units involved in intelligence collection, this means the collection must relate to defense-related foreign intelligence or counterintelligence. This generally means "information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations." In some very limited circumstances, this will include domestic collection.

--- For example, AFOSI has the authorized standing mission to perform counter-intelligence. As such, it may collect intelligence information on a USP under the procedures of DoD Manual 5240.01 for that purpose.

-- In general, DoD components may gather information essential to the accomplishment of the following defense missions: 1) protection of DoD functions and property, 2) personnel security investigations, and 3) operations related to civil disturbance. Legal professionals should carefully consider whether their unit's mission requires the contemplated intelligence collection.

- What Authorities allow the Collection of Information under an authorized mission?

-- Even if an intelligence unit has the mission to collect the information, they must also have specific legal authorization to collect the information

-- Intelligence collection is "authorities driven," meaning that unlike many military functions that are included under a commander's inherent authority, a commander must have specific authority to perform an intelligence mission. Such authority may exist in orders, directives, publications, or other documentation of delegated authority from one vested with authority under EO 12333.

-- Intelligence authorities are primarily contained in two areas of the U.S.C.: Titles 10 and 50. Intelligence collection that occurs during ongoing military operations are generally considered Title 10 intelligence activities, while those focused on foreign intelligence outside of ongoing military operations generally fall under Title 50.

-- Intelligence collection taking place during military operations are typically authorized by the Execution Order (EXORD) directing that mission. The assigned commander may use any intelligence assets under his or her command in furtherance of the assigned mission contained in the EXORD, unless its use is prohibited by higher headquarters or elsewhere in law. Additionally, oversight procedures in DoDM 5240.01 concerning USPs must still be complied with.

-- Intelligence collection outside of ongoing military operations occurs under a series of standing authorities governed by Title 50 of the U.S.C. These authorities are contained in the directives and regulations relating to particular intelligence agencies and disciplines of intelligence.

- What Information Is Being Collected?

  -- If the unit has a valid mission and there is specific authority to collect information, the next question is whether USPI has been collected as that term is defined by DoDM 5240.01

  -- Under DoDM 5240.01, information is collected "when it is received by a Defense Intelligence Component, whether or not it is retained by the Component for intelligence or other purposes. Collected information includes information obtained or acquired by any means, including information that is volunteered to the Component. "

  -- Collected information does not include:

    --- Information that only momentarily passes through a computer system of the Component;

    --- Information on the internet or in an electronic forum or repository outside the Component that is simply viewed or accessed by a Component employee but is not copied, saved, supplemented, or used in some manner;

    --- Information disseminated by other Components or elements of the Intelligence Community; or

    --- Information that is maintained on behalf of another U.S. Government agency and to which the Component does not have access for intelligence purposes

  -- Critically, information is only collected (and therefore subject to IO rules) if it is received by a member of the DoD intelligence component. This drives the next question of who is actually seeking the information

    --- Once information has been received by a member of the DIC, it triggers the procedures of DoDM 5240.01. This represents a change from the old rule that information had to be "accepted" by a member of the component. Depending on how the USPI is collected governs how long the information can be retained. The clock is not triggered for "unintelligible information" which includes information that cannot be decrypted or understood in its original format.

-- If the information has been collected, the next question is whether it is USPI?

--- USPI is information that is reasonably likely to identify one or more specific U.S. persons. USPI may be either a single item of information or information that, when combined with other information, is reasonably likely to identify one or more specific U.S. persons. Determining whether information is reasonably likely to identify one or more specific U.S. persons in a particular context may require a case-by-case assessment by a trained intelligence professional. USPI is not limited to any single category of information or technology. Depending on the context, examples of USPI may include: names or unique titles; government-associated personal or corporate identification numbers; unique biometric records; financial information; and street address, telephone number, and Internet Protocol address information. USPI does not include:

---- A reference to a product by brand or manufacturer's name or the use of a name in a descriptive sense, as, for example, Ford Mustang or Boeing 737; or

---- Imagery from overhead reconnaissance or information about conveyances (e.g., vehicles, aircraft, or vessels) without linkage to additional identifying information that ties the information to a specific U.S. person

-- If the information collected is USPI, the analysis turns to application of the procedures in DoDM 5240.01 and DoD 5240.1-R governing when and how it can be collected (Procedure 2), how long it can be retained (Procedure 3), where it can be disseminated (Procedure 4), and whether any other detailed rules, prohibitions, or approvals for specialized collection methods and techniques apply (Procedures 5-10)

References

10 U.S.C. § 162
10 U.S.C. § 164
10 U.S.C. § 8013
50 U.S.C. § 3001 *et seq.*
50 U.S.C. § 3038
Executive Order 12333, as amended by Executive Orders 13284 (2003), 13355 (2004) and 13470 (2008)
DoDD 5148.11, *Assistant to the Secretary of Defense for Intelligence Oversight (ATSD(IO))* (24 April 2013) [to be replaced by forthcoming DoDI 5148.11, *Intelligence Oversight*]
DoDD 5200.27, *Acquisition of Information Concerning Persons and Organizations Not Affiliated with the Department of Defense* (7 January 1980)
DoDD 5240.01, *DoD Intelligence Activities* (27 August 2007), incorporating Change 1 and certified current through 27 August 2014
DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities* (8 August 2016)
DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (December 1982), incorporating Change 1, effective 8 August 2016
DTM 08-052, *DoD Guidance for Reporting Questionable Intelligence Activities or Highly Sensitive Matters* (17 June 2009), incorporating through Change 6, 10 September 2015
AFI 14-104, *Oversight of Intelligence Activities* (5 November 2014)
AFI 14-119, *Intelligence Support to Force Protection (FP)* (4 May 2012), incorporating through Change 2, 31 March 2016
AFI 14- 202V3, *General Intelligence Rules* (10 March 2008)
AFI 71-101V4, *Counterintelligence* (26 January 2015)
Office of the Director of National Intelligence, *Intelligence Community Legal Reference Book 2012*, http://www.dni.gov/files/documents/IC_Legal_Ref_2012.pdf

FOREIGN CRIMINAL JURISDICTION

Air Force members serving or deployed at overseas locations may be subject to criminal proceedings by both the host nation (HN) and by the United States for offenses allegedly committed. It is the policy of the Department of Defense (DoD) and the Air Force to protect to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.

- As a starting point, unless an exception has been granted, the HN has jurisdiction under international law over any person, including another nation's service members, physically within its borders based on territorial sovereignty

- Simultaneously, the United States always has court-martial jurisdiction over its service members for UCMJ offenses (the UCMJ applies "in all places")

  -- Normally only one nation will exercise criminal jurisdiction against the Air Force member. That nation is referred to as having primary jurisdiction.

  -- Primary jurisdiction of the case is often governed by the terms of any applicable status of forces agreement (SOFA) with the particular HN. In certain peace operations, especially those run by the United Nations, a status of mission agreement (SOMA) may be used instead of a SOFA. In this discussion, SOFA will refer to both SOFAs and SOMAs.

Violations of HN Law

- If a U.S. military member commits an offense that violates HN law, regardless of whether it violates the UCMJ, numerous actions may be triggered

  -- Military commanders generally have an obligation to place U.S. service members on "international hold" pending resolution of criminal cases within the HN

  -- U.S. service members generally are made available to HN officials by commanders in consultation with the local staff judge advocate (SJA) (specific timing of release varies by country)

    --- Consultation and cooperation with HN law enforcement agencies is always desirable, but it should be noted that in some HNs, local law enforcement have the right to enter the installation to arrest the member regardless of the desire for consultation and cooperation

  -- U.S. service members, dependents and civilian employees of the U.S. Armed Forces facing HN criminal charges may request the Air Force employ legal counsel

and pay counsel fees, court costs, bail, and other expenses incident to the representation. Reasonable counsel fees for civilian HN attorneys may be paid on behalf of U.S. service members.

--- A U.S. service member or civilian employed by or accompanying the armed forces who is the victim of a crime being adjudicated by the HN criminal justice system may request payment of counsel fees for representation in the case, if:

---- The HN confers on the victim a right to be represented in court; and

---- The commander determines it is in the best interests of the government

-- U.S. service members facing HN criminal charges may also request a Military Legal Advisor (who must be an Air Force judge advocate appointed by the SJA) to advise the member on U.S. related matters arising out of the criminal charges

-- U.S. service members, dependents and civilian employees of the U.S. Armed Forces will have a trial observer, usually a designated judge advocate, appointed by the U.S. Chief of Mission, monitor HN criminal proceedings to report whether the trial was fair

-- If conviction results in a HN court, U.S. service members, dependents and civilian personnel face HN sentencing, including confinement in the HN

-- The DoD seeks to assure that U.S. military personnel, civilian employees, and dependents, when in the custody of foreign authorities, are treated fairly at all times. DoD further seeks to assure that when confined (pretrial, during trial, and post-trial) in foreign penal institutions, these personnel receive the same or similar treatment, rights, privileges, and protections of personnel confined in U.S. military facilities.

SOFAs

- The major SOFAs (NATO, Japan, and Korea) contain similar formulas for determining which country gets to exercise jurisdiction over U.S. personnel for criminal offenses

  -- Exclusive jurisdiction belongs to:

  --- United States for crimes under U.S. military or other applicable law that are not violations of HN law (e.g., absent without leave (AWOL), disrespect, and disobeying orders)

--- HN for acts that are crimes under the HN's laws but not under U.S. law (e.g., religious crimes, political crimes, and certain negligent acts that, under U.S. law, do not rise to the level of criminal conduct)

-- Concurrent (shared) jurisdiction occurs when conduct is criminal under both U.S. and HN law. The HN has the primary right to try all concurrent cases, except:

--- Official duty cases: When the offense arises out of an act in the performance of the U.S. service member's official duty

--- *Inter se:* When the crime affects only U.S. parties or U.S. property

-- DoD policy is to maximize U.S. jurisdiction, subject to any international or bilateral agreements

--- In a concurrent jurisdiction case, when the HN has the primary right to try a case, the United States will normally request a waiver of jurisdiction from the HN

--- The procedures for and the likely success of a request for waiver vary depending on the HN and, frequently, the seriousness of the offense (the more serious the offense, the less likely it will be granted)

--- When a waiver is granted, the U.S., pursuant to treaty or other appropriate legal authority, may report to the HN the final result of the action, if any, taken against the member

- In other HNs not covered by the major SOFAs, there may be other relevant bilateral agreements or diplomatic notes. The SJA should be consulted regarding jurisdiction and procedures.

Civilians and Dependent Family Members Accompanying the Force

- Civilians (rarely contractors) and dependent family members accompanying U.S. forces abroad are normally considered subject to the terms of the applicable SOFA

- The HN will have jurisdiction based on its territorial sovereignty, but the U.S. commander usually does not have UCMJ authority over these persons

- If the HN cedes primary jurisdiction to the United States, or otherwise chooses not to exercise jurisdiction, the options of the commander are limited to administrative procedures (e.g., Family Member Misconduct Boards, early return of dependents and employment disciplinary procedures, if appropriate)

- To remedy this problem, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA) of 2000. The Act extends U.S. jurisdiction to cover offenses committed by dependents and other civilians accompanying our forces if the criminal act is punishable by at least one year in confinement. This act allows the Department of Justice, not the Air Force or DoD, to prosecute the offending civilian. MEJA can also extend jurisdiction over military personnel and contractors' employees who are not normally resident in the HN.

- Congress also amended Article 2a(10), UCMJ, to provide jurisdiction over civilians serving with or accompanying U.S. armed forces in the field during either declared war or a contingency operation

- Reasonable counsel fees for civilian HN attorneys may be paid on behalf of U.S. personnel

Absence of a SOFA or Other Agreement

- The prevailing international view is that, in the absence of an agreement to the contrary, criminal jurisdiction rests exclusively with the HN

- While the United States has worldwide personal jurisdiction over U.S. service members, the exercise of that jurisdiction in the HN without HN permission may be considered a breach of its territorial sovereignty

- Particular emphasis has been placed on ensuring a SOFA or other agreement with similar provisions is entered into with all HNs hosting U.S. forces

References

10 U.S.C. § 802(a)(10)
10 U.S.C. § 805
10 U.S.C. § 1037
Military Extraterritorial Jurisdiction Act,18 U.S.C. § 3261, *et seq.*
Status of Forces Policies and Information, 32 C.F.R. Part 151 (2014)
DoDD 5525.1, *Status of Forces Policy and Information* (7 August 1979), incorporating through Change 2, 2 July 1997, certified current, 21 November 2003 (editor's note: at the time of printing, this DoDD was current, however, it will be replaced by DoDI 5525.01 soon)
AFJI 51-706, *Status of Forces Policies, Procedures, and Information* (15 December 1989), certified current, 21 December 2010
AFI 51-703, *Foreign Criminal Jurisdiction* (21 May 2014), including AFI51-703_AFGM2016-01, 6 January 2016
AFI 51-705, *Criminal Jurisdiction of Service Courts of Friendly Foreign Forces and Sending States in the United States* (9 October 2014)
AFI 51-705 AFMC Supplement 1, *Jurisdiction of Service Courts of Friendly Foreign Forces in the United States* (29 December 1994)

DEFENSE SUPPORT OF CIVIL AUTHORITIES

Defense Support of Civil Authorities (DSCA) is support provided by U.S. Federal military forces, Department of Defense (DoD) civilians, DoD contract personnel, DoD component assets, and National Guard forces (when the Secretary of Defense (SecDef), in coordination with the Governors of the affected States, elects and requests to use those forces in Title 32, United States Code, status) in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events. "Special events," in this context, means events recognized or defined in the relevant provisions of the United States Code or the Code of Federal Regulations (e.g., Presidential inaugurations, international summits, the Olympics, and World Cup soccer games). The federal government maintains a wide array of capabilities and resources that, in accordance with governing statutes, as well as DoD and Air Force regulations and policy, can be made available to civil authorities upon request. While the DoD is normally the lead agency for homeland defense missions, the DoD conducts DSCA operations in a supporting role.

DSCA Generally

- DSCA is initiated when civil authorities or qualifying entities request DoD assistance or when assistance is authorized by the President of the United States (POTUS) or the SecDef

  -- Unless approval authority is delegated by the SecDef, all DSCA requests shall be submitted to the Office of the Executive Secretary of the DoD

  -- Except for immediate response and emergency authority, as well as situations in which SecDef has delegated authority to the commanders of NORTHCOM and PACOM via the DSCA Standing execute order (EXORD), only the SecDef may approve requests from civil authorities or qualifying entities for Federal military support for:

    --- Response to civil disturbances;

      ---- Civil disturbance operations generally require authorization from the POTUS (but see, discussion of emergency authority below)

    --- Response to chemical, biological, radiological, nuclear, and explosives (CBRNE) events;

    --- Assistance to civilian law enforcement organizations; and

--- Response with potentially lethal assets. This includes:

---- The loaning of arms, aircraft, or ammunition;

---- Assistance to the Department of Justice (DOJ) in emergency situations involving weapons of mass destruction;

---- Assistance to the DOJ concerning prohibited transactions involving nuclear material;

---- Support to counterterrorism operations; and

---- Support to civilian law enforcement authorities in situations where it is reasonable to anticipate a confrontation between civilian law enforcement and civilian individuals or groups

-- The Joint Staff (JS), upon SecDef approval of DoD assistance, coordinates with the Services to source the assistance to be provided

--- Based on the capabilities required, Air Force assets may be directed to provide assistance

- Federal military forces employed for DSCA are to remain under Federal military command and control at all times

- Per DoDD 3025.18, *Defense Support of Civil Authorities*, requests for DSCA, except requests for support under immediate response authority (discussed below) and mutual or automatic aid arrangements (such as reciprocal fire protection agreements under Title 42, United States Code, §§ 1856-1856p and governed by DoDI 6055.06, *DoD Fire and Emergency Services (F&ES) Program*), must be submitted in writing

- Written requests shall include a commitment to reimburse the DoD in accordance with the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Title 42, United States Code, § 5121, *et seq.*), the Economy Act (Title 31, United States Code, § 1535), or other statutory reimbursement authorities

-- Support may be provided on a non-reimbursable basis only if required by law or if both authorized by law and approved by the appropriate DoD official

- All DSCA requests for assistance must be evaluated for:
    - -- Legality;
    - -- Lethality (potential that DoD Forces may use or be subject to the use of lethal force);
    - -- Risk to the safety of DoD Forces;
    - -- Cost (including the source of funding and the effect on the DoD budget);
    - -- Appropriateness (whether providing the requested support is in the interest of the DoD); and
    - -- Readiness (impact on the DoD's ability to perform its primary missions)
        - --- Assistance may not be provided if such assistance would adversely affect national security or military readiness
- No DoD unmanned aircraft systems (UAS) will be used for DSCA operations unless expressly approved by the SecDef
    - -- Use of armed UAS for DSCA operations is not authorized
- Joint investigations of matters within their respective jurisdictions conducted by military criminal investigative organizations (e.g., Air Force Office of Special Investigations) and civilian law enforcement agencies, where each is using its own forces and equipment, are not DSCA
- Assistance provided by DoD intelligence and counterintelligence components in accordance with DoDD 5240.01, *DoD Intelligence Activities*; Executive Orders 12333 and 13388; DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons*; and other applicable laws and regulations, is not DSCA
- Support provided in response to foreign disasters (e.g., foreign consequence management or foreign humanitarian assistance/disaster response) is not DSCA

Immediate Response Authority (IRA)

- Upon request and without SecDef approval, Air Force commanders may temporarily employ the resources under their control to save lives, prevent human suffering, or mitigate great property damage within the United States

  -- For support under IRA to be proper, "imminently serious conditions" must be present such that time does not permit seeking approval from higher authority

    --- Requests are time-sensitive and shall be received from local government officials within 24 hours following completion of a damage assessment

  -- Due to the emergent nature of the situation, the initial request for DoD assistance may be made orally, but it should be followed with a written request at the earliest opportunity

    --- Civil authorities shall be informed that oral requests for assistance in an immediate response situation must be followed by a written request that includes an offer to reimburse the DoD at the earliest available opportunity

  -- Where appropriate or legally required, support provided under immediate response authority should be provided on a cost-reimbursable basis

    --- Air Force commanders should not delay or deny support under immediate response authority based on the fact that the requester is unable or unwilling to commit to reimbursing the DoD

  -- Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory, and therefore violate the Posse Comitatus Act

  -- Air Force commanders must consider the impact providing immediate response would have on military mission requirements

    --- Commanders must not jeopardize the Air Force mission to provide immediate response

  -- Immediate response is subject to higher headquarters direction and limitation

-- Per DepSecDef Policy Memorandum 15-002, "*Guidance for the Domestic Use of Unmanned Aircraft Systems*," DoD UAS may not be used for Federal, State, or local immediate response

-- The Air Force commander directing a response under IRA shall, through the chain of command, immediately notify the National Joint Operations and Intelligence Center (NJOIC)

-- An immediate response shall end when the urgent need giving rise to the response is no longer present (i.e., when there are sufficient non-DoD resources available to adequately respond and that agency or department is responding) or when the initiating DoD official or a higher authority directs an end to the response.

--- The Air Force commander directing a response under IRA shall reassess as soon as practicable, but no later than 72 hours after receiving the request for assistance, whether there is a continuing need for the DoD to respond under this authority

- Air Force commanders acting under IRA shall not use military force to quell civil disturbances unless specifically authorized by the POTUS in accordance with the Insurrection Act of 1807 or unless permitted under emergency authority as outlined below

Emergency Authority

- Air Force commanders have the authority, in extraordinary emergency circumstances where prior POTUS authorization in accordance with the Insurrection Act of 1807 is not possible and where duly constituted local authorities are unable to control the situation, to temporarily engage in activities necessary to quell large-scale, unexpected civil disturbances when:

-- Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order; or

-- When duly constituted civil authorities are unable or unwilling to provide adequate protection for Federal property or Federal governmental functions

--- Federal military forces are authorized to protect Federal property or functions

References

10 U.S.C. §§ 331-335
10 U.S.C. § 382
10 U.S.C. § 2564
18 U.S.C. § 831
18 U.S.C. § 1385
31 U.S.C. § 1535
42 U.S.C. § 5121, *et seq.*
32 C.F.R. § 183.3
DoDD 3025.18, *Defense Support of Civil Authorities* (29 December 2010), incorporating Change 1, 21 September 2012
DoDI 3020.52, *DoD Installation Chemical, Biological, Radiological, Nuclear, and High-Yield Explosive (CBRNE) Preparedness Standards* (18 May 2012)
DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies* (27 February 2013)
DoDI 6055.06, *DoD Fire and Emergency Services (F&ES) Program* (21 December 2006)
Deputy Secretary of Defense Policy Memorandum 15-002, *"Guidance for the Domestic Use of Unmanned Aircraft Systems"* (17 February 2015)
JP 3-28, *Defense Support of Civil Authorities* (31 July 2013)
AFI 10-801, *Defense Support of Civil Authorities* (23 December 2015)

SMALL UNMANNED AIRCRAFT SYSTEMS

As use of small unmanned aircraft systems (sUAS) by hobbyist/recreational, commercial/civil, and public (government) users is increasing, questions regarding the use of sUAS on or near military installations are also increasing. Similarly, organizations on an installation may raise questions as they seek to incorporate sUAS into their operations. This area is still developing, so installations should generally consult their legal offices at their MAJCOMs and HAF as issues arise.

Definition

- The Department of Defense (DoD) categorizes Unmanned Aircraft Systems (UAS) into five Groups based on the attributes of weight, altitude, and speed

- sUAS span Groups one through three with Group three being the most common type of sUAS

- Group three UAS are under 1,320 pounds and operate below 18,000 feet at speeds less than 250 knots

  -- The DoD definition differs from the Federal Aviation Administration (FAA) definition of sUAS, which includes only those UAS that are under 55 pounds. Note that an FAA Notice of Proposed Rulemaking (NPRM) (final rule expected summer 2016) would also place altitude and airspeed requirements of 500 feet above ground level and 87 knots on sUAS.

Operation of Nongovernmental sUAS on or Near Military Installations

- Airspace within the United States, including airspace above DoD installations, is regulated by the FAA

  -- sUAS operations in the airspace above military installations must comply with FAA regulations and guidance; installation commanders generally do not have the authority to further restrict the use of airspace above an installation

  -- In 2016, the FAA is in the process of rulemaking regarding sUAS. The NPRM is available on the FAA web site and a final rule is expected in the summer of 2016.

  -- The initial consideration on sUAS operations on or over the installation should always be identifying the class of airspace above the installation, and determining whether there is any special use airspace (or other restrictions) above the installation. The types of sUAS operations that are permitted may vary depending on the airspace classification and any applicable restrictions. Legal offices should

consult with the organization responsible for airfield operations to learn more about the airspace above their installation.

-- Individuals flying sUAS for hobby/recreational purposes (a specific category of operations defined by the FAA as "model aircraft operations") are expected to contact the airport operator and the airport air traffic control (ATC) tower (when an ATC facility is located at the airport) if they are planning to operate a sUAS within 5 nautical miles of the airport. Installations with airfields may receive requests or notifications from groups or individuals operating sUAS.

--- The term "airport" is broadly defined and would likely include any military airfield. The statutory definition used by the FAA is contained in 49 U.S.C. § 47102(2) and the FAA provides further information about airports on its web site at: http://www.faa.gov/airports/planning_capacity/passenger_allcargo_stats/categories/

--- Installation airfield managers, ATC towers, or equivalent must be aware of FAA regulations regarding the use of sUAS and respond to notifications received from sUAS operators accordingly. Note that the requirement is to provide *notification* to the airport and ATC tower, not to request permission to operate.

--- Do not assume that those requesting to operate near or over an installation are legally entitled to do so. sUAS users may not understand the regulations and restrictions that pertain to them. If there are questions about particular sUAS operations, coordinate with the local FAA office.

--- Be aware of any airspace authorities that may have been granted to the installation commander by the FAA (if such a delegation exists, it will generally be in the form of a memorandum of agreement (MOA) between the installation ATC, or similar, and the FAA), and determine whether the commander or his designee has the authority to restrict or prohibit sUAS activities

-- The FAA has stated that its current policy regarding UAS is based on three categories: (1) UAS used as public aircraft; (2) UAS used as civil aircraft; and (3) UAS used as model aircraft (see 72 Fed. Reg. 6689 (Feb. 13, 2007)). Regardless of size or cost, as a general matter, aircraft purchased by the services or operated by a service for military purposes are public aircraft, and are ineligible for exceptions to regulation available to model aircraft operators. Note that with respect to UAS used as model aircraft, the FAA has reiterated that to qualify as a model aircraft, the aircraft would need to be operated purely for recreational or hobby purposes.

- Installation commanders, consistent with their authority over the installation and its activities, may prohibit (or limit) the operation of sUAS on the installation, to include the following: a sUAS taking off from the installation; a sUAS landing on the installation; and controlling a sUAS from the installation

  -- As previously noted, the authority of an installation commander does not generally extend to restricting the use of the airspace above an installation. The national airspace, including the airspace above defense installations, falls under the exclusive jurisdiction of the FAA. Absent a delegation of authority from the FAA to the installation commander, the commander has no independent authority to place any restrictions on the use of the airspace.

    --- Commanders may request the FAA impose a Temporary Flight Restriction (TFR). TFRs are regulatory actions issued via a Notice to Airmen (NOTAM) to restrict certain aircraft from operating within a defined area, on a temporary basis, to protect persons or property on the ground. The FAA may impose TFRs for a number of reasons, to include reasons of national security (see FAA Advisory Circular (AC) No. 91-63C, *Temporary Flight Restrictions* (20 May 2004)). AC 91-63C clearly states that a TFR can be requested by, among other entities, a military command.

      ---- Pursuant to 14 C.F.R. § 99.7, *Special Security Instructions*, the DoD can request a TFR for a "defense area" for reasons of national security. A "defense area" for purposes of this C.F.R. provision is any airspace of the U.S. "in which the control of aircraft is required for reasons of national security" (14 C.F.R. § 99.3).

- While simply flying a sUAS near or above an installation may be permissible under FAA regulations, if the sUAS is being used to conduct another activity (e.g., taking photos or videos), additional restrictions may apply

  -- Installation legal offices should familiarize themselves with any state or local laws relating to UAS that may be applicable to operations near, on, or over the installation

  -- Federal laws may also prohibit certain activities, for example:

    --- 18 U.S.C. 795, *Photographing and Sketching Defense Installations* and 18 U.S.C. 796, *Use of Aircraft for Photographing Defense Installations*, criminalize photographing "…vital military and naval installations or equipment without first obtaining permission of the commanding officer…." Note that such installations must be designated by the President, SecDef, or a service secretary. Executive Order 10104, *Definition of Vital Military and Naval Installations and*

Equipment (dated 1 Feb 1950) contains the President's definitions of these items. They are broadly defined to include all "military, naval, or air-force installations and equipment which are now classified, designated, or marked under the authority or at the direction of the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force as "top secret," "secret," "confidential," or "restricted," and all military, naval, or air-force installations and equipment which may hereafter be so classified, designated, or marked with the approval or at the direction of the President…."

-- Monitoring the content of suspected downlink video would not violate 18 U.S.C. 2511, et seq., if sufficient consent can be shown or the downlink is configured so it is "readily accessible to the general public" under 18 U.S.C. 2510(16)

- Outside of the United States, the host nation generally regulates the use of the airspace above U.S. military bases. Status of Forces Agreements (SOFAs) or other agreements with the host nation may give installations some rights with respect to airspace control.

Operation of sUAS Within the United States by DoD Organizations

- Secretary of Defense (SecDef) approval is required for all domestic UAS operations (including sUAS operations) unless a specific exemption or exception applies

  -- The policy (to include very limited exceptions) is contained in in DepSecDef Policy Memorandum 15-002, *Guidance for the Domestic Use of Unmanned Aircraft Systems*

  -- Any domestic use of UAS requires consultation with the FAA and must be consistent with applicable laws, regulations, and memoranda of agreement concerning use in the National Airspace System (NAS)

- Units are generally not authorized to purchase sUAS without prior coordination

  -- AFI 11-502V3, *Small Unmanned Aircraft Systems Operations,* para. 1.1.3 states that "Units do not have the authority to obligate the Government to purchase, lease, procure, or contract of any new Air Force SUAS to include UA, Ground Control Station (GCS), Remote Video Terminal (RVT), Electro-Optical/Infrared (EO/IR), or any other payload prior to coordination with SAF/AQIJ. Include HQ AFSOC/A5KJ, HQ AFSOC/A3OU, and MAJCOM/A3 as information addressees".

- DoD operation of sUAS are subject to specific training, requirements, and other restrictions, to include:

-- A 2013 MOA with the FAA requiring that "Pilots/operators and crew members of DoD UAS shall be qualified and medically certified by the appropriate Military Department to operate in the class of airspace in which operations are to be conducted." The term "operator" is a "DoD specific term to describe individuals with the appropriate training and Military Department certification for the type of UAS being operated, and as such, is responsible for the UAS operations & safety. It is understood that all DoD UAS will be flown with a designated Pilot in Command (PIC)."

-- AFI 11-502V3, para. 1.3 defines a sUAS operator (SUAS-O) as "[a]n individual who has completed Initial Qualification Training (IQT) in a specific UAS and is responsible for the safe ground and flight operation of the Unmanned Aircraft (UA) and Ground Control Station (GCS). The SUAS-O shall be current and qualified in the SUAS to be operated or under the supervision of a SUAS-I[nstructor]."

-- All sUAS must be assessed for airworthiness pursuant to AFI 62-601, *USAF Airworthiness*

-- The sUAS operator must be familiar and ensure compliance with relevant technical orders for the aircraft, pursuant to AFI 11-502V3, Chapter 2

-- The sUAS must also have proper and adequate technical orders for its use, operation, and maintenance, designed to ensure safety of flight and avoid mishaps resulting in damage (and potential government liability) to persons or property, both military and civilian

-- The sUAS should be tracked for maintenance and accountability with a SUAS Manager, pursuant to AFI 11-502V3, paras. 1.5 and 11.2, and consistent with AFI 21-103, *Equipment Inventory, Status, and Utilization Reporting,* Chapter 2

-- The sUAS operator will also need to ensure the radio frequency (RF) used is deconflicted

--- This should consider both the capacity of the UAS to cause harmful interference with local RF usage (civilian and military) as well as the potential for any local RF usage to interfere with the operator's ability to maintain control of the sUAS, as addressed in AFI 11-502V3, para. 2.5. See also AFI 11-502V3, para. 3.3.9 (Frequency Deconfliction directives).

-- Operations of sUAS must also comply with DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons*; AFI 14-104, *Oversight of Intelligence Activities*; and applicable AFOSI issuances

Operation of sUAS Outside of the United States by DoD Organizations

- In addition to any DoD or service regulations or guidance generally applicable to the operation of sUAS by military organizations, note that operations of sUAS within the national airspace of another country may be severely restricted by the domestic laws of that country

  -- If no specific rights have been granted in a SOFA, basing agreement, or other agreement with the host nation, assume that specific permission will likely be needed to operate a sUAS (i.e., even if citizens of the country are typically allowed to operate sUAS, do not assume that U.S. operations are authorized)

    --- Follow all applicable coordination and approval procedures to ensure that operations within the airspace of another county are authorized by the host nation and conducted in conformity with all applicable conditions of the permission granted. Be aware that conditions frequently include respect for the laws and regulations of that host state.

References

Memorandum of Agreement (with the FAA) *Concerning the Operation of Department of Defense Unmanned Aircraft Systems in the National Airspace System* (16 September 2013)

Deputy Secretary of Defense Policy Memorandum 15-002, *Guidance for the Domestic Use of Unmanned Aircraft Systems* (15 February 2015)

DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons* (7 December 1982)

AFPD 11-5, *Small Unmanned Aircraft Systems Rules, Procedures, and Service* (8 October 2015)

AFI 11-502V1, *Small Unmanned Aircraft Systems Training* (19 August 2015)

AFI 11-502V2, *Small Unmanned Aircraft Systems Standardization/Evaluation Program* (19 August 2015)

AFI 11-502V3, *Small Unmanned Aircraft Systems Operations* (21 August 2015)

AFI 14-104, *Oversight of Intelligence Activities* (5 November 2014)

AFI 21-103, *Equipment Inventory, Status, and Utilization Reporting* (26 January 2012)

AFI 62-601, *USAF Airworthiness* (11 June 2010)

FAA Unmanned Aircraft Systems web page: http://www.faa.gov/uas/ (contains comprehensive information on the operation of UAS in the U.S.)

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CHAPTER EIGHTEEN: CYBER LAW

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CYBER LAW OVERVIEW

The term "cyber law" can be misleading. Rather than being a discrete legal field, cyber law is essentially specialized subsets of traditional legal fields (criminal law, international law, administrative law, privacy law, tort law, etc.). This chapter addresses the legal issues in cyberspace that Air Force commanders are most likely to encounter, such as searching and seizing computers/accessing electronically stored information and computer misuse (criminal law); defending Air Force networks and attacking adversary networks (the law of armed conflict/international law); and the Freedom of Information Act (FOIA), the Privacy Act, and Personally Identifiable Information (privacy law). Most of these discrete areas of the law have their own chapter or section throughout this handbook, so this chapter will only focus on their cyber-specific aspects.

While the content of this chapter has been substantially revised from previous editions of the Military Commander and the Law, it is important to remember the technology, law, and policy in this area are dynamic. Commanders and judge advocates should seek the most current guidance from subject matter experts at the 67th Cyberspace Wing (CW) legal office, 24th Air Force legal office, or the Air Force Space Command legal office.

Roles and Responsibilities

- Commander, AFSPC: AFSPC is responsible for the overall command and control, security, and defense of the Air Force Information Network (AFIN). AFSPC/CC commands, controls, implements, configures, secures, operates, maintains, sustains, and the AFIN.

- Commander, 24th Air Force: 24 AF is the Air Force component to U.S. Cyber Command (USCYBERCOM). Accordingly, 24 AF/CC, when acting as AFCYBER/CC or when executing authorities delegated by AFSPC/CC, issues cyber orders to MAJCOMs, wings, Integrated Network Operations and Support Centers, and Communications Focal Points via the 624 Operations Center. 24 AF/CC also presents forces to USCYBERCOM and other combatant commanders as required in support of cyberspace operations as directed.

- 624th Operations Center (OC): The 624 OC is the 24 AF/AFCYBER operations center responsible for issuing cyber orders as directed by 24 AF/AFCYBER/CC. 624 OC also oversees compliance with Air Force and USCYBERCOM cyber operations and relay status of those orders to 24 AF/AFCYBER/CC and USCYBERCOM as directed.

LEGAL ISSUES IN AIR FORCE INFORMATION NETWORK (AFIN) OPERATIONS

Cyber Definitions

- Department of Defense Information Networks (DODIN) (JP 3-12): The globally interconnected, end-to-end set of information capabilities for collecting, processing, storing, disseminating, and managing information on-demand to warfighters, policy makers, and support personnel. The DODIN includes owned and leased communications and computing systems and services, software (including applications), data, security services, other associated services, and national security systems.

- Air Force Information Networks (AFIN): The AFIN is the globally interconnected, end-to-end set of Air Force information capabilities, and associated processes for collecting, processing, storing, disseminating, and managing information on-demand to warfighters, policy-makers, and support personnel, including owned, leased, and contracted communications and computing systems and services, software, data, security services, and national security systems

- DODIN Operations (JP 3-12): Operations to design, build, configure, secure, operate, maintain, and sustain DoD communications systems and networks in a way that creates and preserves data availability, integrity, confidentiality, as well as user/entity authentication and non-repudiation

AFIN Operations Authority

- AFI 10-1701, *Command and Control (C2) for Cyberspace Operations*, implements AFPD 10-17, *Cyberspace Operations*, and provides that AFSPC/CC is responsible for the command, control, implementation, security, operation, maintenance, sustainment, configuration, and defense of the AFIN

- AFIN operations authorities can be summarized as the responsibility to operate, maintain, and defend the AFIN as well as the authority to issue various orders in furtherance of those responsibilities. Some of these orders consist of Air Force Cyber Tasking Orders (AFCTOs), Maintenance Tasking Orders (MTOs), and Cyber Control Orders (CCOs).

- Cyber orders issued by AFSPC/CC, or the delegee, 24 AF/CC, via the 624 OC, are mandatory military orders

- 24 AF/CC, in the role of AFCYBER/CC, directs Air Force cyberspace forces in executing missions and tasks assigned by USCYBERCOM and exercises OPCON over Air Force forces assigned/attached to USCYBERCOM in support of joint objectives. There is significant overlap between the Air Force service authority to operate and defend Air Force networks and the USCYBERCOM authority to defend Air Force networks.

Computer Monitoring and Stored Communications

- Commanders may have to deal with questions concerning monitoring active duty members or obtaining electronic data stored somewhere on the Air Force network systems. These requests typically come from law enforcement, but they also may be requested by unit commanders, investigative officers, safety investigation boards, etc. The following discussion examines the law in this area, exceptions, and the process for obtaining these items in the Air Force.

  -- Fourth Amendment: Establishes the right to be free from unreasonable searches when an individual has a reasonable expectation of privacy

    --- Determination of an expectation of privacy on any given piece of information on any given computer or computer system (including servers) depends upon a number of factors, such as the owner of the computer (i.e., personal or business); the relationship of the information to the computer system (i.e., in transit or stored); the nature of the data communicated (i.e., metadata or content); the location of the information; and the information owner's citizenship

  -- Computer Fraud and Abuse Act, 18 U.S.C. §1030: Prohibits unauthorized access (or exceeding authorized access) to any computer involved in interstate or foreign commerce or communications. Sometimes referred to as the anti-hacking statute.

  -- Federal Wiretap Act, 18 U.S.C. § 2510 *et seq.*: Prohibits a third party to a communication from wiretapping, monitoring, or intercepting that communication in transit. The Wiretap Act covers both telephone conversations and electronic communications, and it grants protection to individuals above that in the Fourth Amendment (searches and/or seizures with a warrant). However, there are numerous exceptions to the Wiretap Act prohibitions:

    --- The Service Provider Exception (18 U.S.C. § 2511(2)(a)(i)): Permits service providers to "intercept, disclose, or use" a communication while engaged in activity necessary to the provision of service or the protection of the provider's rights or property. This authority is broad, but there must be a

substantial nexus between the monitoring and the system administrator's duties to maintain and protect the system.

--- Consent (18 U.S.C. § 2511(2)(c)-(d)): Just as in other applications, consent to a "search" eliminates a privacy interest in the subject to be searched. The DoD banner, as mandated by the DoD Chief Information Officer (DoD-CIO), obtains consent to monitoring from any potential user prior to authorized use of DoD computer networks. The consent banner and user agreement are now used universally in the Air Force and are the main exception to the Federal Wiretap Act.

--- Pursuant to Foreign Intelligence Surveillance Act (18 U.S.C. § 2511(2)(e)): This exception will most likely only be used by an intelligence-gathering agency

--- Communication readily accessible to the general public (18 U.S.C. § 2511(2)(g)(i)): An intercepted or accessed electronic communication which is readily accessible by the general public (e.g., social media post, status update) is excepted

--- Trespasser Exception (18 U.S.C. § 2511(2)(i)): An individual acting lawfully is authorized to intercept the communications of a trespasser into a computer system (i.e., hackers). The Air Force Office of Special Investigations (AFOSI) frequently relies on this exception when conducting counter intelligence investigations.

--- Pursuant to a Court Order (18 U.S.C. § 2518): Applications for orders authorizing or approving the interception of electronic communications are made in writing to a judge of competent jurisdiction

-- Stored Communications Act (18 U.S.C. § 2701 *et seq.*): The protection in this statute applies to stored communications, rather than in-transit communications covered by the Wiretap Act (see above). Similar to the Wiretap Act, the Stored Communications Act provides an exception for service providers.

--- 18 U.S.C. § 2702(a) limits voluntary disclosure of communications or records by those providing electronic communication services "to the public." The AFIN does not provide electronic communications services to the public. *Bohach v. City of Reno*, 932 F. Supp. 1232 (D.Nev.1996).

--- Service provider exception does not require a nexus between maintaining and protecting the system and accessing stored data

--- DoD consent banner and user agreement is the usual method by which stored data can be obtained in the Air Force and will apply in most situations. Despite the banner, some communications stored on Air Force network systems may contain communications between users and attorneys, chaplains, or mental health providers. These matters are still considered privileged communications, and there may be restrictions on using these communications. Commanders should consult with their servicing legal offices if such communications are encountered.

---- Search authorizations for electronically stored information should not be used in most cases. AFI 51-201, *Administration of Military Justice*, says "[o]nly if the totality of the facts and circumstances indicate that the subject has a reasonable expectation of privacy (for example, no DoD banner in place, no user agreement, or local policy inadvertently creates an expectation of privacy) is obtaining a search authorization warranted."

---- Routine use of search authorizations to collect information from government computer systems would contravene the language in the consent banner and could create a reasonable expectation of privacy in government computer systems

Bottom Line

- No reasonable expectation of privacy on Air Force networks

- DoD banner implemented throughout all Air Force computer systems, telephone networks, and other electronic communications systems, provides consent from all users to monitor their activities and retrieve data under the consent exceptions of the Stored Communications Act and Wiretap Act (see *U.S. v. Larsen*, 525 F.2d 444 (2008))

- Accordingly, law enforcement and AFOSI personnel do not require a search authorization to examine data for law enforcement purposes on Air Force Networks and should only seek search authorizations in unusual cases

- Air Force system administrators do not require permission to take action on any computer or system device to properly operate, maintain, or defend Air Force Networks under the Stored Communications Act and Federal Wiretap Act exceptions for system administrators. However, the Federal Wiretap Act exception requires a more substantial nexus to actively monitor in-transit activities and communications.

Electronically Stored Information Request Process

- Electronically stored information (ESI) may be requested for any official purpose. Common purposes include: criminal investigations, administrative investigations, commander directed investigations, civil litigation involving the Air Force, or retrieving e-mails of an absent member in support of some military mission or duty.

  -- DoD consent banner eliminates the need for search authorization from a search magistrate in most cases (see Stored Communication Act section, above)

- As outlined in AFI 33-210, *Air Force Certification and Accreditation (C&A) Program,* para. 2.4.5, System Designated Approval Authorities (DAAs) may delegate to installation commanders or higher the authority to approve Air Force Information System (IS) access

  -- As such, the AFSPC/A6 has delegated to the 24 AF/CC, 624 OC/CC, and installation commanders the authority to approve requests for ESI on ISs for law enforcement, and approve real-time monitoring of network communications requests by AFOSI (AFSPC/A6 Delegation Memo, dated 7 December 2009)

  -- The Air Force implements the DoD Banner which notifies all users of their consent to monitoring. Under 18 U.S.C. § 2702(b)(3), communications may be released with the consent of the user.

- Tasking Order 2013-098-004, issued by the 624 OC, standardizes the process for requesting electronically stored information. The order requires all requests be submitted through the 624 OC via a digitally-signed e-mail and following a designated format (see ESI Request Format below).

- Installation commanders have the authority to grant access and release e-mails and data on systems under their control as delegated by AFSC/A6, however, that authority is not further delegable

  -- Additionally, even if the data resides on systems under the control of the installation commander, the process described in TO 2013-098-004 must still be followed

  -- Bottom line is all requests for ESI must go through the 624 OC

Freedom of Information Act (FOIA)/Privacy Act (PA) Requests vs. ESI Requests

- ESI requests must be differentiated from FOIA/PA requests, but at times may follow similar procedures. The servicing legal office should be the first line of defense in determining whether the request requires processing under FOIA.

- Generally, requests for ESI are those which are not of a personal nature and have an inherent military mission or function for its use

  -- For example, requesting e-mails pursuant to a commander directed investigation would be an ESI request

  -- Also, requesting e-mails of a recently deceased member to continue a military duty is an ESI request

  -- A request for all e-mails between person 1 and person 2 concerning selection for an advertised duty position would be a FOIA/PA request

- If the request received is FOIA/PA, FOIA/PA managers will still need to request the release of e-mails and data through the 624 OC. During this process, the information should be released back to the FOIA/PA managers for continued processing.

  -- Approval of the request to retrieve e-mails or data for FOIA/PA requests does not constitute a FOIA/PA approval/disapproval. Only FOIA/PA managers and the servicing legal office will ascertain whether information contained in the e-mails should be released to the third party.

ESI Request Format

- A request for ESI must contain key information for System Administrators, exchange administrators, and judge advocates to process the request. The ESI request format directed by TO 2013-098-004 is on the next page:

ELECTRONICALLY STORED INFORMATION (ESI) E-MAIL MESSAGE TEMPLATE

MEMORANDUM FOR 624 OC/CC

FROM: _____ (Requestor)

SUBJECT: Request for Access to Electronically Stored Information in support of _____ (brief description of investigation "CDI involving…", "AFOSI case #")

1. On _____(date)_____ , _____ (appointing CC) _____ appointed _____ (investigator's name) investigating officer for a Command Directed Investigation, to examine _____(fill in purpose of CDI).

2. Request access to ESI on the Air Force Information Network (AFIN), as described below, to support the listed investigation (ensure the that the following information is included, preferably using this format):
   a. Requestor: Name, Rank, unit:
   b. Requestor Duty Address:
   c. Requestor E-mail address:
   d. Requestor Duty Phone (Comm & DSN):
   e. Requestor's After Duty Hours Phone:
   f. Preferred method of receiving the requested information (encrypted e-mail, remote delivery to the requestor's desk, secure FTP, CD, etc….):
   g. System where the information will be found and expected classification of the information: NIPRnet (Unclassified) or SIPRnet (Secret):
   h. Expected location of e-mail and/or data if known:
   i. Specific dates of any requested e-mails and/or data (logs, etc….): From _____ to _____ (must include an end date):
   j. List of e-mail accounts (individual and/or organizational) to examine: (subject's name/e-mail account address/unit, EIN): [Note: it is best to scope the request down as far as possible while still satisfying the purpose of the request]
   k. Purpose of Request: [Note: be very detailed as this is the information the DAA uses to make the substantive decision regarding whether the ESI will be released—for instance: "to investigate communications regarding possible inappropriate relationships between ____ and ____, and ____ knew about it"]
   l. Is the requested e-mail and/or data believed to contain communications involving a lawyer, clergy, health care provider, parties married to each other, or information protected by HIPAA? Yes/No (explain if possible)

m. Is the requested e-mail and/or data expected to contain proprietary information relating to government contracts, or contractor-related protected information? Yes/No (explain if possible)

// REQUESTOR'S ELECTRONIC SIGNATURE BLOCK\//

Administrative Note: Requestor must sign and encrypt the e-mail (in the permissions group under options tab in Outlook)

1st Ind, 624 OC/CC

MEMORANDUM FOR RECORD

I approve/disapprove

624 OC/CC Signature Block

ESI Request Reviews

- An ESI request legal review, conducted by 24 AF/JA, generally will analyze the following:
  - -- Proper authority of the requesting individual (valid basis to request information)
  - -- (1) privilege(s) claimed; (2) proprietary information claimed; and (3) any classification claimed
  - -- Ensure legitimate request (not overly broad, pursuant to official purpose, etc.)
  - -- Ensure sufficiently detailed description of data requested in light of basis for the request
  - -- Advise if data may be released and any remarks regarding the data being released
- E-mail requests typically provide **ALL** e-mails for the period requested. These will require a content review prior to certain uses of the data.
  - -- Review is required to safeguard any proprietary information of DoD Contractors, or privileged communications between the individual and clergy, health care practitioners, or attorneys
  - -- Requestor is responsible for ensuring proper uses of all retrieved data and should seek legal advice from the servicing legal office as appropriate

Computer Misuse Incident Program

- Seemingly small incidents of computer misconduct may have large impacts for the AFIN
  - -- For example, installing unauthorized software on a single computer may expose the entire network to malware infection and disruption
- The 67 CW, one of the wings under 24 AF with responsibility for maintaining the AFIN, has instituted a Computer Misuse Incident Program to promote accountability for these actions across the Air Force
- Objective of the Computer Misuse Incident Program is to increase awareness and accountability of computer misuse around the Air Force and to empower the owning commander to respond to computer misuse as he/she would to any other misconduct

- AFMAN 33-152, *User Responsibilities and Guidance for Information Systems*, details specific prohibited conduct on the AFIN

  -- Para. 3.2 outlines inappropriate uses that are punishable under UCMJ Article 92, Failure to Obey Order or Regulation. AFMAN 33-282, *Computer Security* (COMPUSEC), provides further guidance on prohibited conduct

- As examples, common inappropriate uses include, but are not limited to (1) unauthorized personal use; (2) viewing prohibited content; (3) circumventing security systems; and (4) installing freeware/shareware without DAA approval

- The 24 AF/CC may also issue orders regarding proper conduct on the AFIN, which, if violated, could represent chargeable offenses under the UCMJ

- Oftentimes, the only evidence of computer misuse resides with the squadrons within 67 CW tasked to monitor the AFNET for suspicious activity. When they detect an intrusion or poor security practice, these squadrons produce a technical report of the incident, which they share with their servicing legal office, 67 CW/JA.

- 67 CW/JA reviews these reports for possible misconduct. When there is evidence of misconduct, 67 CW/JA creates a narrative of the incident and the potential violations.

  -- Narrative includes a summary of the costs to the Air Force in equipment and manpower for each incident

  -- The 67 CW Commander then shares this narrative with the Installation Commander of the relevant installation for further action as the owning commander believes appropriate

  -- 67 CW/JA also provides a courtesy copy of the narrative to the servicing legal office where the individual resides

Personally Identifiable Information (PII)

- PII breaches have recently become a high-level interest issue. PII breaches create personal vulnerabilities for individuals, but can also create AFIN vulnerabilities.

- Per AFI 33-332, *The Air Force Privacy and Civil Liberties Program*, PII is information that can be used to distinguish or trace an individual's identity and includes: social security number, alien registration number, date and place of birth, mother's maiden name, financial account numbers, and biometric records

- E-mails containing PII (alpha rosters, recall rosters, investigative reports, etc.,) must be encrypted and must contain a Privacy Act statement (see AFI 33-332, para. 2.2.5)

- Per AFSPCGM 2013-33-01, *Personally Identifiable Information (PII) Breach Reporting, Notification and Air Force Network (AFNET) Account Actions*, upon notification of a PII breach, the 624 OC will direct suspension of the offending user's account

  -- Offending user's account will remain locked until the 624 OC receives a request for the resumption of access from the first O-6 in the offending user's chain of command

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References

U.S. Const. Amend IV
Freedom of Information Act, 5 U.S.C. § 552
Privacy Act, 5 U.S.C. § 552a
The Stored Communications Act, 18 U.S.C. § 2701-2712
The Wire Tap Act, 18 U.S.C. §§ 2510-2520
Computer Fraud and Abuse Act, 18 U.S.C. C 1030
Bohach v. City of Reno, 932 F.Supp. 1232 (D.Nev.1996)
U.S. v. Larsen, 525 F2d 444 (2008)
DoDI 8500.01, *Cybersecurity* (14 March 2014)
JP 3-12(R), *Cyberspace Operations* (5 February 2013)
CJCSI 6510.01F, *Information Assurance (IA) and Support to Computer Network Defense (CND)* (29 June 2015)
AFPD 33-2, *Information Assurance (IA) Program* (3 August 2011)
AFPD 71-1, *Criminal Investigations and Counterintelligence* (13 Nov 2015)
AFMAN 33-152, *User Responsibilities and Guidance for Information Systems* (1 June 2012)
AFMAN 33-282, *Computer Security* (COMPUSEC) (27 March 2012)
AFI 10-1701, *Command and Control for Cyberspace Operations* (5 March 2014), including AFI10-1701_AFGM2016-01, 12 May 2016
AFI 33-210, *Air Force Certification and Accreditation (C&A) Program (AFCAP)* (23 December 2008), incorporating Change 1, 2 October 2014
AFI 33-332, *The Air Force Privacy and Civil Liberties Program* (12 January 2015)
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016
AFSPC/A6 Delegation Memorandum, *Delegation of Authorities to Access Stored Data and Monitor Communications* (7 December 2009)
AFSPCGM 2013-33-01, *Personally Identifiable Information (PII) Breach Reporting, Notification and Air Force Network (AFNET) Account Actions* (12 November 2013)
624 OC Tasking Order 2013-098-0004

LEGAL ISSUES IN CYBERSPACE OPERATIONS

Terminology

- Cyber Operations Definitions (JP 3-12(R)): There are three basic mission sets for cyber operations:
  - -- Offensive Cyberspace Operations (OCO)
  - -- Defensive Cyberspace Operations (DCO)
  - -- DoD Information Network (DODIN) Operations
- Within those three mission sets are four different types of cyberspace actions:
  - -- Cyberspace Defense
  - -- Cyberspace Intelligence, Surveillance, and Reconnaissance (ISR)
  - -- Cyberspace Operational Preparation of the Environment
  - -- Cyberspace Attack
- However, cyberspace terminology is somewhat in flux, and terminology varies across U.S. Government agencies. Also, not all terms are consistent with their traditional uses (for example, the Cyberspace Attack definition is not consistent with notions of attack under international law).

Mission Sets

- Offensive Cyberspace Operations (OCO): Cyberspace operations intended to project power by the application of force in or through cyberspace
- Defensive Cyberspace Operations (DCO): Passive and active cyberspace operations intended to preserve the ability to use friendly cyberspace capabilities and protect data, networks, net-centric capabilities, and other designated systems
- DoD Information Network (DODIN) Operations: Operations to design, build, configure, secure, operate, maintain, and sustain DoD networks to create and preserve information assurance on the DoD information networks

Cyberspace Actions

- Cyberspace Attack: Cyberspace actions that create various direct denial effects in cyberspace (i.e., degradation, disruption, or destruction) and manipulation that leads to denial that is hidden or that manifests in the physical domains

  -- DENY: To degrade, disrupt, or destroy access to, operation of, or availability of a target by a specified level for a specified time. Denial prevents adversary use of resources. There are three types of deny actions:

    --- Degrade: To deny access (a function of amount) to, or operation of, a target to a level represented as a percentage of capacity

    --- Disrupt: To completely but temporarily deny (a function of time) access to, or operation of, a target for a period represented as a function of time

    --- Destroy: To permanently, completely, and irreparably deny (time and amount are both maximized) access to, or operation of, a target

  -- MANIPULATE: To control or change information, information systems, and/or networks in a manner that supports the commander's objectives, including deception, decoying, conditioning, spoofing, falsification, etc.

    --- Manipulation uses an adversary's information resources for friendly purposes

- Cyberspace Defense: Actions normally created within DoD cyberspace for securing, operating, and defending the DODIN

  -- Specific defensive actions are usually created by the joint force commander (JFC) or service that owns or operates the network, except in such cases where these defensive actions would impact the operations of networks outside the responsibility of the respective JFC or service

- Intelligence, Surveillance, and Reconnaissance (ISR): An intelligence action conducted by the JFC authorized by an EXORD or conducted by attached Signals Intelligence (SIGINT) units under temporary delegated SIGINT Operational Tasking Authority (SOTA)

  -- Cyberspace ISR includes ISR activities in cyberspace conducted to gather intelligence from target and adversary systems that may be required to support future operations, including OCO or DCO

--- These activities synchronize and integrate the planning and operation of cyberspace sensors, assets, and processing, exploitation, and dissemination systems, in direct support of current and future operations

-- ISR in cyberspace is conducted pursuant to military authorities and must be coordinated and deconflicted with other U.S. Government departments and agencies in accordance with the *Trilateral Memorandum of Agreement Among the Department of Defense, the Department of Justice, and the Intelligence Community Regarding Computer Network Attack and Computer Network Exploitation Activities,* 9 May 2007, and Executive Order 12333, *United States Intelligence Activities*

--- EO 12333 only addresses intelligence activities and not surveillance or reconnaissance activities

"Title 10" vs. "Title 50"

- "Title 10" and "Title 50" are often used for shorthand for "military operations" and "intelligence operations," respectively. Usually, the speaker refers to DoD activity ("Title 10") or Intelligence Community activity ("Title 50"). Although such terminology is widespread, it is generally incomplete, inaccurate, and confusing.

- DoD is authorized to conduct both Title 10 and Title 50 operations. Proper legal and operational analysis begins with identifying the purpose of the activity, the entity that is conducting the activity, and how the information gathered during the activity will be used.

- Title 10: The heading of Title 10, United States Code, is "Armed Forces." It is the primary authority for the manning, training, and equipping of the armed forces by each Service.

- Title 50: The heading of Title 50 is "War and Defense." It provides the authority for operating the intelligence community, providing a breakdown of responsibilities for Departments and Agencies with intelligence community elements, including major agencies within the DoD.

Covert Action and Traditional Military Activity

- Covert Action: Defined as "activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States will not be apparent or acknowledged. 50 U.S.C. § 3093(e), *Presidential Approval and Reporting of Covert Actions* (1947)

  - Covert actions must be approved by the President and have significant congressional oversight

- Traditional Military Activities (TMA): Are expressly deemed not covert actions. At a minimum, to qualify as a TMA, the activities must be under the direction and control of a military commander.

- Regardless of the underlying authority, many cyberspace operations are conducted at higher classification levels, so it is imperative that any legal advisor receive the pertinent classification and read-in prior to providing legal advice

Domestic Law

- With respect to the application of domestic law, there is no substantive difference between whether an activity is classified as "Title 10" or "Title 50." Activities conducted under both titles must comply with the constitution and with U.S. law

- Domestic laws place considerable restraints on cyberspace operations, particularly within the United States, but also in foreign countries

- Although many of the statutes provide exceptions for law enforcement, they do not expressly provide exceptions for military operations (however, the military can rely on the generally applicable exceptions). Please see the references at the end of this section for a list of the pertinent laws in this area.

Policy

- Presidential Policy Directive-20 (PPD-20), U.S. Cyber Operations Policy: All cyber operations must comply with PPD-20. The document itself is classified.

- The 2015 DoD Cyber Strategy establishes policy for the U.S. DoD Cyber Enterprise. Under this strategy, the DoD will focus on five overarching goals.

  - First, the DoD will build and maintain ready forces and capabilities to conduct cyberspace operations

  - Second, the DoD will defend the DoD information network, secure DoD data, and mitigate risks to DoD missions

  - Third, the DoD will be prepared to defend the U.S. homeland and U.S. vital interests from disruptive or destructive cyberattacks of significant consequence

-- Fourth, the DoD will build and maintain viable cyber options and plan to use those options to control conflict escalation and to shape the conflict environment at all stages

-- Fifth, the DoD will build and maintain robust international alliances and partnerships to deter shared threats and increase international security and stability

- Air Force Policy Regarding Cyber Capabilities

  -- Air Force policy requires that cyber capabilities "being developed, bought, built, modified or otherwise acquired by the Air Force that are not within a Special Access Program are reviewed for legality under [the Law of Armed Conflict], domestic law, and international law prior to their acquisition for use in a conflict or other military operation" (AFI 51-402, *Legal Reviews of Weapons and Cyber Capabilities,* para. 1.1.2)

    --- Note that this requirement applies to all cyber capabilities, not just to weapons. However, this requirement is directed for Air Force cyber capabilities, and it is not automatically extended to joint operations and capabilities.

  -- Authority to execute the legal review may be delegated to AF/JAO or to MAJCOM staff judge advocates. Any further delegation requires AF/JA approval. Currently, legal review authority for cyber capabilities **NOT** rising to the level of a weapon resides with the AFSPC/SJA.

  -- The legal review is required to address the following (AFI 51-402 para. 3.1):

    --- Whether there is a specific rule of law, whether by treaty obligation of the United States or accepted by the United States as customary international law, prohibited or restricting the use of the weapon or cyber capability

  -- If there is no express prohibition, the following questions are considered:

    --- Whether the weapon or cyber capability is calculated to cause superfluous injury

    --- Whether the weapon or cyber capability is capable of being directed against a specific military objective and, if not, is of a nature to cause an effect on military objectives and civilians or civilian objects without distinction

- The fact that another service or the forces of another country have adopted the weapon or cyber capability may be considered in determining the legality of such a weapon or cyber capability, but such fact shall not be binding

International Law and Law of Armed Conflict (LOAC) Considerations

- International Law Regarding Cyberspace Operations and the Use of Force:

  -- *Jus ad bellum*: The United States has generally treated the terms "use of force" and "armed attack" from the UN Charter synonymously. The issue of whether OCO rises to the level of an armed attack is an important one for ensuring the United States complies with the UN Charter and because of the potential application of the nation's inherent right of self-defense.

  -- Currently there is no official international consensus regarding what constitutes a use of force or armed attack in cyberspace

    --- However, there is also a growing body of state practice supporting the position that disruptive actions resulting in annoyance or harassment, even if for an extended period of time against many web sites, do not amount to an armed attack

    --- There is also a growing consensus among academics and policymakers that cyber activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force/armed attack

  -- If OCO rises to the level of an "armed attack," then the state where the action occurs would be justified under Article 51 of the UN Charter to use force in response

  -- Under international law, it is still unsettled how a state may respond to OCO that does not rise to the level of a use of force/armed attack

    --- Many would claim that such actions, if committed against cyber infrastructure within a state's territory, would still constitute a violation of that state's sovereignty, to which the state could respond with necessary and proportionate countermeasures that themselves do not rise to the level of a use of force/armed attack

- Military Necessity:

  -- It is unlawful for a party to a conflict to "destroy or seize the enemy's property unless such destruction or seizure is imperatively demanded by the necessities of war" (Hague IV, Annex, art. 23(g))

- -- Lawful military objectives (targets) are those objects "which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definitive military advantage (Additional Protocol I, art. 52(2))

- -- Just as for kinetic targets, a legal review will address employment of cyberspace capabilities in both a targeting review (is it a valid target?) and in the operational legal review (will the method to prosecute that target advance a legitimate military objective?)

- Unnecessary Suffering:

  - -- As stated in the LOAC Chapter, the use of arms which are calculated to cause unnecessary suffering is prohibited

  - -- Generally, cyber capabilities will not cause such effects, but if such effects are likely, they will be addressed in the operational legal review

- Proportionality:

- Just as with physical operations, cyber operations must take into account potential collateral damage caused to the civilian population, and it must not be excessive in relation to the military advantage anticipated

  - -- For example, a cyber operation to disrupt a nation's air traffic control feed in order to take out a valid military target aboard an aircraft may run afoul of the proportionality requirement

  - -- The commander must assess whether the damage to civilians and civilian property is excessive in relation to the military advantage anticipated by the cyber operation

- Distinction:

  - -- Sometimes referred to as discrimination, requires parties to a conflict to distinguish between combatants and the civilian population and property

  - -- Due to the overlapping nature of military and civilian uses of cyberspace, distinction can play a very important role in cyber operations. Depending on how the code is written, cyber capabilities can be developed with specific or generic targets.

--- For example, a cyber capability designed to only create effects on certain industrial control systems known to be used in an adversary's nuclear enrichment facility would likely be considered a discriminate weapon. In contrast, a virus (such as the conficker worm in the early 2000s) designed to replicate and spread to any system it touches on the Internet would raise distinction concerns because it does not distinguish between civilian and military systems.

-- Dual-use systems provide service and capabilities to the civilian population and are also used for military purposes

--- Terrorists, enemy combatants, and even nation-states will use civilian networks and cyber infrastructure for their operations, so any operation targeting these capabilities will, by definition, target civilian infrastructure

--- These dual-use systems are lawful military targets if they make an effective contribution to the enemy. This unique aspect of cyberspace targeting will be addressed in both the targeting and operational legal reviews.

- Chivalry:

-- As mentioned in the Law of Armed Conflict chapter, the principle of chivalry permits lawful ruses such as camouflage, false signals, and mock troop movements but forbids perfidious acts

-- Because the infrastructure allowing for the delivery of cyber effects crosses multiple countries and cyber effects can be created by non-state actors (e.g., independent hackers), attributing a cyber effect to a particular source can be difficult

--- An additional issue is that, unlike physical attacks, the ability to mislead an adversary as to the source of cyber operations is much greater

-- Disguising cyber effects as normal Web traffic or concealing the source of such operations is similar to a permissible lawful ruse and does not violate chivalry

--- However, conducting a cyber operation with the intention of having it attributed to another state (e.g., country A making a cyber operation against country B appear as though it is being conducted by country C) in order to start a war between those two states may run afoul of the chivalry requirement

- The Tallinn Manual on the International Law Applicable to Cyber Warfare: The manual, published in 2013, contains 95 rules related to both the *jus ad bellum* and *jus in bello* aspects of cyber warfare. The manual is not binding international law but rather represents opinions on how the law of armed conflict applies to actions in cyberspace.

Cyber Operations Command and Control

- USCYBERCOM: A sub-unified command belonging to United States Strategic Command, USCYBERCOM is tasked with directing DoD network operation and defense. When directed, USCYBERCOM conducts full-spectrum military cyberspace operations in order to enable actions in all domains and ensures U.S. and allied freedom of action in cyberspace while denying the same to our adversaries.

- Air Force Space Command: The Air Force major command responsible for the Air Force cyber mission. Its mission is to provide resilient and cost-effective Space and Cyberspace capabilities for the Joint Force and the Nation.

- 24th Air Force/AFCYBER: The operational warfighting organization that establishes, operates, maintains, and defends Air Force networks and conducts full-spectrum operations in cyberspace. It establishes, operates, and defends Air Force networks to ensure warfighters can maintain the information advantage as we prosecute military operations. The unit is responsible to conduct the full range of cyber operations. While subordinate to Air Force Space Command, 24th Air Force also provides forces to USCYBERCOM in its joint mission.

References

18 U.S.C. § 1030

18 U.S.C. § 2510

18 U.S.C. § 2701

50 U.S.C. § 3093

War and National Defense, Title 50, Chapter 36, Subsections I-V

Executive Order 12333, *United States Intelligence Activities*, 4 December 1981

Presidential Policy Directive-20 (PPD-20), *U.S. Cyber Operations Policy* (October 2012)

Hague Convention No. IV, Respecting the Laws and Customs of War on Land and Annex Thereto, Oct 18, 1907

Additional Protocol to the Geneva Convention of 12 August 1949 (Protocol I), art. 52(2) Oct. 10, 1980, 1343 U.N.T.S. 137

Additional Protocol to the Geneva Convention of 12 August 1949 (Protocol I), art. 51(2)

Trilateral Memorandum of Agreement Among the Department of Defense, the Department of Justice, and the Intelligence Community Regarding Computer Network Attack and Computer Network Exploitation Activities, 9 May 2007

DoDD 2310.01E, *Department of Defense Detainee Program* (19 August 2015)

JP 3-13, *Information Operation*s (27 November 2012), incorporating Change 1, 20 November 2014

AFI 51-402, *Legal Reviews of Weapons and Cyber Capabilities* (27 July 2011)

A.R. Thomas and James C. Duncan, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, International Law Studies, Vol. 73, 1999 at 403

Kristen M. Thomasen, *Air Power, Coercion, and Dual-Use Infrastructure: A Legal and Ethical Analysis*, International Affairs Review, Oct. 24, 2008

John A. Warden III, *The Enemy as a System*, Airpower Journal, Spring, 1995

Air Force Operations and the Law, Ch. 16 Targeting and Weaponeering (2009)

DoD Cyber Strategy (April 2015)

Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)

Tallinn Manual On the International Law Applicable to Cyber Warfare (2013)

A.R. Thomas and James C. Duncan, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, International Law Studies, Vol. 73, 1999, at 403

Air Force Operations and the Law (2009), pp 249-250)

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ACRONYMS

A

AAC	Assignment Availability Code
AAFES	Army and Air Force Exchange Service
AC	Advisory Circular
ACA	Airman Comprehensive Assessment
ACHP	Advisory Council on Historic Preservation
ACSA	Acquisition and Cross-Servicing Agreements
AD	Active Duty
ADA	Americans With Disabilities Act
ADA	Anti-Deficiency Act
ADAPT	Alcohol and Drug Abuse Prevention and Treatment Program
ADC	Area Defense Counsel
ADCON	Administrative Control
ADEA	Age Discrimination in Employment Act
ADHD	Attention Deficit Hyperactivity Disorder
ADR	Alternative Dispute Resolution
ADSC	Active Duty Service Commitment
AF IMT	Air Force Information Management Tool
AFAM	Air Force Assigned Mission
AFBCMR	Air Force Board for Correction of Military Records
AFCAF	Air Force Central Adjudication Facility
AFCARO	Air Force Civilian Appellate Review Office
AFCCA	Air Force Court of Criminal Appeals
AFCEC	Air Force Civil Engineer Center
AFCP	Air Force Community Partnership Program
AFDRB	Air Force Discharge Review Board
AFDTL	Air Force Drug Testing Laboratory
AFEM	Air Force Encroachment Management Program
AFFARS	Air Force Federal Acquisition Regulation Supplement
AFFMS	Air Force Fitness Management System
AFI	Air Force Instruction
AFIN	Air Force Information Network
AFNET	Air Force Network
AFOSI	Air Force Office of Special Investigations
AFP	Appropriated Fund
AFPB	Air Force Personnel Board
AFPC	Air Force Personnel Center
AFPD	Air Force Policy Directive
AFR	Air Force Reserve
AFRBA	Air Force Review Boards Agency
AFRC	Air Force Reserve Component
AFROTC	Air Force Reserve Officer Training Corps
AFSC	Air Force Specialty Code
AGR	Active Guard Reserve
AIB	Accident Investigation Board
AICUZ	Air Installation Compatible Use Zone Program
AIDS	Acquired Immune Deficiency Syndrome
AJ	Administrative Judge
ALJ	Administrative Law Judge
ALO	Wing Accounting Liaison Officer
ANG	Air National Guard
AOR	Area of Responsibility
APA	Advanced Payment Act
APZ	Above Promotion Zone
AQCR	Air Quality Control Regions
ARC	Air Reserve Component
ARMS	Automated Records Management System
ART	Air Reserve Technician
ASBCA	Armed Services Board of Contract Appeals
ASJA	Assistant Staff Judge Advocate
AT	Annual Tour
ATC	Air Traffic Control
AVIP	Anthrax Vaccine Immunization Program
AWOL	Absence Without Leave

B

BAA	Business Associate Agreement
BAC	Blood Alcohol Content
BAH	Basic Allowance for Housing
BAT	Blood Alcohol Test
BMI	Body Mass Index
BOI	Board of Inquiry
BRAC	Base Realignment and Closure
BRAC	Breath Alcohol Content
BX	Base Exchange

C

CA	Compliance Agreement
CA	Convening Authority
CAA	Clean Air Act
CAAF	Court of Appeals for the Armed Forces
CACV	Command and Control Vehicles
CAP	Civil Air Patrol
CAT A	Category A Reservist
CAT B	Category B Reservist
CAtAF	Contractors Authorized to Accompany the Force
CATEX	Categorical Exclusion
CBA	Collective Bargaining Agreement
CBRN	Chemical, Biological, Radiological, Nuclear
CBRNE	Chemical, Biological, Radiological, Nuclear, and Explosives
CCIF	Combatant Commander Initiative Funds
CCIP	Commander's Inspection Program
CCIR	Commanders Critical Information Requirement
CCS	Clinical Case Staffing
CDA	Contract Disputes Act
CDC	Child Development Center
CDE	Commander-Directed Evaluation
CDI	Commander-Directed Investigation
CE	Civil Engineer/Engineering
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CERP	Commander's Emergency Response Program
CFR	Code of Federal Regulations
CI	Critical Information
CI	Counterintelligence
CICA	Competition in Contracting Act
CMG	Case Management Group
CND	Computer Network Defense
CO	Conscientious Objector
CO	Consent Order
CO	Contracting Officer
COB	Coordination of Benefits
COCOM	Combatant Commander
COE	Conditions of Employment
COFC	Court of Federal Claims
COMAFFOR	Commander, Air Force Forces
COMPUSEC	Computer Security
CONUS	Continental United States
CPA	Certified Public Accountant
CPO	Civilian Protective Order
CPS	Civilian Personnel Section
CR	Continuing Resolution
CRB	Central Registry Board
CRDP	Concurrent Retirement and Disability Pay
CRSC	Combat-Related Special Compensation
CSAF	Chief of Staff of the Air Force
CSC	Air Force Claims Service Center
CSMRT	Child Sexual Maltreatment Response Team
CSRA	Civil Service Reform Act
CTO	Commercial Travel Office
CUI	Controlled Unclassified Information
CWA	Clean Water Act
CYP	Child and Youth Programs

D

DAVA	Domestic Abuse Victim Advocate
DCO	Defensive Cyberspace Operations
DDRPM	Drug Demand Reduction Program Manager
DeCA	Defense Commissary Agency
DERP	Defense Environmental Restoration Program
DES	Disability Evaluation System
DFARS	Defense Federal Acquisition Regulation Supplement
DFAS	Defense Finance and Accounting Service
DIC	Defense Intelligence Component
DITY	Do-It-Yourself Move
DLC	Duty Limiting Conditions
DNIF	Duty Not Involving Flying
DoD	Department of Defense
DoDEA	Department of Defense Education Activity
DoDI	Department of Defense Instruction

DODIN	Department of Defense Information Network
DOJ	Department of Justice
DOL	Department of Labor
DOS	Date of Separation
DOS	Department of State
DPM	Disability Program Manager
DPS	Defense Personal Property System
DRP	Disposable Retired Pay
DSCA	Defense Support of Civil Authorities
DTD	Domicile to Duty
DTM	Directive-Type Memorandum
DTMO	Defense Travel Management Office
DTPAM	Drug Testing Program Administrative Manager
DUI	Driving Under the Influence
DUSTWUN	Duty Status Whereabouts Unknown
DWI	Driving While Intoxicated

E

EA	Enlisted Aide
EA	Environmental Assessment
EA	Epidemiological Assessment
EAD	Extended Active Duty
EAP	Employee Assistance Program
ECARS	Employee-Certification and Reporting System
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
EES	Enlisted Evaluation System
EFT	Electronic Funds Transfer
EIAP	Environmental Impact Analysis Process
EIS	Environmental Impact Statement
ELS	Entry Level Separation
EM	Emergency Management
EMS	Environmental Management System
EO	Equal Opportunity
EO	Executive Order
EOD	Explosive Ordinance Disposal
EOT	Equal Opportunity and Treatment
EPA	Environmental Protection Agency
EPR	Enlisted Performance Report
EPTS	Existed Prior to Service
ER	Environmental Review
ERAB	Evaluation Reports and Appeals Board
ES	Environmental Study
ESGR	Employer Support for the Guard and Reserve
ESI	Electronically Stored Information
ESOHC	Environment, Safety and Occupational Health Council
ESPC	Energy Savings Performance Contract
ET	Expedited Transfer
ETS	Expiration of Term of Service
EUL	Enhanced Use Lease
EXORD	Execution Order

F

FA	Fitness Assessment
FAA	Federal Aviation Administration
FAC	Family Advocacy Committee
FAC	Fitness Assessment Cell
FAD	Final Agency Decision
FAO	Family Advocacy Officer
FAP	Family Advocacy Program
FAR	Federal Acquisition Regulation
FCA	Foreign Claims Act
FCC	Foreign Claims Commission
FCC	Family Child Care
FDCPA	Fair Debt Collection Practices Act
FDM	Financial Disclosure Management
FEB	Flying Evaluation Board
FECA	Federal Employees Compensation Act
FGS	Final Governing Standards
FI	Foreign Intelligence
FIP	Fitness Improvement Program
FISA	Foreign Intelligence Surveillance Act
FLRA	Federal Labor Relations Authority
FLSA	Fair Labor Standards Act
FM	Financial Management
FMCRA	Federal Medical Care Recovery Act

FMCS	Federal Mediation and Conciliation Service
FMLA	Family and Medical Leave Act
FNCA	Federal Noise Control Act
FOIA	Freedom of Information Act
FONSI	Finding of No Significant Impact
FOUO	For Official Use Only
FPEB	Formal Physical Evaluation Board
FRV	Full Replacement Value
FSC	Family Support Center
FSIP	Federal Service Impasses Panel
FSLMRS	Federal Service Labor-Management Relations Statute
FSO	Financial Services Office
FSS	Force Support Squadron
FTCA	Federal Tort Claims Act
FTS	Full-Time Support
FY	Fiscal Year

G

G claims	Government Claims
GAIB	Ground Accident Investigation Board
GAO	Government Accountability Office
GARS	Government Administrative Rate Supplement
GCM	General Court-Martial
GCMCA	General Court-Martial Convening Authority
GCS	Ground Control Station
GO	General Officer
GOQ	General Officer Quarters
GOV	Government Owned Vehicle
GPC	Government Purchase Card
GS	General Schedule
GSA	General Services Administration
GSU	Geographically Separated Unit
GTC	Government Travel Card
GWOT	Global War on Terrorism

H

HA	Humanitarian Assistance
HAPS	Hazardous Air Pollutants
HC	Chaplin
HCA	Humanitarian and Civic Assistance
HIPAA	Health Insurance Portability and Accountability Act
HIV	Human Immunodeficiency Virus
HN	Host Nation
HQ	Headquarters
HRVRT	High Risk for Violence Response Team
HYT	High Year Tenure
HW	Hazardous Wastes

I

IA	Information Assurance
IA	International Agreement
IACA	International Agreement Claims Act
IAW	In Accordance With
ICRMP	Integrated Cultural Resources Management Plan
IDA	Initial Denial Authority
IDES	Integrated Disability Evaluation System
IDIQ	Indefinite Delivery, Indefinite Quantity
IDT	Inactive Duty Training
IEMT	Installation Encroachment Management Team
IG	Inspector General
IGF	Inherently Governmental Functions
IGSAs	Intergovernmental Support Agreements
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILOD	In the Line of Duty
IMA	Individual Mobilization Augmentee
IMPAC	International Merchant Purchase Authorization Card
INA	Immigration and Nationality Act
INCAP	Incapacitation
ING	Inactive National Guard
IO	Investigating Officer
IO	Intelligence Oversight
IPEB	Informal Physical Evaluation Board
IPZ	In Promotion Zone
IQT	Initial Qualification Training

IR	Individual Reservist
IRA	Immediate Response Authority
IRB	Institutional Review Board
IRD	Investigations and Resolutions Division
IRR	Individual Ready Reserve
IRS	Internal Revenue Service
ISD	Incident Status Determination
ISR	Intelligence, Surveillance, and Reconnaissance

J

JA	Judge Advocate
JER	Joint Ethics Regulation
JFC	Joint Force Commander
JS	Joint Staff
JTR	Joint Federal Travel Regulation

L

LBP	Lead-Based Paint
LEC	Lead Environmental Component
LLFSC	Labor Law Field Support Center
LOA	Letter of Admonishment
LOAC	Law of Armed Conflict
LOC	Letter of Counseling
LOD	Line of Duty
LOE	Letter of Evaluation
LON	Letter of Notification
LOR	Letter of Reprimand
LoW	Law of War
LPSP	Limited Privilege Suicide Prevention
LRO	Local Responsible Official
LSP	Lengthy Service Probation
LSSS	Logistic Support, Supplies, and Services

M

MACT	Maximum Available Control Technology
MAJCOM	Major Command
MCA	Military Claims Act
MCIO	Military Criminal Investigation Organization
MCM	Manual for Courts-Martial
MCR	Medical Cost Reimbursement
MCRP	Medical Cost Reimbursement Program
MDA	methylenedioxyamphetamine ("Sally", "Sass")
MDG	Medical Group
MDMA	3,4-methylenedioxy-methamphetamine ("Molly", "Ecstasy", "E")
MEB	Medical Evaluation Board
MEDCON	Medical Continuation
MEJA	Military Extraterritorial Jurisdiction Act
MEO	Military Equal Opportunity
MHP	Mental Health Provider
MHPI	Military Housing Privatization Initiative
MICT	Management Internal Control Toolset
MILCON	Military Construction
MilPDS	Military Personnel Data System
MNF	Multinational Force
MO	Mortuary Officer
MOA	Memorandum of Agreement
MON	Memorandum of Notification
MOS	Military One Source
MOU	Memorandum of Understanding
MPDATP	Military Personnel Drug Abuse Testing Program
MPerRGp	Master Personnel Record Group
MPF	Military Personnel Flight
MPO	Military Protective Order
MPS	Military Personnel Squadron
MR	Mobility Restrictions
MRE	Military Rules of Evidence
MRO	Medical Review Officer
MSME	Medical Standards Management Element
MSPB	Merit Systems Protection Board
MSRRA	Military Spouses Residency Relief Act
MT	Military Technicians
MTF	Medical Treatment Facility
MWR	Morale, Welfare, and Recreation

N

NAAQS	National Ambient Air Quality Standard
NAF	Numbered Air Force

NAF	Nonappropriated Funds
NAFI	Nonappropriated Fund Instrumentality
NAS	National Airspace System
NATO	North Atlantic Treaty Organization
NCO	Non-Commissioned Officer
NDA	National Defense Area
NDAA	National Defense Authorizations Acts
NEPA	National Environmental Policy Act
NFE	Non-Federal Entities
NGB	National Guard Bureau
NGCA	National Guard Claims Act
NILOD	Not in the Line of Duty
NJOIC	National Joint Operations and Intelligence Center
NJP	Nonjudicial Punishment
NOD	Notice of Deficiency
NON	Notice of Non-compliance
NOPP	Notice of Privacy Practice
NOTAM	Notice to Airmen
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
NPL	National Priorities List
NPRM	Notice of Proposed Rulemaking
NPS	National Park Service
NPSP	New Parent Support Program
NQP	Not Qualified for Promotion
NRHP	National Register of Historic Places
NSE	National Security Exemption
NSPS	New Source Performance Standards
NSR	New Source Review

O

O&M	Operation and Maintenance
OAC	Office of Airmen's Counsel
OCIs	Organizational Conflicts of Interest
OCO	Offensive Cyberspace Operations
OCONUS	Outside the Continental United States
OEBGD	Overseas Environmental Baseline Guidance Document
OES	Officer Evaluation System
OEIS	Overseas Environmental Impact Statement
OFO	Office of Federal Operations
OGD	Officer Grade Determination
OHDACA	Overseas Humanitarian, Disaster, and Civic Aid
OI	Operating Instructions
OJT	On the Job Training
OMB	Office of Management and Budget
OPCON	Operational Control
OPM	Office of Personnel Management
OPMC	Outreach Management Prevention Council
OPR	Office of Primary Responsibility
OPR	Officer Performance Report
OPSEC	Operations Security
ORF	Official Representation Funds
OSC	Office of Special Counsel
OSH	Occupational Safety and Health
OSHA	Occupational Safety and Health Administration
OSI	Office of Special Investigations
OSR	Officer Selection Record
OT	Overtime

P

P claims	Other Tangible Property Claims
P&R	Probation and Rehabilitation
PA	Privacy Act
PA	Public Affairs
PAO	Public Affairs Officer
PAS	Privacy Act Statement
PC	Protected Communication
PCA	Personnel Claims Act
PCA	Permanent Change of Assignment
PCBs	Polychlorinated Biphenyls
PCI	Personal Conflict of Interest
PCP	Personal Care Provider
PCRO	Pretrial Confinement Reviewing Officer
PCS	Permanent Change of Station
PD	Position Description
PDBR	Dod Physical Disability Board of Review

PDI	Potentially Disqualifying Information
PEB	Physical Evaluation Board
PEBLO	Physical Evaluation Board Liaison Officer
PfP	Partnership for Peace
PHI	Protected Health Information/Personal Health Information
PHO	Preliminary Hearing Officer
PIF	Personnel Information File
PII	Personally Identifiable Information
PIP	Performance Improvement Period
PIRR	Participating Individual Ready Reservist
PM	Program Manager
PO	Private Organization
POA	Power of Attorney
POC	Point of Contact
POTUS	President of the United States
POV	Privately Owned Vehicle
PPA	Power Purchase Agreement
PPBE	Planning, Programming, Budgeting and Execution
PPM	Personally Procured Moves
PRF	Promotion Recommendation Form
PRP	Personnel Reliability Program
PSAB	Personnel Security Appeal Board
PSRB	Physical Security Review Board
PT	Physical Training
PT claims	Household Goods Claims
PTA	Pretrial Agreement
PTE	Potential to Emit
PTL	Physical Training Leader
PTSD	Post Traumatic Stress Disorder
PWS	Public Water Systems

Q

QIA	Questionable Intelligence Activity
QRE	Qualifying Representational Events

R

RAB	Restoration Advisory Board
RCPHA	Reserve Component Physical Health Assessment
RCRA	Resource Conservation and Recovery Act
RDT&E	Research, Development, Test and Evaluation
RF	Radio Frequency
RIC	Record of Individual Counseling
RIF	Reduction-In-Force
RIO	Readiness Integration Organization
RMC	Rules for Courts-Martial
RMG	Readiness Management Group
RMO	Responsible Management Official
ROD	Record of Decision
ROE	Rules of Engagement
ROI	Report of Investigation
ROS	Report of Survey
ROT	Record of Trial
ROTC	Reserve Officer Training Corps
RRF	Retention Recommendation Form
RUF	Rules for the Use of Force
RVT	Remote Video Terminal

S

SAC	School Age Care
SAD	State Active Duty
SAFPC	Secretary of the Air Force Personnel Council
SAFRB	Secretary of the Air Force Remissions Board
SAIRO	Sexual Assault Incident Response Oversight
SAMMC	San Antonio Military Medical Center
SAPR	Sexual Assault Prevention and Response
SAPR VA	Sexual Assault Prevention and Response Victim Advocate
SARC	Sexual Assault Response Coordinator
SAUSA	Special Assistant United States Attorneys
SBP	Survivor Benefit Plan
SCA	Show Cause Authority
SCI	Sensitive Compartmented Information
SCMCA	Special Court-Martial Convening Authority
SCO	Summary Court Officer
SCOD	Static Close Out Date

SCRA	Servicemembers Civil Relief Act
SDO	Air Force Debarring and Suspending Official
SDWA	Safe Drinking Water Act
SecAF	Secretary of the Air Force
SecDef	Secretary of Defense
SES	Senior Executive Service
SF	Security Forces
SFOI	Security Forces Office of Investigations
SFS	Security Forces Squadron
SHPO	State Historic Preservation Officer
S/HSM	Significant or Highly Sensitive Matter
SIB	Safety Investigation Board
SIGINT	Signals Intelligence
SIO	Senior Intelligence Officer
SIP	State Implementation Plan
SJA	Staff Judge Advocate
SME	Subject Matter Expert
SMS	Short Message Service
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
SOTA	SIGINT Operational Tasking Authority
SpCM	Special Court-Martial
SPCMCA	Special Court-Martial Convening Authority
SPINS	Special Instructions
SPO	Senior Profiling Officer
SROE	Standing Rules of Engagement
SRP	Selective Reenlistment Program
SRUF	Standing Rules for the Use of Force
sUAS	Small Unmanned Aircraft Systems
SVC	Special Victims' Counsel
SVIP	Special Victim's Investigation and Prosecution
SWDA	Solid Waste Disposal Act
SWMP	Solid Waste Management Plan

T

T4C	Termination for Convenience
T4D	Termination for Default
TACON	Tactical Control
TAFMS	Total Active Federal Military Service
TBI	Traumatic Brain Injury
TCN	Third Country Nationals
TDP	Testing Designated Position
TDRL	Temporary Disability Retirement List
TDY	Temporary Duty Assignment
TFR	Temporary Flight Restriction
TFSC	Total Force Service Center
TIG	Time in Grade
TIS	Time in Service
TJAG	The Judge Advocate General
TMA	Traditional Military Activity
TPS	Third Party Site
TR	Traditional Reservist
TSCA	Toxic Substances Control Act
TT	Treatment Team

U

UA	Unmanned Aircraft
UAS	Unmanned Aircraft Systems
UCA	Unit Career Advisor
UCC	Unified Combatant Command
UCCJEA	Uniform Child Custody Jurisdiction and Enforcement Act
UCI	Unlawful Command Influence
UCMJ	Uniform Code of Military Justice
UEI	Unit Effectiveness Inspection
UESC	Utility Energy Service Contract
UFPM	Unit Fitness Program Manager
UGPCA	Use of Government Property Claims Act
UIF	Unfavorable Information File
ULFSC	Utility Law Field Support Center
ULP	Unfair Labor Practice
UMMC	Unspecified Minor Military Construction
UOTHC	Under Other than Honorable Conditions
UPA	Unfavorable Personnel Action
USAF	United States Air Force
USCIS	U.S. Citizenship and Immigration Services
USERRA	Uniformed Services Employment and Reemployment Rights Act

USFSPA	Uniformed Services Former Spouses' Protection Act
USP	United States Persons
USPI	United States Person Information
UST	Underground Storage Tank
UTA	Unit Training Assembly

V

VA	Veteran Affairs
VA	Victim Advocate
VCSAF	Vice Chief of Staff of the Air Force
VITA	Volunteer Income Tax Assistance Program
VVA	Volunteer Victim Advocates
VWAP	Victim and Witness Assistance Program

W

WG	Wage Grade
WPA	Whistleblower Protection Act

Y

YP	Youth Programs

On the back: Two F-22 Raptors from the 3rd Wing at Joint Base Elmendorf-Richardson, Alaska (U.S. Air Force photo/Justin Connaher) over iStockphoto™ background image by chainatp.

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